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SOL (MSHA) V. HIOPE MINING
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. VA 89-68 A.C. No. 44-05748-03554
v.	Docket No. VA 89-69 A.C. No. 44-05748-03555
HIOPE MINING INCORPORATED, RESPONDENT	Mine No. 1
HIOPE MINING, INC., CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. VA 89-35-R Citation No. 2969642; 1/23/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. VA 89-36-R Order No. 2969654; 3/6/89 Mine No. 1 Mine ID 44-05748

DECISIONS

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner/Respondent;
Daniel R. Bieger, Esq., Copeland, Molinary & Bieger, Abingdon, Virginia, for the Respondent/Contestant.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concerns Notices of Contest filed by the contestant (Hiope) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d), challenging the captioned citation and order issued by MSHA mine inspector Steven May. The civil penalty proceedings concern proposals for assessment of civil penalties filed by MSHA seeking

civil penalty assessments against Hiope for the alleged violations stated in the citation and order. Hearings were held in Kingsport, Tennessee, and the parties waived the filing of posthearing briefs. However, I have considered their oral arguments made on the record during the hearings in my adjudication of these matters.

Issues

The issues presented in these proceedings include the following: (1) Whether Hiope violated the cited mandatory safety standards; (2) whether the alleged violations were significant and substantial (S&S); and (3) whether the alleged violations cited in the contested section 104(d)(1) citation and order resulted from an unwarrantable failure by Hiope to comply with the cited standards.

Assuming the violations are established, the question next presented is the appropriate civil penalties to be assessed pursuant to the civil penalty assessment found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301, et seq

2. Sections 110(a), 110(i), 104(d), and 105(d) of the Act.

3. Mandatory safety standards 30 C.F.R. 75.400 and 75.220.

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

Stipulations

The parties stipulated to the following (Tr. 10; Joint Stipulation):

1. Hiope is the owner and operator of the No. 1 Mine.

2. The operations of the mine are subject to the jurisdiction of the Act.

3. The Commission and its presiding Administrative Law Judge have jurisdiction in these matters.

4. MSHA Inspector Steven May was acting in his official capacity as an authorized representative of

the Secretary of Labor, when he issued the contested citation and order.

5. True copies of the citation and order were served on Hiope or its agent as required by the Act. Copies of the citation and order, exhibits G-1 and G-2, are authentic and may be admitted into evidence for the purpose of establishing their issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

6. The imposition of civil penalty assessments for the alleged violations in question will not adversely affect Hiope's ability to continue in business.

7. The alleged violation stated in the section 104(d)(1) citation was timely abated.

8. MSHA's Proposed Assessment Data Sheet, exhibit G-4, accurately sets forth (a) the number of assessed non-single penalty violations charged to Hiope for the years 1986 through April, 1989, and (b) the number of inspection days per month during this time period.

9. MSHA's Assessed Violations History Report, exhibit G-3, may be used in determining the appropriate civil penalty assessments for the alleged violations.

The parties agreed that Hiope's annual coal mining production was approximately 130,000 tons, that it employed approximately 30 miners, and may be considered a small mine operator (Tr. 5).

The parties further stipulated that the technical procedural requirements concerning the section 104(d)(1) citation and order issued by Inspector May (the section 104(d) "chain") have been met in these proceedings, and that there were no intervening "clean inspections" during the intervening time period when the supporting citation and subsequently issued order were issued by Inspector May (Tr. 8).

Discussion

Docket Nos. VA 89-36-R and VA 89-69

The section 104(d)(1) "S&S" Order No. 2969654, issued on March 6, 1989, by MSHA Inspector Steven May, citing an alleged violation of 30 C.F.R. 75.220, states as follows (exhibit G-2):

Approximately 12 feet of coal was mined from the pillar split of the No. 1 pillar block on the 001-0

section and a breaker line had not been established across the 001-0 pillar section. The approved roof control plan requires that all breakers (timbers) be installed prior to any mining along the pillar line.

The record reflects that the citation was issued at 11:06 a.m., and that Inspector May terminated it at 1:15 p.m., the same day.

MSHA's Testimony and Evidence

MSHA Inspector Steven May testified as to his background and experience, and he confirmed that he has served as an inspector for 7 years, previously worked for two coal mining companies, and holds certificates as a mine foreman, electrician, and a state mining inspector. He also confirmed that he conducted two complete inspections of the Hiope No. 1 Mine in November, 1988, and January, 1989. He stated that he was at the mine on March 6, 1989, for the purpose of giving a safety talk, and after completing this talk he decided to conduct an inspection. Referring to a sketch of the area which he made, exhibit G-15, he explained that he proceeded inby the belt conveyor area for two breaks where he gave his safety talk, and then went to the point marked "C" on the sketch where he found a continuous-mining machine "sumped up" in the block of coal (Tr. 18-23).

Inspector May testified that he issued the violation because mining had proceeded in the No. 1 pillar split without first setting eight timber breaker posts in each entrance, and that the failure by Hiope to first set these posts before commencing mining violated its approved roof-control plan and constituted a violation of section 75.200. He found the continuous-mining machine advanced approximately 12 feet into the No. 1 pillar block of coal, and no breaker posts were installed in this area. He observed no supply of timbers on the section. He identified the applicable roof-control plan, at page 9, exhibit G-16, and explained the plan requirements for installing posts before the No. 1 coal block is cut and taken. He also explained the mining and roof bolting cycles which follow the taking of the number 1 coal block (Tr. 24, 29-35). He confirmed that he issued the section 104(d)(1) order because "its something that the operator known (sic) or should have known" (Tr. 24).

Mr. May stated that the failure to follow the roof-control plan presented a roof fall hazard, and by taking a cut of coal without installing any roof support timbers, there was a danger of a roof fall. In the event mining had continued and the entire coal pillar were mined without any roof support timbers in place, a roof fall was reasonably likely. He also believed that it was highly likely that an injury would have occurred as a result of a roof fall and that the continuous-mining operator would be

exposed to disabling or fatal crushing injuries from such a fall (Tr. 36-38).

Mr. May confirmed that no mining was taking place, and no coal was being cut at the time he observed the mining machine. He also confirmed that the machine was not equipped with a canopy. Since there was nothing supporting the roof where the machine cut into the block of coal, he believed that the machine operator would be exposed to a roof fall hazard in that the roof could have broken out and fallen back beyond the end of the unsupported coal block.

Mr. May stated that he based his "high negligence" finding on the fact that mine management had knowledge of its roof-control plan and that it knew or should have known that cutting coal from the pillar block in question without installing the required roof support timbers was contrary to the plan. An additional factor which prompted him to issue the order was the fact that the continuous-miner operator Aaron Feeser was instructed to go to the area and to take the first cut of coal out of the coal block in question.

Mr. May stated that he spoke with section foreman Curt Armstrong when he issued the order but he could not recall specifically asking him why the cut of coal had been made without any roof support timbers. Mr. May confirmed that he observed no roof support timbers stored on the section, and that the lack of timbering presented a risk of a roof fall (Tr. 38-42).

On cross-examination, Mr. May confirmed that his inspection notes include a notation that if it were not for the fact that he found the mining machine "sumped up" in the coal block, he would not have issued the violation. He explained that regardless of the presence of the continuous-miner machine, he would have still issued the violation because of the fact that a cut was taken from the block without first setting timbers. If that cut had not been made, and no coal taken, he would not have issued it (Tr. 44). He confirmed that the "dots" shown at the top of exhibit G-15, reflect that roof support timbers had been installed at the locations shown. He also stated that in the event a continuous-mining machine "accidentally" cuts into a coal block the proper procedure is to stop mining and install roof support timbers. He agreed that in this case, no further mining took place after the machine cut into the coal block, and that management proceeded to install the required timbers.

Mr. May stated that 48 additional roof support timbers should have been installed before the first coal cut was taken, and confirmed that the coal block in question was the proper block to begin the mining cycle, but that no mining was taking place when he viewed the violative conditions.

Mr. May stated that Mr. Armstrong told him that the miner had accidentally cut into the coal block while Mr. Feeser was picking up gob, but that his notes reflect that Mr. Feeser told him he was told to cut into the coal block. Mr. May stated that he did not believe the coal cut was taken accidentally because there were two cuts of coal taken, and the mining machine had penetrated the coal block for a distance of 12 feet.

In response to further questions, Mr. May stated that given the size of the cut made into the block, it would have taken 10 minutes to make that cut, and if Mr. Feeser were only cleaning up gob, he would not have turned the machine into the block of coal. Mr. May also confirmed that he did not measure the size of the coal cuts made by Mr. Feeser, and that he estimated it by the location of the machine head lights which were 12 feet into the block. He also stated that Mr. Feeser told him that he had been instructed to clean up the gob and to cut the block of coal (Tr. 42-76).

Aaron Feeser testified that he was previously employed by Hiope in early August, 1989, and had worked there for 4 years as a roof bolter, scoop operator, and continuous-miner operator and helper. He was also a member of the union mine safety committee (Tr. 77-79).

Mr. Feeser confirmed that on March 6, 1989, he was working on the No. 1 section as a continuous-miner operator "getting ready to start the pillar section," and that prior to the inspector's safety talk "we had cleaned up a section and moved the miner across the section and started mining" coal from the first pillar block (Tr. 81). He stated that none of the pillars had been mined at that time and that he had just started one block and took approximately one-half of a cut of coal. He described the "cut" as 12 feet deep and "maybe" 18 feet wide. He observed no timbers set between the blocks. He confirmed that the miner machine is 10 feet wide, and that in order to take an 18-foot wide cut, "we'd cut into the block of coal on one side and back up and set it over and cut into the block again" (Tr. 82).

Mr. Feeser stated that he operated the miner for approximately 30 minutes cutting the pillar, and that mine foreman Curt Armstrong instructed him "to take the miner across the section and start the first block" (Tr. 82). He denied that Mr. Armstrong told him to go and clean up gob at that location. Mr. Feeser stated that there were "buggy men running buggies" in the area, and he believed there were three men other than himself in the area, and that Mr. Armstrong was on the section all morning (Tr. 83).

On cross-examination, Mr. Feeser stated that he was familiar with the mine roof-control plan and knew the requirements for setting timbers. He confirmed that during a meeting with Hiope's

counsel (Daniel Bieger) at the mine office sometime in March, 1989, he told Mr. Bieger that he was cleaning up the gob and had accidentally cut into the coal block (Tr. 86). He also confirmed that he attended an informal conference at MSHA's Richlands, Virginia office, and when asked whether he had stated at that time that he had accidentally cut into the block while picking up gob, Mr. Feeser stated as follows at (Tr. 86-87):

> Q. Okay. and you said the same thing to the informal conference man, that you accidentally cut into the block while you were picking up gob, didn't you?
>
> A. No.
>
> Q. You didn't tell them that when we were all sitting around the table, the same thing?
>
> A. No, not those words, I did not.
>
> Q. Okay. You told them that you were picking up gob, didn't you?
>
> A. I did.
>
> Q. And that you cut into the -- that you accidentally cut into the block?
>
> A. No.
>
> JUDGE KOUTRAS: What specifically do you remember telling them at the conference?
>
> THE WITNESS: I didn't tell them I accidentally cut into the block.
>
> JUDGE KOUTRAS: What did you tell them?
>
> THE WITNESS: They asked did I pick up gob? Yes, I did. Did I accidentally cut into the block? No, I did not.
>
> BY MR. BIEGER:
>
> Q. You didn't say -- you didn't tell them at the informal conference that you intentionally cut into the block?
>
> A. I wasn't asked.
>
> Q. Okay. And you didn't volunteer that?
>
> A. I wasn't asked.

Mr. Feeser confirmed that subsequent to the informal conference in question, he was laid off by Hiope and filed a grievance which went to an arbitration hearing. However, during the grievance process, he quit and went to work for his current employer. He denied that he changed his testimony because of any disagreement with Hiope in connection with this grievance (Tr. 93-94).

Mr. Feeser confirmed that he stopped the miner into the cut in the coal block when someone told him to "stop the miner" (Tr. 95). He stated that he was told to stop by "Curt (Armstrong) or Danny (McGlothlin) or it might have been a buggy man" (Tr. 95).

Mr. Feeser stated that he "sometimes" takes his safety committeeman's position seriously and that he feels some responsibility not to engage in unsafe practices (Tr. 96). He confirmed that he had picked up gob with his miner machine, but denied that he cut into the block while using the machine to push the gob against the block (Tr. 97).

Mr. Feeser stated that he spoke with Mr. May when the citation was issued and that he informed Mr. May that he was told to cut into the block by Mr. Armstrong (Tr. 98). When asked how far he would have to go into the coal block if he were cleaning up gob, he replied "maybe a foot" (Tr. 99). He stated that there was no need to cut into the block for 10 or 12 feet in order to pick up the gob, and when asked why he was told to stop mining, he replied "they told me we had an inspector . . . to stop mining, that we was going to set timbers" (Tr. 99). After stopping mining, Mr. May came to the section to give his safety talk and all operations stopped (Tr. 99).

Mr. Feeser stated that he made no complaint to anyone that he was "about to engage in an unsafe mining practice" and conceded that it should have been his duty as a safety committeeman to do so. He confirmed that at the time he spoke with counsel Bieger in the mine office, Mr. Bieger did not "bully or scare him" in any way (Tr. 100).

Mr. Feeser stated that he did not know in advance that Mr. May was coming to the mine to give a safety talk, and found out about it "when he come" (Tr. 102). When he was told to stop mining, he was not told that he was to stop because Mr. May was going to make a safety talk, and was simply told "stop mining, we had an inspector" (Tr. 102). He construed this to mean that the inspector "was coming inside and everything better be right." He confirmed that he knew the timbers were not set, and when asked why he did not refuse to work without the timbers being installed, he replied "I don't know. I was told to take the miner across the section and start mining," and that he said nothing to Mr. Armstrong (Tr. 103).

Mr. Feeser stated that a "complete cut of coal" would have been an area 20 feet by 20 feet, and that he took "half of one cut." He explained that his machine initially penetrated the coal block on one side for a distance of 6 feet deep, backed out, and then made another "pass" back into the coal block for approximately a 10 to 12 foot distance, and that the ultimate cut was approximately 18 feet wide (Tr. 105-107).

Mr. Feeser stated that if the roof had fallen while he was making the cuts he would have been in danger "if it would have run through an intersection," and if the fall did not go through the intersection, he would not have been in danger (Tr. 107). He stated that no timbers were set before Mr. May came to the cited location, and that Mr. May came to the area after completing his safety talk. He stated that he simply left the mine machine parked into the block of coal, that no one informed Mr. May that it was there, and that he came to the face area as part of his normal inspection routine (Tr. 109). Mr. Feeser confirmed that he was laid off, and not discharged by Hiope, and that his lay off had nothing to do with this case (Tr. 110).

Inspector May was recalled by the Court, and he confirmed that although he had previously visited the mine with other inspectors, he had been assigned to the mine for regular inspections 4-months prior to the time he issued the contested citation in question. He confirmed that there were no prior roof control violations at the face areas, and that the mine "didn't usually get too many roof control violations," and that he had not previously encountered a situation where coal was cut before the timbers were installed. He stated that he did not accept the assertion by Hiope that the block of coal had been cut accidentally, and he decided to issue the unwarrantable failure citation because he believed that Mr. Feeser was told to cut the coal block. When asked why anyone would tell Mr. Feeser to cut the coal in violation of the roof-control plan, Mr. May stated "obviously, he didn't think I was coming to the mine," and that it takes time to set all of the timbers, and "they'd go ahead and run and mine that coal and be setting the timbers in the process" (Tr. 113).

Mr. May stated that his inspection notes reflect that Mr. Armstrong told him that "by the time we get this row of pillars pulled we'll have the timbers installed." Mr. May believed that the timbers would have been installed eventually, but that the roof-control plan requires them to be installed before any coal is mined. He confirmed that he did not attend the MSHA violation conference (Tr. 114). He confirmed that he has never had any problems with Mr. Armstrong and considered him to be a fair person (Tr. 119).

Mr. May stated that after the citation was issued it took an hour to obtain the timbers, and another hour or so to install them. Mr. May stated that "anytime you pull a pillar there's a danger," and that if part of a coal pillar is pulled without first installing timbers there would be a danger because there is no way to get in to install timbers because one would have to be working in an unsupported roof area, and once the pillar block is split through, it is too late to install timbers (Tr. 120).

Hiope's Testimony and Evidence

Curtis A. Armstrong stated that he has been employed by Hiope as a section foreman for 4 years, has served as a section foreman for 16 years, and has worked in underground mines for 21 years. He stated that on the day in question the pillar section was just starting and he planned to begin the cycle of pulling the pillars. He stated that he instructed Mr. Feeser to take the miner machine to the pillar block of coal which was cited and told him that "that was the block that we were supposed to start." The gob, or loose debris, had been pushed up to the pillar block and needed to be cleaned up (Tr. 124). He believed that Mr. Feeser cut into the coal block when he was picking up the gob, and turned the machine into the block "and it started cutting." He denied that he told Mr. Feeser to start cutting the block, and stated that when this occurred he was installing curtains or checking the ventilation, and when he returned he found that the block had been cut and he stopped Mr. Feeser from further cutting (Tr. 126).

Mr. Armstrong denied that he knew that Mr. May was at the mine, and that he learned about his presence while in the process of installing timbers. He stated that approximately 50 timbers had already been installed that morning by the rest of the section crew, and that after instructing Mr. Feeser to stop cutting, he was to help set all of the required timbers before any mining was started. Referring to Mr. May's diagram, Mr. Armstrong explained where the timbers had already been installed, and where he intended to continue installing additional timbers. He denied that he intended to mine any blocks of coal without installing the timbers (Tr. 128).

Mr. Armstrong stated that the block of coal was cut at an angle, and he estimated that a cut of approximately 10 feet was taken, and since the miner was at an angle, the cut could end up 15 to 18 feet wide. He did not see the miner cutting into the block, was not present when it was cutting, and he did not know whether it went into the block of coal one or two times (Tr. 129). It was possible to have a wide cut with one pass of the miner because it went in at an angle (Tr. 129).

Mr. Armstrong stated that since the section was new and just starting up, he has to know exactly where to begin starting to

cut a block of coal once mining began, and that he instructed Mr. Feeser to take the miner to the block of coal in question and told him "This right here is the block that we will start" according to the mining plan (Tr. 130). With regard to the statement attributed to him by Inspector May, as reflected in his notes, Mr. Armstrong recalled some conversation with Mr. May but could not recall exactly what was said. He stated that he told Mr. May that "he knew that these timbers would be set there before this block was mined" (Tr. 131). He could not recall how much time passed from the time he told Mr. Feeser to stop cutting and Mr. May's arrival at the scene (Tr. 131). Everyone on the section was installing timbers at the time and no coal was being mined. No coal was mined after he told Mr. Feeser to stop cutting, and by the time Mr. May arrived, no coal had been mined (Tr. 132).

Mr. Armstrong stated that timbers were stored underground and that 60 timbers had been installed before Mr. May came to the area. Approximately 48 additional timbers were subsequently installed, and that a sufficient supply of timbers were readily available for the entire timbering job (Tr. 134). Mr. Armstrong confirmed that he was present in the mine office when Mr. Feeser met with counsel Bieger, but he could not recall what was said, and did not remember Mr. Feeser stating that he accidentally or intentionally cut into the block of coal (Tr. 135).

On cross-examination, Mr. Armstrong confirmed that he helped install some of the timbers while Mr. Feeser was moving the miner machine across the section, and that five or six men were on the section installing timbers and hanging curtains, and one mechanic was working on a shuttle car (Tr. 137). He estimated that it would have taken an hour and a half to 2 hours to install all of the timbers on the pillar line (Tr. 141). Given the fact that the miner machine has cables and water lines, it would have taken Mr. Feeser approximately 40 minutes to move the miner machine across the section to the block, a distance of about 280 feet (Tr. 144-145). He confirmed that he saw the cut made by the machine into the block of coal in question, and that it was approximately 10 feet in at the deepest penetration (Tr. 146).

Mr. Armstrong stated that a "buggy" was parked near the coal block in question and a mechanic was working on it when Mr. May came to the area, and that the entire block of coal would not have been mined out with the buggy parked in that location (Tr. 148). Mr. Armstrong did not dispute the fact that the roof-control plan required that timbers be installed along the area cited by Mr. May, and he did not believe that Mr. Feeser had to penetrate the coal block as far as he did to pick up gob which had been left over and pushed up against the coal block (Tr. 154).

Danny W. McGlothlin, President, Hiope Mining, stated that he works underground at the mine everyday overseeing the operation, and that he was working at the mine when the citation was issued. He stated that he did not tell anyone to cut into the block of coal in question, and he explained that while he was underground working "somebody hollered and said there was a mine inspector outside." Mr. McGlothlin stated that he proceeded to the outside to meet the inspector, and that it took him a half-hour to get to the outside, and a half-hour to get back underground. Mr. May wanted to give a safety talk, and all of the men were gathered up for the talk (Tr. 156). Mr. May then informed him he wanted to visit the faces, and after crawling to the area he saw the miner machine and informed him that it was a violation of the roof-control plan and that he was going to issue "a order over it" (Tr. 157). Mr. McGlothlin confirmed that the buggy parked by the block of coal in question had broken down on the previous night shift, and he believed that Mr. May "had to crawl around it" (Tr. 158).

Mr. McGlothlin confirmed that he was present during the meeting in the mine office with Mr. Feeser and Hiope's counsel Bieger, and that Mr. Feeser stated that "he loaded up the loose coal and proceeded into the block" (Tr. 160). Mr. McGlothlin stated that "I can't recall for sure whether he said it was accidental" (Tr. 160). He further stated that he attended the MSHA informal conference, which he had requested, and that Mr. Feeser was present at this conference and stated that he had accidentally cut into the coal block. The statement was made to Larry Werrell, the MSHA supervisor conducting the conference, in response to a question from Mr. Werrell as to whether he had accidentally cut into the coal (Tr. 162). Mr. McGlothlin further explained Mr. Feeser's statement as follows at (Tr. 162-163):

> Q. And did he ask Mr. Feeser if he accidentally cut into it?
>
> A. Yes.
>
> Q. And he replied yes to that?
>
> A. He replied that he was cleaning up coal and cut into the block of coal. And we had done, you know, said accidentally, and Mr. Werrell or Mr. Bieger one said, "Is that accidentally?" and he said, "Yes."
>
> Q. But he never actually said, "I accidentally cut into the block," did he, or at least you don't remember him saying that?
>
> A. At one time he did say he accidentally cut into the block, I do remember that.

Q. Okay. Replying to a question by somebody else?

A. Yes.

Mr. McGlothlin agreed that Inspector May could come to the conclusion that the roof-control plan was violated when he saw that the area where the coal was cut was not completely timbered. He confirmed that the citation was served on him and that he explained to Mr. May that they were in the process of installing the bleeder timbers, that other timbers were brought in, and that when they saw that the block of coal had been cut, "we ceased to mine" (Tr. 164). He also stated that he told Mr. May that it "made no sense" to bring him into the mine if he thought that a (d) order violation had occurred, and that if they thought this would occur, the timbers could have been brought in and set before the inspector got there because "I had enough time, if I felt like this was going to be a (d) order, to set the timbers" (Tr. 164). Mr. McGlothlin confirmed that he did not speak to Mr. Feeser that day because he was busy installing timbers. He confirmed that he explained to Mr. May that Mr. Feeser "was told to go up and clean up the loose coal and I figured he just cut into it cleaning up the loose coal," and that Mr. May replied "I have to write a (d) order" (Tr. 165).

In response to further questions, Mr. McGlothlin stated that the coal cut made by Mr. Feeser was made before he left the mine to get Mr. May, and that the miner was in the same position when he returned with Mr. May. He conceded that he knew at that time that there was a roof control violation, but did not think about it being a (d) order because timbers were being installed and he did not realize that the miner machine "was in as much as it was" (Tr. 167). He also conceded that even though he knew that the cut taken was a potential violation, he said nothing to Mr. May about it (Tr. 169).

James C. McGlothlin, mine superintendent, confirmed that he was not present when the block of coal was cut, but that he was present during the meeting in the mine office to discuss the matter, and he stated as follows in this regard (Tr. 173-175):

Q. All right. Do you recall what Aaron Feeser said about how the block came to be cut into?

A. Yes, sir, I do.

Q. What did he say?

A. Aaron said they'd cleaned up a section that morning and dumped a gob out against the block of coal. And they told him to take the miner over and clean up the loose coal. And said, "They done told me that the block actual we was going to start." Said, "I didn't

try just to clean the block of coal or the gob up." Said, "Whenever the miner started in the coal," said "I didn't think it was going to matter because that was the block that was going to come out."

Q. Did he say whether he intended to cut in there or whether it was an accident?

A. He told us that it was an accident that he cut that much. Said he just -- it went further than he thought.

Q. All right. Were you also present at the informal conference?

A. Yes, sir.

Q. Did he testify similarly or differently at the informal conference?

A. He said it was an accident. And I asked Mr. Feeser before we even had the meeting what happened because it aggravated me that it happened. And he said, "Well," said, "Curt didn't tell me to do it." Said, "He come down and stopped me." Said, "I just cut a little more out of there than I did."

Q. And after you had that conversation with him that's why we had the meeting, right?

A. That's right.

Inspector May was recalled, and he questioned Mr. Armstrong's assertion that all of his crew, except for a mechanic, were installing timbers, because someone had to haul the coal cut by Mr. Feeser away from the face area in question. He also did not believe that Mr. Danny McGlothlin would have known how much coal Mr. Feeser cut because he was outby the section when he came to bring him into the mine, and he may not have known that the cut had been taken. Mr. May could not recall whether the buggy which was parked near the coal block was down for maintenance, but this would have made no difference since there were other buggies available on the section (Tr. 181).

Mr. May reiterated that he based his unwarrantable failure finding on the fact that Hiope "knew or should have known" that coal could not be cut before installing timbers, and that Mr. Armstrong was required to check the section every 20 minutes and should have stopped Mr. Feeser from cutting "prior to getting in there as much as he did" (Tr. 182). Mr. May also considered Mr. Feeser's statement that he was told by Mr. Armstrong to take the cut, and Mr. Armstrong's statement which he recorded in his notes that "By the time we get this block or these blocks mined,

then we'll have our timbers set" (Tr. 183-184). Mr. May also believed that "they were going to mine coal to the point they got caught up with the timbers" (Tr. 187).

Docket Nos. VA 89-35-R and VA 89-68

The section 104(d)(1) "S&S" Citation No. 2969642, issued on January 23, 1989, by MSHA Inspector Steven May, citing an alleged violation of 30 C.F.R. 75.400, states as follows (exhibit G-2):

> Float coal dust has been allowed to accumulate on previously rock dusted surfaces at the belt conveyor entry and connecting crosscuts beginning at the mine portal and extending to the 1st return overcast a distance of approximately 2,000þ (feet). This dust is very dry and is from 0" to 13" (inches) in depth. Citations were issued for the same condition on the last AAA inspection. This conveyor entry serves the 001-0 section.

The record reflects that Inspector May fixed the abatement time as 7:00 a.m., January 24, 1989, but that on January 25, 1989, he extended the time for abatement to January 26, 1989, because "float coal dust was cleaned from around the conveyor. However, sufficient inert material was not applied to the crosscuts to render float coal dust present inert. More time is granted."

On January 26, 1989, Inspector May extended the abatement time further to January 30, 1989, after verifying that the mine ran out of rock dust before the crosscuts were completely rock dusted and Hiope experienced a problem in obtaining more rock dust from the supplying quarry. He also noted that the mine was down because a conveyor belt was being moved, and he granted Hiope more time to completely abate the cited conditions. He subsequently terminated the citation on January 30, 1989, at 3:00 p.m., after finding that the cited areas had been cleaned and the float coal dust rendered inert by the application of rock dust.

MSHA's Testimony and Evidence

MSHA Inspector Steven May confirmed that he conducted a regular inspection of the mine on January 23, 1989, and issued the citation after finding accumulations of float coal dust ranging in depth from zero to 13 inches on previously rock dusted surfaces along the mine belt conveyor entry and connecting crosscuts from the mine portal to the first return overcast (exhibit G-2). He explained that the belt travels through two stoppings as it comes to the outside, and that the belt air travels from the outside along the belt toward the face. He stated that the accumulations were "worse" along the first 400 feet of the number

one belt, and that he used a mine map to estimate the belt conveyor distance.

Mr. May stated that in order to reach the 001 section, miners had to pass by the cited conveyor belt areas and that the belt was required to be examined at least once each day during the working shift, and if the mine works two shifts, it must be examined twice a day. He stated that the accumulations were deeper at the two stopping doors where the air would pick up the dust from the belt and deposit it on the floor. He stated that the float coal dust was black in color, and that he used a rule to measure the 13-inch accumulations at three locations along the belt conveyor. The belt and the accumulations were dry, and he described the float coal as "black, fine, coal dust." He did not consider the accumulated float coal dust to be spillage because spillage would be "heavier and granular," and would be deposited "straight down" from the belt conveyor.

Mr. May stated that the float coal dust accumulations constituted a fire and explosion hazard because they could be placed in suspension and heat and ignition sources were present. He described the ignition sources as the belt conveyor drive motors, the conveyor belts and rollers, and electrical cables which would be present along the conveyor belt system. He considered the float coal dust to be combustible and that the possibility of a fire is always present with float coal dust and sources of ignition.

Mr. May stated that the presence of the float coal dust increased the likelihood of a fire, and that in the event of a fire the hazard would be more severe because of the extent of the accumulations. He believed that an accident was highly likely if the conditions were allowed to continue without being corrected. He did not consider the accumulations to be an imminent danger because he saw no visible or readily available heat sources. He observed one man inby at the No. 3 belt drive, and eight men were on the section. He did not believe that mining was taking place, and that in the event of a fire on the section it would travel "up the belt" and towards the face area. He also believed that the miners would be unable to escape a fire and would suffer permanently disabling injuries.

Mr. May stated that he based his high negligence finding on the fact that the violation was repetitious, and that he had issued prior coal and float coal accumulation violations of section 75.400 during prior inspections of the same belt conveyor area. He also confirmed that other inspectors had also issued prior violations for the same conditions (exhibits G-6 through G-14). Mr. May also considered the fact that management could have discovered the accumulations by making the proper daily shift examinations.

Mr. May stated that the accumulations along the first 400 feet on the No. 1 belt conveyor "possibly" accumulated over a period of 1 week, and that the area inby the No. 1 belt where the accumulations were 2 inches deep took a month or so to accumulate. In view of the amount of accumulated coal dust he observed, he believed that they should have been detected and reported by the preshift mine examiner.

Mr. May drew a sketch of the belt conveyor system which extended from the mine portal to the working face, and he explained that the distances noted between the four belt sections were approximations which he arrived at by reference to the scale shown on the mine map which he reviewed. He estimated the distance of the No. 1 belt as 400 feet, and the No. 2 belt as 1,600 feet (Tr. 13-46).

Mr. May confirmed that he extended the abatement times after returning to the mine and finding that the conditions were partially abated and he verified the fact that Hiope was having a problem with obtaining rock dust to complete the abatement work and were making an effort to complete the job (Tr. 46-53). He confirmed that he based his "S&S" finding on his belief that there was a reasonable likelihood that an injury, with lost work days or restricted duty, would occur (Tr. 53).

On cross-examination, Mr. May stated that the individual he observed at the No. 3 belt drive was there to maintain the belt. Mr. May confirmed that he took no float coal dust samples, took no pictures, and did not test the "combustibility" of the float coal dust. He explained that he cannot test float coal dust, but that he did feel it with his hand and kicked it around. He observed no dust in the air and did not believe that coal was being mined when he observed the conditions. He confirmed that he did not tell management not to run any coal, and did not tell them that "everything was so dangerous and so hazardous" that he did not want any coal run. If he had thought this was the case, he would have issued an imminent danger order. He confirmed that the float coal dust was deposited on the previously rock dusted areas in question (Tr. 53-58).

Mr. May confirmed that dust is present wherever coal is mined, and that during a previous inspection he required Hiope to plaster some ventilation brattices to abate a citation which he issued. He denied that this action on his part increased the air flow over the belt and made any dust problem worse. He believed that Hiope had installed some additional curtains on their own inside the belt line to help slow down the air, and that he did not object to this (Tr. 59).

In response to further questions, Mr. May confirmed that he spoke with Mr. McGlothlin over the phone about the citation and that Mr. McGlothlin gave him no explanation with respect to the

existence of the float coal dust and told him that he "would get somebody to work on it" (Tr. 61). Mr. May confirmed that he checked the shift book, and it reflected that the belts had been "walked" and that the belts "had been made" the day before his inspection (Tr. 62). He could not recall any notations in the book confirming the existence of the float coal dust, and he recalled looking at the book "for several days ahead." He confirmed that all of the cited dust was float coal dust, black in color, and that the areas were previously rock dusted to abate a prior citation which he had issued. He further confirmed that he is not required to take float coal dust samples, did not use a sieve, and based his determination that it was float coal dust by kicking it and observing it and that "it'll go out in front of you when you step on it" (Tr. 65). He confirmed that the float coal was dry and that none of it was wet, and he determined that it was combustible by its black color (Tr. 65).

Mr. May confirmed that the No. 2 and No. 4 belt drives were equipped with water sprays, and that the No. 3 belt had a chemical type spray (Tr. 66). He also confirmed that he found no stuck belt rollers, or the belt out of line, and he considered the ignition sources which were present to be potential sources of ignition (Tr. 67). He believed that the eight people working in the mine would be exposed to a hazard in the event of a belt fire because it was the belt closest to the outside (Tr. 68). He confirmed that the prior citations issued for float coal and loose coal accumulations indicated to him that dust accumulations were a problem in the mine (Tr. 69).

Hiope's Testimony and Evidence

Mine Superintendent James C. McGlothlin, confirmed that he is underground on a daily basis, and that he was present when Inspector May conducted his inspection. He disputed Mr. May's assertion that there was 2 to 13 inches of coal dust at the belt line, but conceded that "right behind the brattices there might have been 10 to 11 inches of coal dust" which he attributed to the wind which pulling the dust through the brattices where the belt travels through (Tr. 71). He described the coal as "grains . . . big as your finger and it settles right beside the brattice just like a snowstorm, just like a drift, whenever it gets to where the air ain't hitting it, it lays down there" (Tr. 72). He contended that the coal dust was 20 feet behind the brattice where it was "probably from 8 to 12 inches," and indicated that "it was coal" rather than float coal dust (Tr. 72).

Mr. McGlothlin explained the steps taken by management to control float coal dust, and stated that the belts are equipped with sprays and fire hoses. He contended that the mine had never been cited for a violation of its dust-control plan, but conceded that there have been problems because of the air velocity going through the restricted overcast which "throws a lot of air on the

belt line" (Tr. 73). He contended that Mr. May and another inspector required him to replaster the brattice line, and that this holds all of the air on the belt, and that this occurred before Mr. May became the "regular inspector" at the mine (Tr. 74). He further explained his efforts at dealing with the problem. He confirmed that Mr. May told him that he was going to issue an order because of the dust from the overcast area back towards the outside of the mine, and that he assigned men to take care of the problem immediately and stopped mining. He contended that coal was being run on the belt at the time Mr. May observed the conditions, and that Mr. May told him that he did not need to stop running coal and that he would give him time to clean up the belt. He stated that after the belt was cleaned, Mr. May refused to go back into the mine to check it, and advised him that he would return the next day (Tr. 78).

In response to further questions, Mr. McGlothlin disputed the inspector's contention that the float coal dust extended 2,000 feet along the belt line up to the overcast. He contended that his mine maps reflect that the belt line is 1,100 feet up to the overcast, and that the coal dust was "backed up about 20 feet behind the . . . brattices where it was piled up from 8 to 13 inches. From the rest on back, it wasn't even enough to shovel. All we could do to that was just put dust over it and make it white" (Tr. 81). He conceded that the coal dust was black in color, that at least 1,000 feet of the belt cited by Mr. May was black, and it needed some rock dust (Tr. 82). He confirmed that prior ventilation changes were made "to suit three different inspectors," and that some of the changes were made "to try and help us solve the problem" on a "tough belt line to control" because of the amount of air (Tr. 83-84).

Inspector May was recalled, and he confirmed that he discussed the violation with Mr. McGlothlin, and that he (McGlothlin) thought that a (d) order rather than a (d) citation would be issued. Mr. May denied that he told Mr. McGlothlin that he need not clean up the float coal dust immediately, and he stated that no one told him that it had been cleaned up before he left the mine (Tr. 94). Mr. May confirmed that he estimated the 2,000 feet belt line distance from the scale on the mine map, and that "it looked like 2,000 feet," but "it may have been 1,000" (Tr. 96). He confirmed that the depth of the material "ranged from zero to 13 inches" along the entire length of the belt line "and tapered out by the time you got to the overcast return" (Tr. 96).

Danny McGlothlin, explained the efforts made to keep the coal dust from accumulating on the belt line, the "continuous problems" with ventilation on the belt, beginning in June, 1985, and the efforts made by state and federal inspectors who have suggested ways to control the ventilation (Tr. 103-106).

Mr. McGlothlin stated that during a state mine inspection conducted January 11-13, 1989, the No. 1 and No. 2 belt lines were cited for loose coal and float coal dust accumulations, and the lack of rock dusting, and that he was with the inspector when the citations were issued. He confirmed that no float dust tests were made at that time, and that all of the conditions were corrected on January 13, 1989, 10 days before Mr. Mays issued the contested citation in this case. Mr. McGlothlin did not believe that the float coal dust cited by Inspector existed for a month along portions of the cited belt because the state inspector "is a strict inspector" (Tr. 107).

Mr. McGlothlin stated that he has always tried to keep two men assigned to the belt to keep it clean, and that the certified man who has been assigned to the belt for 3 years "knows the trouble spots, will not sign the books if the belt is not kept up, and each day he cleans the belt." He explained further that its impossible to keep the belt clean while coal is being run, and that Hiope has done everything possible to try and correct the problem, and that its recent efforts at cutting down on the ventilation air velocity on the belt had helped. He believed that management makes an attempt to keep the belt clean and did not believe that its "entirely negligence and we don't try" (Tr. 109).

When asked whether he and the state inspector went into and looked at the crosscuts during the state inspection, Mr. McGlothlin stated that "me and him crawled up No. 2 belt line on the opposite side of the belt and came out the return side" (Tr. 110). When asked why the No. 2, No. 3, and No. 4 belts were cited by the state inspector if there were problems on the No. 1 belt, Mr. McGlothlin responded "when you spend a lot of time on one, you kind of let the other one just get behind too" (Tr. 111). Findings and Conclusions Docket Nos. VA 89-35-R and VA 89-68 Fact of Violation - 30 C.F.R. 75.400

Hiope is charged with a violation of mandatory safety standard 75.400, for allowing float coal dust to accumulate on previously rock dusted surfaces along the belt conveyor entry and connecting crosscuts described by Inspector May. Section 75.400 provides as follows:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

In Old Ben Coal Company, 1 FMSHRC 1954, 1 BNA MSHC 2241, 1979 CCH OSHD 24,084 (1979), the Commission held that "the language of the standard, its legislative history, and the general purpose of the Act all point to a holding that the standard is violated when an accumulation of combustible materials exist," 1 FMSHRC at 1956. At page 1957 of that decision, the Commission also stated that section 75.400 is "directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated." See also: MSHA v. C.C.C. Pompey Coal Company, Inc., 2 FMSHRC 1195 (1980), and 2 FMSHRC 2512 (1980).

In Back Diamond Coal Company, 7 FMSHRC 1117, 1120 (August 1985), the Commission stated as follows:

> We have previously noted Congress' recognition that ignitions and explosions are major causes of death and injury to miners: "Congress included in the Act mandatory standards aimed at eliminating ignition and fuel sources for explosions and fires. [Section 75.400] is one of those standards." Old Ben Coal Co., 1 FMSHRC 1954, 1957 (December 1979). We have further stated "[i]t is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe." Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980). The goal of reducing the hazard of fire or explosions in a mine by eliminating fuel sources is effected by prohibiting the accumulation of materials that could be the originating sources of explosions or fires and by also prohibiting the accumulation of those materials that could feed explosions or fires originating elsewhere in a mine.

I conclude and find that Inspector May's credible testimony establishes the existence of float coal dust accumulations deposited on previously rock dusted surfaces along a rather extensive area of the cited belt conveyor in question. Mr. May's confirmed that he measured the depth of the accumulations with a rule at three locations and estimated the depth of the rest of coal dust by observation. He visually observed the accumulations, which he described as dry "black, fine, coal dust," and while he did not test it with a sieve, he felt it with his hand and kicked it around to confirm his visual observations that the black coal dust was in fact float coal dust which he believed is combustible.

Although superintendent James McGlothlin disputed the accuracy of Inspector May's estimate of the length of the conveyor belt, the depths of some of the accumulations, and believed that some of the accumulations were loose coal rather than float

coal dust, Mr. McGlothlin nonetheless confirmed that coal dust was present behind the brattices where it was backed up for some 20 feet at depths ranging from 8 to 13 inches, and that the coal dust which had accumulated along at least 1,000 feet of the belt cited by Mr. May was black in color, needed rock dust, and had not been cleaned.

Danny McGlothlin took issue with Inspector May's estimate as to how long the accumulations had existed prior to his inspection, and I find nothing in his testimony to rebut the inspector's testimony that the float coal accumulations did in fact exist at the time Mr. Mays observed them.

On the facts of this case, the fact that the inspector did not sample the float coal dust is irrelevant to any determination of a violation of section 75.400. The inspector's credible and unrebutted testimony establishes the existence of a significant amount of accumulated dry float coal dust which was black in color over a rather extensive area, and I conclude and find that the inspector's observations, coupled with his feeling and kicking the float coal dust around is sufficient enough to establish a violation. See: Kaiser Steel Corp., 3 IBMA 489 (1974); Pyro Mining Company, 7 FMSHRC 1415 (September 1985); Helvetia Coal Company, 7 FMSHRC 1613 (October 1985).

In view of the foregoing, I conclude and find that MSHA has established by a preponderance of the evidence that the accumulations of float coal dust as described by Inspector May were allowed to accumulate and were not cleaned up as required by section 75.400. Accordingly, the violation IS AFFIRMED. Docket Nos. VA 89-36-R and VA 89-69 Fact of Violation - 30 C.F.R. 75.220

Hiope is charged with a violation of mandatory safety standard 30 C.F.R. 75.220, for failing to install roof support timbers at the cited pillar block which had been cut by the continuous-miner operator. Hiope's approved roof-control plan required the installation of timbers at the cited pillar location before any mining commenced, and Hiope does not dispute the fact that the required roof support timbers were not installed as required. Section 75.220 requires a mine operator to follow its roof-control plan.

The credible and unrebutted testimony of Inspector May clearly supports a violation of section 75.220. Accordingly, the violation IS AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon 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." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> 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 United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Violation of 30 C.F.R. 75.400

The credible evidence adduced by MSHA establishes the existence of the dry and black coal dust which was deposited on top of previously rock dusted surfaces along the belt conveyor system locations described by the inspector. These accumulations ranged in depths of 0 to 13 inches, and they were located in belt conveyor areas which included potential sources of ignition. The inspector described these ignition sources as a belt conveyor drive motor, the belts and rollers, and electrical cables. Since miners travelled through the cited conveyor belt location and worked on the section on a daily basis, and the belt was on an intake air course, the inspector believed that in the event of a belt fire, smoke would course through the area towards the working face areas where miners would be working, and they would be exposed to fire and smoke hazards, and possible entrapment. If a fire were to occur, it would be reasonably likely that the miners would be exposed to these hazards and suffer permanently disabling injuries of a reasonably serious nature.

I conclude and find that the inspector's credible testimony establishes that the float coal dust accumulations in question, which I believe one may assume were combustible, located in areas where potential ignition sources were present, presented a discrete fire and smoke hazard, and possibly an explosion hazard. The inspector's belief that no coal was being mined or transported on the belt at the time of his observations of the float coal dust conditions was disputed by superintendent James McGlothlin who believed that the belt conveyor was in operation. If this were true, and the belt was running with coal, I believe that the hazard presented by the existence of float coal dust along a rather extended area of the belt conveyor, with potential ignition sources present would be increased. Any frozen or stuck belt roller, or malfunctions of the electrical cables or belt drive motors would provide a ready source of heat or friction to ignite the float coal dust and propagate a fire.

The fact that the conveyor belt may not have been in operation at the precise moment the inspector made his inspection and observed the conditions does not affect the hazards which one may reasonably conclude existed. In the normal course of mining with the belt running, the miners working on the section would be exposed to fire, smoke, and explosion hazards of a reasonably serious nature. Under all of these circumstances, I conclude and find that the violation was significant and substantial, and the inspector's finding in this regard IS AFFIRMED.

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Hiope does not dispute the fact that the pillar coal block was in fact cut, and that coal was removed from the block, without first installing the roof support timbers required by the

roof-control plan. I agree with the inspector's credible testimony that there is always a danger of a roof fall where coal pillars are mined without adequate roof support, and that the increased stress placed on the roof by the lack of timbering increases the likelihood of a roof fall.

The inspector's unrebutted credible testimony establishes that the taking of a cut of coal without first installing roof support timbers exposed the continuous-miner operator to the danger of a roof fall, and that in the event the miner operator continued to cut the coal block without timbers being installed, a roof fall was reasonably likely. If a roof fall had occurred, I believe it was reasonably likely that the miner operator would have sustained injuries of a reasonably serious nature.

The fact that the continuous-miner operator may not have been under unsupported roof while at the controls of his machine does not lessen the hazard exposure. The inspector reasonably concluded that the unsupported roof area in question could have broken out and fallen back beyond the end of the unsupported coal block while it was being cut, and exposed the miner operator to a roof fall hazard. Indeed, in this case, the miner operator believed that he would be exposed to a danger if the roof had fallen and extended out through the pillar intersection.

The Commission has taken note of the fact that mine roofs are inherently dangerous and that even good roof can fall without warning. Consolidation Coal Company, 6 FMSHRC 34, 37 (January 1984). It has also stressed the fact that roof falls remain the leading cause of death in underground mines, Eastover Mining Co., 4 FMSHRC 1207, 1211 & n. 8 (July 1982); Halfway Incorporated, 8 FMSHRC 8, 13 (January 1986); Consolidation Coal Company, supra.

In the Consolidation Coal Company case, supra, the Commission affirmed my "S&S" finding concerning an over-wide roof bolting pattern which had existed along a supply track for a period of 6-months, and stated that "[T]he fact that no one was injured during that period does not ipso facto establish that there was not a reasonable likelihood of a roof fall."

In U.S. Steel Mining Company, Inc., 6 FMSHRC 1369, 1376 (May 1984), Judge Melick found that a hazardous roof condition was significant and substantial notwithstanding testimony from a mine foreman that it was unlikely that the roof would fall "right away," and his belief that the condition was not unsafe because he and the inspector were under the roof while taking certain measurements. In R B J Coal Company, Inc., 8 FMSHRC 819, 820 (May 1986), Judge Melick cited Mathies Coal Company, 6 FMSHRC 1 (1984), in support of his finding that a hazardous roof condition constituted a significant and substantial violation even in the absence of an "immediate hazard."

In Halfway Incorporated, supra, the Commission upheld a significant and substantial finding concerning a roof area which had not been supported with supplemental support, and ruled that a reasonable likelihood of injury existed despite the fact that miners were not directly exposed to the hazard at the precise moment of the inspection. In that case, the Commission stated as follows at 8 FMSHRC 12:

> [T]he fact that a miner may not be directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood for injury existed. The operative time frame for making that determination must take into account not only the pendency of the violative condition prior to the citation, but also continued normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

In view of the foregoing findings and conclusion, I conclude and find that the violation was significant and substantial, and the inspector's finding in this regard IS AFFIRMED. The Unwarrantable Failure Issues

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

> In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery

Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

> We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more that ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

> We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

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MSHA argues that the violation resulted from a high degree of negligence on the part of Hiope, and that due to the egregious nature of the violation, MSHA concludes that it has established that the violation resulted from Hiope's unwarrantable failure to comply with the requirements of section 75.400. In support of its conclusion, MSHA relies on the testimony of the inspector which reflects his opinion that in some areas where the float coal dust was up to 13 inches in depth, it could have accumulated over a period of at least a week, and that in other areas where there was less air, and where it had accumulated to depths of 2 inches, it would have taken over a month for the float coal dust to accumulate.

MSHA asserts that since the belt line in question is subject to at least one inspection a day, Hiope should have observed the float coal dust conditions and cleaned them up. MSHA points out that the mine had a history of coal dust accumulation problems and similar prior violations were issued at the same belt area for the same conditions as those cited by Inspector May, and that Hiope's management acknowledged its awareness of the problem.

waited until its rock dust supplies were exhausted before ordering more (Tr. 120-122).

Hiope denies that it has exhibited a high degree of negligence with respect to the violation. It takes the position that it cannot be held accountable "for every bit of float dust," and that it has attempted to control float coal dust and has done everything that it has been asked to do to control it. Hiope disputes the accuracy of the inspector's belief that the accumulations had existed for a month, and it points to the fact that a state mine inspection report reflects that as late as 10 days before the inspection, the state inspector found the cited area to be "all clear" (Tr. 129-130).

Hiope's witness, Danny McGlothlin disputed the inspector's estimates that the float coal accumulations along the first 400 feet of the No. 1 belt had possibly accumulated over a period of 1 week, and that the area inby that location took possibly a month for the float coal dust to accumulate. Mr. McGlothlin stated that during a prior state inspection, the No. 1 belt was cited for loose coal and float coal dust accumulations, and lack of rock dust, during an inspection on January 11-13, 1989, and that the accumulations were cleaned up on January 13, 1989, 10-days prior to the inspection by Mr. May. With regard to the areas where Mr. May believed the accumulations existed for possibly a month, Mr. McGlothlin's basis for disputing Mr. May's belief was that the state inspector was "strict."

Hiope did not offer the state mine inspection report that it alluded to, and in my view, Mr. McGlothlin's testimony at best reflects that the last time the conveyor belt was cleaned was 10-days prior to the inspection conducted by Inspector May on January 23, 1989. I cannot conclude that this rebuts the inspector's belief that the accumulations had probably existed for at least a week. Indeed, Mr. McGlothlin's testimony corroborates the inspector's testimony. Mr. McGlothlin's characterization of the State inspector as "strict" falls short of credible testimony rebutting the MSHA inspector's testimony that the remaining float coal conditions accumulated over a period of a month. Hiope does not dispute the fact that the cited belt conveyor belt was not cleaned, and it presented no evidence to establish when the belt was last cleaned up and rock dusted.

With regard to Hiope's contention that it had difficulty obtaining an adequate supply of rock dust, I reject this as a defense. Although I do not dispute the difficulty which was verified by the inspector, it is incumbent on Hiope to insure that it maintains an adequate supply of rock dust to stay in compliance with the requirements of the regulations. Further, Hiope has not established that it could not obtain adequate

supplies of rock dust from sources other than the quarry which was experiencing a production problem.

Hiope did not dispute the fact that prior violations were issued by MSHA inspectors for violations of section 75.400 because of float coal dust and loose coal accumulations along the same belt conveyor location. Copies of the previous violations reflects that Inspector May issued two prior citations for violations of section 75.400, because of float coal dust accumulations on the No. 1 belt conveyor on March 14 and November 14, 1988 (exhibits G-6 and G-13). He also issued seven additional citations for accumulations of dry loose coal and float coal dust on the Nos. 2, 3, and 4 belts during March, May, and November, 1988 (exhibits G-7 through G-12, and G-14).

After careful review of all of the testimony and evidence adduced with respect to this violation, I conclude and find that MSHA has established by a preponderance of the evidence that the violation was indeed the result of Hiope's unwarrantable failure to comply with the requirements of section 75.400. I take note of Danny McGlothlin's tacit admission that he sometimes "got behind" in insuring that the belts were cleaned up of accumulated float coal dust accumulations. I conclude and find that the evidence establishes that the float coal accumulations had existed for some time prior to the inspection without any effort by Hiope to clean them up. Coupled with the prior citations, which were issued relatively close in time to the violation issued by Inspector May on January 23, 1989, for identical float coal dust conditions, I conclude and find that Hiope's failure to clean up the accumulations constituted a serious lack of reasonable care in failing to take any action to clean up the accumulations. I further conclude and find that Hiope demonstrated indifference and a lack of due diligence in failing to correct the cited conditions, and that its failure to act demonstrated aggravated conduct which clearly supports the inspector's unwarrantable failure finding in this case. Accordingly, the inspector's finding is affirmed, and the contested section 104(d)(1) citation IS AFFIRMED.

Violation of 30 C.F.R. 75.220

MSHA argues that the violation was the result of an unwarrantable failure by Hiope because the continuous-miner operator, Mr. Feeser, was instructed by his section foreman, Mr. Armstrong, to begin cutting the coal pillar in question before roof pillars were installed at that location.

With regard to Mr. Feeser's testimony, and the question of whether he changed his alleged prior statements that he cut into the block of coal accidentally, MSHA asserts that at the time of the inspection, Mr. Feeser told Inspector May that he was instructed to take the continuous-mining machine across the

section and start cutting, and that this prior statement by Mr. Feeser is consistent with his testimony during the hearing (Tr. 123-125).

Hiope argues that MSHA's conclusion that the violation constituted an unwarrantable failure rests on continuous-miner operator Feeser's testimony that he was instructed by foreman Armstrong to take the continuous miner to the coal block in question and to begin cutting the coal. However, Hiope contends that Mr. Feeser's testimony has been discredited in that he has given inconsistent testimony and did not completely admit or deny that he had made previous statements that he had cut into the block of coal accidentally, and Hiope's witnesses have attested to the fact that Mr. Feeser has given inconsistent testimony.

Hiope suggests that since Mr. Feeser was laid off by Hiope and filed a grievance in the matter he is a biased witness whose testimony is not credible. Further, Hiope asserts that it would be "insane" for Hiope to mine the pillars without supporting the roof, that it never intended to do so, and that the shuttle car which was broken down would have been in the way of any mining. Hiope concludes that MSHA's position is simply flawed (Tr. 127-129).

Continuous-miner operator Feeser testified that section foreman Armstrong instructed him to take the mining machine to the cited pillar location and to "start the first block" of coal. Mr. Armstrong confirmed that he instructed Mr. Feeser to take the machine to that location, but he stated that he simply pointed out to Mr. Feeser that the block of coal in question would be the initial starting point to begin cutting once the mining cycle was begun.

Mr. Armstrong stated further that some coal gob or debris left over from previous mining had been pushed up and against the coal block in question and that it needed to be cleaned up. He believed that Mr. Feeser cut into the coal block while cleaning up the gob and turned his machine into the block and it started cutting. He denied that he instructed Mr. Feeser to start cutting and mining the block of coal in question, and his unrebutted testimony establishes that when he observed that Mr. Feeser had cut into the block, he instructed him to stop any further cutting, and to help install all timbers before starting any mining.

Mr. Feeser, who was a safety committeeman, and who acknowledged that he was familiar with the roof-control plan, admitted that when he attended a meeting at the mine office, he told Hiope's counsel that he had accidentally cut into the coal block. Although he denied that Mr. Armstrong instructed him to clean up the gob which was against the block, Mr. Feeser admitted that during an informal violation conference with MSHA, he confirmed

that he was in fact cleaning up the gob with his machine, and he also confirmed that this was the case during his hearing testimony.

Mr. Feeser denied that he made any statement during the MSHA conference that he had accidentally cut into the coal block while cleaning up the gob. When pressed further on this question, he stated that he was never asked a direct question as to whether or not he accidentally cut into the coal block, and did not volunteer any such information.

During his direct testimony, Inspector May testified that when he spoke with Mr. Armstrong at the time the order was issued, he could not recall specifically asking Mr. Armstrong for an explanation as to why the cut was made before any roof support was installed. However, on cross-examination, Mr. May acknowledged that Mr. Armstrong told him that Mr. Feeser had accidentally cut into the coal block while cleaning the gob. Mr. Armstrong could not recall what was said during his conversation with Inspector May, and he acknowledged telling Mr. May that he knew that the timbers would be set before the block of coal was mined.

Hiope's witness Danny McGlothlin, testified that he was present during the meeting in the mine office after the order was issued, and he confirmed that while he was not certain that Mr. Feeser stated that the coal cut was accidental, Mr. Feeser admitted that he loaded up the loose coal gob and "proceeded into the block." Mr. McGlothlin further confirmed that he was present during the informal MSHA conference, and that Mr. Feeser acknowledged that he had accidentally cut into the coal block. Mr. McGlothlin also confirmed that when it was discovered that Mr. Feeser had cut into the coal block, all further mining ceased.

Mine Superintendent James McGlothlin confirmed that he was also present at the meeting in the mine office after the order was issued, and that Mr. Feeser admitted that he had accidentally cut too much out of the block of coal while cleaning up the gob, but that he did not think it would matter because the block of coal was going to be mined out. Mr. McGlothlin stated further that prior to the meeting, Mr. Feeser acknowledged to him that Mr. Armstrong did not instruct him to begin the cut into the coal block in question, and that Mr. Feeser stated "I just cut a little more out of there than I did."

Inspector May confirmed that Hiope had no prior roof control violations at the face areas, and that he had not previously encountered a situation where coal was cut before roof timbers were installed. Mr. May further confirmed that he never had any problems with section foreman Armstrong and considered him to be a fair person.

Inspector May confirmed that he based his unwarrantable failure finding on Mr. Feeser's statement that Mr. Armstrong instructed him to take the miner and proceed to cut the coal block, and on Mr. Armstrong's statement, as reflected in his notes, that "by the time we get this block or these blocks mined, then we'll have our timbers set." Mr. May also believed that Hiope "knew or should have known" that coal could not be cut before first installing timbers, and that Mr. Armstrong should have stopped Mr. Feeser from cutting as much as he did earlier because he was required to check the section every 20 minutes.

After careful review of all of the evidence and testimony in this case, I cannot conclude that MSHA has established an unwarrantable failure violation by a preponderance of the credible evidence. I find that Hiope's testimony is more credible than Mr. Feeser's with respect to the accidental cutting of the block, and I believe and accept as credible Mr. Armstrong's assertion that he did not instruct Mr. Feeser to cut the coal block before the timbers were installed, and that he only informed him where he was to start his cut once the timbers were installed and the mining cycle has begun.

I find Mr. Feeser's testimony and denials that he accidentally cut into the coal block to be contradictory and lacking in credibility. Mr. Feeser's initial admission and acknowledgement that he had previously stated that he accidentally cut into the block of coal was corroborated by Danny and James McGlothlin, and I find them to be credible witnesses.

I take note of the fact that Mr. Feeser was a member of the safety committee and was aware of the roof-control plan requirement for timbering before cutting any coal. Although he denied that his lay off and grievance colored his testimony against Hiope, I believe that Hiope's assertion that Mr. Feeser was a biased witness has a ring of truth about it. I believe that Mr. Feeser cut into the coal block while in the process of cleaning up the gob, and that he cut more coal than he had initially intended to take while cleaning up the gob, and stopped cutting and left the machine sumped up into the coal block after Mr. Armstrong observed what he had done and stopped him.

After careful review of all of the testimony and evidence in this case, I cannot conclude that MSHA has established by a preponderance of the evidence that the cutting of the coal block in question before adequate roof supports were installed resulted from a lack of diligence, or from indifference amounting to aggravated conduct. To the contrary, I find Mr. Armstrong's testimony and explanation with respect to his instructions to the continuous-miner operator to be believable and credible. Accordingly, the inspector's unwarrantable failure finding IS VACATED,

and the contested section 104(d)(1) order IS MODIFIED to a section 104(a) citation, with special significant and substantial (S&S) findings, and the citation is AFFIRMED AS MODIFIED.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Remain in Business

The parties stipulated that Hiope is a small mine operator and that the imposition of civil penalty assessments for the violations in question will not adversely affect its ability to continue in business. I adopt these stipulations as my findings and conclusions on these issues. History of Prior Violations

MSHA's computer print-out reflects that during the period January 23, 1987 through January 22, 1989, Hiope paid civil penalty assessments in the amount of $8,177, for 105 violations, 17 of which are for violations of section 75.400. Although Inspector May testified that he was unaware of any prior roof control violations concerning facts similar to those in this case, the print-out reflects three prior violations of section 75.220 (exhibit G-3). A computerized MSHA "Proposed Data Sheet" reflects that for a 4-year period encompassing 1986 through May 12, 1989, Hiope's mine was inspected a total of 185 days, and that it received 152 assessed violations during these inspections. Although Hiope's compliance record may not be particularly good for an operation of its size, I cannot conclude that it is such as to warrant any additional increases in the civil penalties which I have assessed for the violations which have been affirmed. Gravity

For the reasons stated in my S&S findings with respect to the violations which I have affirmed, I conclude and find that both violations were serious. Negligence

In view of my unwarrantable failure findings with respect to the violation of section 75.400, I conclude and find that it resulted from a high degree of negligence on the part of Hiope. With respect to the violation of section 75.220, I conclude and find that it resulted from Hiope's failure to exercise reasonable care, and that this amounts to ordinary negligence.

Good Faith Compliance

I conclude and find that Hiope exercised good faith compliance in timely abating the conditions cited with respect to both violations.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments for the violations which I have affirmed are reasonable and appropriate:

Citation No.	Date	30 C.F.R. Section	Assessment
2969654	03/06/89	75.220	$ 400
2969642	01/23/89	75.400	$1,000

ORDER

Hiope Mining, Inc., IS ORDERED to pay civil penalty assessments in the amounts shown above within thirty (30) days of the date of these decisions, and upon receipt of payment by the petitioner, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge