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MSHA V. VIRGINIA CREWS COAL
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 92-246
Petitioner	:	A.C. No. 46-04702-03562
v.	:	
	:	Docket No. WEVA 92-247
VIRGINIA CREWS COAL COMPANY,	:	A.C. No. 46-04702-03563
Respondent	:	
	:	No. 14 Mine

DECISIONS

Appearances: Patrick L. DePace, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
David J. Hardy, Esq., Jackson & Kelly, Charleston West Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed 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). Docket No. WEVA 92-246, concerns alleged violations of mandatory safety standards 30 C.F.R. 75.220(a)(1), and 75.208, and Docket No. WEVA 92-247, concerns an alleged violation of mandatory safety standard 30 C.F.R. 75.400.

The respondent filed timely notices of contests and answers, and hearings were held in Charleston, West Virginia. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of these cases.

Issues

The issues presented are (1) whether the cited conditions or practices constitute violations of the cited standards; (2) whether the alleged violations were significant and substantial (S&S); (3) whether the alleged violations were the result of the respondent's unwarrantable failure to comply with the cited standards; and (4) the appropriate civil penalties to

be assessed for the violations taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

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

2. Sections 104(d)(1), 110(a), and 110(i) of the Act.

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

Stipulations

The parties stipulated to the following (Tr. 7-8):

1. The No. 14 Mine is owned and operated by the respondent.

2. The respondent and the mine are subject to the Act.

3. The presiding judge has jurisdiction to hear and decide these matters.

4. MSHA Inspector Gerald L. Cook was acting in his official capacity when he issued the contested citation and orders.

5. True copies of the citation and orders were properly served on the respondent or its agent.

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

7. The respondent is an average sized mine operator, and has a low history of prior violations as shown in an MSHA computer print-out (Exhibit P-1).

8. The cited conditions and practices were abated by the respondent in good faith within the times fixed by the inspector.

Discussion

Docket No. WEVA 92-246

This case concerns a section 104(d)(1) significant and substantial (S&S) Citation No. 3740213, issued by MSHA Inspector Gerald L. Cook at 7:15 a.m., April 16, 1991. The inspector cited a violation of mandatory safety standard 30 C.F.R. 75.220(a)(1) and the condition or practice cited is described as follows:

> The approved Roof Control Plan (permit No. 4-RC-5-76-11069-10 dated 2-20-91) was not being complied with on the 1st Left (003-0) section in No. 6 working place in that the face had been advanced about 15(sic) inby last row of bolts and not supported and evidence indicated that crosscut right had been advanced about 20 feet and not bolted traveling past openings that create intersection that was not supported.

Following the issuance of the citation, Inspector Cook issued section 104(d)(1) "S&S" Order No. 3740214, at 7:18 a.m., April 16, 1991, citing a violation of 30 C.F.R. 75.208, and he included a reference to the previous citation in support of the order. The cited condition or practice is described as follows:

> The No. 6 working place had the face advanced about 15 feet inby last row of permanent roof support and crosscut turned left advanced about 20 feet inby last row permanent roof support and areas not posted with readily visible warning. This condition observed prior to mining started on section. This condition observed on 1st left (003-0) section.

Docket No. WEVA 92-247

This case concerns a section 104(d)(1) Order No. 3739989, issued by Inspector Cook on April 29, 1991, citing an alleged violation of mandatory safety standard 30 C.F.R. 75.400. Inspector Cook relied on the previously issued April 16, 1991, section 104(d)(1) Citation No. 3740213, in support of the Order, and the cited condition or practice is described as follows:

> Loose coal and coal dust was allowed to accumulate from 3 to 24 inches deep and 16 to 18 feet wide and 6 to 10 feet in length in about 6 locations in the left return off the left mains section (003-0). This accumulation had been pushed up and placed in these areas. Accumulations from 2 to 12 inches was present along roadways and ribs also in this area and had not been cleaned on cycle starting at about 70 feet inby the return overcast and extending inby for about 1,000 feet. Some rock had been mixed in some of the accumulations and this entry is ranging from damp to wet conditions with some areas dry. (This company is not following their clean up program).

Petitioner's Testimony and Evidence

Section 104(d)(1) Citation No. 3740213 30 C.F.R. 75.220(a)

MSHA Inspector Gerald L. Cook, Sr., confirmed that he visited the mine on April 16, 1991, to continue an inspection which began the previous day, and he rode in with the day shift section foreman and crew. He identified a copy of the section 104(d)(1) citation which he issued (Exhibit P-1). Mr. Cook stated that he inspected the working faces, travelling from the No. 1 through No. 6 working places, and when he arrived at the No. 5 or No. 6 entry he met union representative Richard Patton who was performing a preshift examination. Mr. Cook stated that he observed that the No. 6 working face had been advanced approximately 15 feet inby the roof bolts, and that the crosscut right, turned back toward the No. 7 entry, had been advanced about 20 feet, and that neither roof area was supported. He concluded that these conditions constituted a violation of the roof control plan because openings that create an intersection must be supported before mining or miners can advance past the openings. He identified a copy of the plan (Exhibit P-3), and stated that paragraph 3 of page 4 of the plan was violated (Tr. 19-25).

Mr. Cook confirmed that the cited areas were not permanently supported, and he saw no evidence of any temporary support. The No. 6 entry had been advanced inby the last row of bolts, and the crosscut to the right, off No. 6, had also been advanced. This indicated to him that someone had to pass by one of the two openings to mine the other opening without any roof support, and that this was a violation of the roof control plan. He confirmed that the intersection itself was supported, but that the crosscut right and the No. 6 heading were not. He stated that the respondent could have mined the right crosscut, or the heading, as long as a row of posts was installed across the mouth of the intersection before mining either opening. Mr. Cook observed that some coal that appeared to have been cleaned from the roadway was shoved into the crosscut between the No. 6 and No. 7 entries in an area which had been mined and not supported and he concluded that work had been performed in that area without any roof support. He confirmed that this was an active area of the mine (Tr. 26-27).

Mr. Cook stated that he based his "significant and substantial" finding on the following (Tr. 28-29):

> A. Because it's been proved -- they want to go back to the history of fatalities. We do have several fatalities that have resulted from a situation as this one where they are mining in past an opening that is not supported.

> We've had miners killed and we've had miners badly injured and it's due to the fact that we have a lot of unsupported top, and swinging, that could fall. If it fell, it could ride back past your -- even back past your permanent supports, which it had done before.

Mr. Cook believed that the violation would reasonably likely cause a fatality "because of the fact that we have had fatalities on this" and "where you're exposing miners to unsupported top, you're giving them a little bit extra where they can have a chance of having a roof fall and getting a person killed". He further stated that "if you go under unsupported top, you're asking for a fatality" and that "the company exposed the miners to unsupported top unnecessarily" (Tr. 29). Mr. Cook further explained that anytime miners are exposed to unsupported top "it is S&S in our criteria" (Tr. 30). He confirmed that the roof did not fall and that he observed no one in the area of unsupported roof while he was there. However, he saw evidence that someone had taken a scoop through the area pushing coal up into the breakthrough, and he saw no evidence that any temporary support had been installed when this was done (Tr. 32). Mr. Cook confirmed that this was his first visit to the underground mine area and he did not observe any broken or loose top in the cited unsupported areas (Tr. 32).

Mr. Cook stated that he based his "unwarrantable failure" finding on the following (Tr. 32-33):

> A. Because the operator has a roof control plan which is their plan . It's supposed to be known by everybody who is working on that section that has to deal with roof control. And whenever they have an approved plan, that is their plan they mine by. And when they violate that plan, there is no way they can tell me they didn't know the plan had that stipulation in it, because they're supposed to review the whole plan and this plan is supposed to be known by everybody.
>
> And once they violate it, the negligence come out that -- if you have a roof control plan that is approved, it's supposed to be known by everybody on that section, what the parts stipulate and what the parts mean. And there is no excuse for them to create a situation, as they did, and there is no way they can tell me they didn't know it existed, because they're supposed to know what the plan states. It is their plan and they're supposed to review it.

Mr. Cook stated that after issuing the citation and order he spoke with section foreman Clyde Bailey who confirmed that he was located in the No. 6 entry. Mr. Bailey assembled the crew and Mr. Cook informed the crew that he had issued the citation and order because they had mined the cited area without any roof

support and no one spoke up to tell him that this was not the case (Tr. 35-36). Since no one spoke up, Mr. Cook assumed that what he had observed "was the way it was done" (Tr. 36). He confirmed that the crew acknowledged that they knew about the roof control plan and that they were not supposed to mine past an opening they had created without supporting it first, and no one suggested that a violation had not occurred (Tr. 37). Mr. Cook confirmed that temporary supports were installed after he issued the citation, and that when he next returned to abate the violation, both entries had been permanently supported (Tr. 37).

On cross-examination, Mr. Cook confirmed that he saw no evidence of the roof dripping or any indications that it was about to fall, and he saw no evidence of any roof danger in the cited areas (Tr. 38). Mr. Cook also confirmed that he did not know which crew had cut the intersection in question, but he believed that any crew that knows that the area is not supported should attend to the matter (Tr. 38). He stated that Mr. Bailey's morning crew had just arrived on the section, and Mr. Cook did not know when the area had been mined or who mined it (Tr. 40). He confirmed that the violation was an unwarrantable failure because "the plan is supposed to be known by the coal crews and the company. It's an approved plan and they're supposed to know what it requires them to do, to mine according to the roof control plan" (Tr. 40).

Mr. Cook stated that he was confident that he was in the No. 6 to No. 7 break and at the No. 6 heading when he made his observations and roof measurements. He initially assumed that he was in the No. 1 entry, but it was not as advanced as the other entries. Mr. Bailey and Mr. Patton both told him he was in the No. 6 entry before he issued the violation, and he asked both of them for his location because he wanted to make sure of the entry location before issuing the violation (Tr. 42). Mr. Cook stated that he made his measurements from the last row of roof bolts, but he could not recall which side of the entry he measured from or whether the entry or face was squared up or at an angle (Tr.43-44). Mr. Cook stated that under the roof control plan he is allowed to be in four feet from the last row of roof bolts, and he explained the measurements he made with his tape and the procedures he followed (Tr. 45-47).

Referring to a mine map (Exhibit R-3), Mr. Cook identified the two unsupported roof locations which he observed, and he explained how he made his measurements while standing under the last row of roof bolts (Tr. 50-54). Mr. Cook confirmed that there were two distinct areas which were not supported, namely, the No. 6 heading, and the No. 6 to No. 7 break. He also confirmed that if the mouth of the No. 6 heading were supported with two rows of roof bolts into the crosscut, it would not have been illegal to mine the No. 6 to No. 7 break, and vice versa (Tr. 55). He stated that the coal accumulations in the break

were roughly 20 to 24 inches deep, but he did not consider them as a barrier preventing entry into the break because the accumulations stopped before the last row of bolts. He did not know how the accumulations got there (Tr. 56).

Mr. Cook clarified his previous "S&S" testimony by stating that miners are exposed to the unsupported roof areas when they pass by the two openings that are unsupported, and he concluded that they had to pass by the unsupported roof area in the No. 6 heading when the loose coal was pushed into the break (Tr. 57). He stated that the "evidence" that someone had been in the area previously consisted of the "ridge of coal" across the mouth of the intersection and rubber tired scoop or tractor tracks going down the No. 6 entry (Tr. 59).

In response to further questions concerning his "S&S" finding, Mr. Cook stated as follows at (Tr. 62-64):

> Q. What you're saying, Mr. Cook, is whether you had evidence of miners in this area or not, you were going to write this as an S&S violation. Is that what you're saying?
>
> A. Yes. It's an S&S violation due to the fact that --
>
> Mr. Hardy: That is all. Thank you.
>
> Judge Koutras: Well, you can finish your answer. Go Ahead.
>
> Mr. Hardy: Yes. Please.
>
> The Witness: It's an S&S violation regardless of whether there is miners active in that area or not. The fact is it's already done. You had exposed the miners to it. And what we're saying is the more times you expose miners to this type of areas leads them up to having more chances or them getting roof on them.

Mr. Cook stated that in the normal course of business the crew would have started producing coal, but he did not know the mining sequence and did not know where mining would have started. He confirmed that the two cited unsupported roof areas had already been mined, and the next step would have been for miners to go to those areas to support the roof before cleaning up the coal accumulations. If the areas were to be abandoned they would still have to be timbered to abate the violation (Tr. 66). He confirmed that the intersection itself, as shown by an "X" mark on the mine map (Exhibit R-3), was permanently supported. In the instant case, the break to the right and the heading straight ahead in the No. 6 entry were not supported. The heading needed to be supported to keep miners from going into the break under unsupported roof (Tr. 68).

Section 104(d)(1) Order No. 3740214, 30 C.F.R. 75.208.

Inspector Cook confirmed that he issued the order after observing that neither of the previously cited unsupported roof areas contained any visible warnings devices. He stated that section 75.208, requires barriers to prevent persons from going under unsupported roof, or visible warning devices such as reflectors or surveyor's ribbons to warn miners not to pass under unsupported roof. In the case at hand, barriers or reflectors should have been located at the last row of bolts at both the No. 6 heading and at the No. 6 to No. 7 crosscut (Tr. 69-70). Mr. Cook confirmed that these unsupported areas were a part of the active working section, and he could find no visible warnings or physical barriers to alert miners about the unsupported areas (Tr. 71).

Mr. Cook explained the basis for his "S&S finding as follows at (Tr. 71-72):

> A. By them not having any kind of means provided to show that this area wasn't supported, a person could go into that area and be out from under supported top before he realized he was out from under supported top. There was no means showing it wasn't supported. That is why we place -- that is why this law is in, so they can make miners aware that this area is unsupported. So you don't need to go past this area.
>
> Q. Why did you determine that this was reasonably likely to cause a fatality?
>
> A. Because there is no means provided and anybody could have been in that area. As it shows here, the way it looks, the evening shift might have mined that area. So the day shift could have thought that since there was no flag there or no visible means, that the area was supported. They might venture up into the face before they would realize they was out from under supported top, exposing themselves to the unsupported top.
>
> Q. What was the likelihood of a roof fall?
>
> A. There was no evidence right there. I'm not a specialist on roof. There was no evidence to show that this area was extremely bad and would be imminent to fall. If it was an extremely bad top and imminent danger, I would have issued an imminent danger, but the top condition in this area wasn't enough to show that there was a fall going to occur.
>
> Q. Under normal mining operations, what was the likelihood of a fatality occurring?

A. Again, we've had people killed by roof and this is -- again, you're taking a chance, exposing the miners to the roof, unsupported. You're just boosting -- You're just increasing your chances on getting someone killed. I can't say that it might have led to a fatality or not, but you have the case of having people exposed to it.

And this is what we're trying to prevent, people being exposed to this unsupported top. And there was no means provided to keep them out of that area, to let them know that the area wasn't supported.

Mr. Cook stated that he based his "unwarrantable failure" finding on the following (Tr. 73):

A. This is a statutory provision of the law which was up until the new roof control plan, new roof control law came into effect, this was part of the plan. And they took this part of the plan out and made it law. Everybody is aware of what needs to be done while they mine a place. It's a statutory provision of the law and it's required to be known on mining.

If you're mining a section, you're supposed to know what parts of the roof control plan you have to abide by and what parts of the law pertain to roof control.

Mr. Cook stated that the violation was abated after foreman Bailey obtained reflectors or ribbons and placed them at the crosscut and the heading to show that these roof areas were unsupported (Tr. 74). Mr. Cook confirmed that the regulatory requirement for reflectors is not included as part of the respondent's roof control plan (Tr. 75).

On cross-examination, Mr. Cook confirmed that although he was aware of the fact that the preshift examiner's book for April 16, 1991, indicated that there was a reflector present in the intersection in question between 4:30 and 5:30 a.m., he still considered the violation to be an unwarrantable failure (Tr. 76).

Mr. Cook acknowledged that in his pretrial deposition he stated that in his judgment one ribbon posted in the intersection would suffice, but he now believed that two ribbons, or reflectors, would be required
(Tr. 76).

In response to further questions Mr. Cook stated that one reflector would probably have been sufficient if it were placed in the middle of the intersection to let people know that the cited areas were unsupported. He then stated that he would still have considered this to be a violation because each of the

unsupported entries would not have been posted with a warning. However, he would not consider it to be an unwarrantable failure because "they at least tried to post it off" (Tr. 81). In the instant case, however, he found no warnings posted at any locations. If the accumulations which were present were pushed all the way out to the last row of roof bolts, this would have constituted a sufficient physical barrier. However, the accumulations were two or three feet short of the last row of bolts and he would not consider this to be a sufficient barrier (Tr. 81).

Mr. Cook confirmed that he checked the preshift book for April 16, 1991, (Exhibit R-2) and after reviewing the entry for that day, he assumed that someone had placed reflectors in the areas shown, but he did not observe any at the time of his inspection (Tr. 86). He stated that ribbons or tape may be used, rather than reflectors, provided they are visible (Tr. 86). He confirmed that he did not check the mine production records to determine when anyone was last present in the area. However, based on the mine map (Exhibit R-2), it would appear that mining last took place in the area three days prior to his inspection (Tr. 87). He had no knowledge that anyone was travelling through the entry to reach any face area where mining was taking place, but someone informed him that a water pump car was brought through the area sometime prior to the day shift and that the car travelled down the No. 6 entry and over to the No. 7 crosscut. However, Mr. Cook did not know when this occurred, and he had no evidence that anyone travelled through the cited unsupported areas (Tr. 89). However, travelling through the supported intersection would be a violation of the roof control plan because the openings must be supported before any other work or travel in the intersection (Tr. 90).

Section 104(d)(1) Order No. 3739989, 30 C.F.R. 75.400.

Inspector Cook confirmed that he issued the order in the course of an inspection on April 29, 1991 (Tr. 91-92; Exhibit P-5). He stated that he was accompanied by company representative Ronald Kennedy, and that he issued the order after observing accumulations of loose coal and coal dust in several areas along the ribs and roadways in the return airways starting at the overcast at the mouth of the first left section and extending inby for about one thousand feet. Referring to the mine map, (Exhibit R-3), Mr. Cook marked the mine areas where he found the accumulations. He stated that a lot of the accumulations were along the rib line and some had been left in the roadway. Coal had been scooped up and placed in piles at six locations, and the "piles" were 16 to 18 feet wide, 6 to 10 feet long, and 3 to 24 inches deep. The remaining accumulations were "here and there, numerous places along the ribs and along the roadway." He measured the accumulations with a rule, and

although they varied in size, the widths and lengths were basically "about the same" (Tr. 91-95).

Mr. Cook stated that the area in question is one of the returns off the first left section and it is required to be traveled on a weekly basis by the fire boss (Richard Patton), who is responsible for inspecting the area. If he is not present, a foreman or other certified person is required to conduct a weekly examination of the area. Some of the area was rock dusted, and some of the accumulations were rock dusted (Tr. 96).

Mr. Cook stated that he based his unwarrantable failure finding on the following (Tr. 97-98):

> A. Due to the fact that a lot of the accumulations were ranging up to one thousand foot outby the working section indicates that the accumulations had been there for a long time and were left, and in some cases were placed and left.
>
> 75.400 requires that no accumulation shall be permitted -- no loose coal or coal dust or combustible material shall be allowed to accumulate in the coal mines. And they allowed this to accumulate for at least a month, month and a half from the time I found it. It had been placed there and left.

Mr. Cook stated that he concluded that the accumulations were allowed to accumulate for at least a month or a month and half before he found them because the mine map (Exhibit R-3), shows that "the earliest they could have started in this area was 3/14/91". He explained that this was the date that the engineers surveyed the area and they were "approximately at that location" at the mouth of the section (Tr. 98). Mr. Cook stated that some of the cited areas had been cleaned, but the accumulations were placed in piles and left, and some of the areas had never been cleaned. The violation was abated after the entire return was cleaned "from just around the overcast up to the section" (Tr. 99).

On cross-examination, Mr. Cook agreed that if the previous citation No. 3740213, which he cited in support of the order, is found not to be an unwarrantable failure violation, the order would not be unwarrantable and there would be no "S&S" finding because it has been modified to a non-"S&S" order (Tr. 100).

Mr. Cook could not recall whether he was told that mining in the area had started at the beginning of the quarter or at the end of the last quarter which is shown as March, 1991, on the mine map. The inspector who last inspected the mine before he did was no longer employed by MSHA when he conducted his inspection, and Mr. Cook's supervisor told him that "they were

just getting ready to start up this first left at the end of the last quarter, which would have been the end of March" (Tr. 101).

Mr. Cook confirmed that the coal accumulations were damp, but were still combustible. However, there were no ignition sources such as power cables or electrical installations in the return (Tr. 101-102). Responding to questions concerning his prehearing deposition of July 8, 1992, Mr. Cook confirmed that he previously stated that the coal dust accumulations which he observed were not combustible (Tr. 103). Responding further, Mr. Cook explained that any loose coal, wet or dry, is considered to be combustible material, but that it needs an ignition source to make it burn (Tr. 103). He confirmed that he did not make any combustibility tests because the coal was damp and wet and there was no way to determine the content of the incombustible material at that time (Tr. 105).

Mr. Cook stated that Company representative Kennedy did not travel the return airway with him until after he found the accumulations and issued the order. He then went back to the cited locations with Mr. Kennedy to show him the conditions, and Mr. Kennedy offered no explanation, but stated that "he could see what the problem was" (Tr. 106). Mr. Cook stated that he checked the prior weekly examination records and he believed that he found an entry which stated "None Observed" (Tr. 106). He confirmed that the accumulations did not extend continuously for one thousand feet, but they were "here and there" within that distance (Tr. 107).

Respondent's Testimony and Evidence

Ronald L. Kennedy, mine chief electrician, stated that he performed a preshift examination in the mine between 4:30 and 5:30 a.m., on April 16, 1991, and recorded the results in his examiner's report (Tr. 109; Exhibit R-2). He stated that he found a reflector at the No. 2 to No. 3 break, and that the No. 6 to No. 7 break, and the No. 7 to No. 8 break were not bolted, but were reflected (Tr. 110). His report shows that he reported the results of his preshift examination to foreman Clyde Bailey (Tr. 111). Mr. Kennedy explained that his examination notations "needs bolted, reflector" for the No. 6 to No. 7 entry means that a crosscut was not bolted and that there was a reflector there. He further explained that a "reflector" is a piece of red tape which is hung on the last roof bolt, and he confirmed that a reflector was in the area when he conducted his examination, and if it were not present he would have installed one as a warning to miners not to proceed beyond the last roof bolt. He stated that he would not have knowingly signed the examination book if the reflector had not been in the No. 6 to the No. 7 area (Tr. 111-112).

On cross-examination, Mr. Kennedy stated that his report does not reflect any observations that he may have made in the No. 6 heading, but he was sure that he inspected that location and knew of no violations. He stated that the reflectors which he observed and recorded were standard markers used in the mine and they were hanging down four to five inches from the roof (Tr. 113). He confirmed that the No. 7 break needed bolting and was not temporarily supported,and he observed no debris or coal in the break (Tr. 114).

Referring to a mine map (Exhibit R-3), Mr. Kennedy identified the No. 6 to No. 7 break area as the circled blue area on the map (Tr. 114-115). Mr. Kennedy stated that he could not recall seeing anything in the No. 6 entry and he did not see any reflector there (Tr. 115). He stated that his crew were maintenance people and were not in the face area, but that he had to travel through the intersection area to conduct his examination. He could not remember whether a pump car was in the area during the shift, but stated that "there might have been one in there" (Tr. 116).

In response to further questions, Mr. Kennedy stated that he saw no need for a reflector in the No. 6 entry and that is why he did not note the lack of a reflector in his report. He confirmed that all of the reflectors noted in his report were in place, and that he did not put them up. He explained that reflectors are supposed to be hung on the last bolt after a place is mined, and if it is torn down, he will replace it (Tr. 117-118). Based on his experience as a mine examiner, he believed that there were adequate reflectors in the intersection. He could not recall whether the No. 6 entry had been mined, but he did see the reflector in the No. 6 to No. 7 break at the time of his examination (Tr. 119).

Richard Patton, union employee and belt fire boss, confirmed that he accompanied Inspector Cook during his inspection on April 16, 1991. He stated that Mr. Cook "duckwalked" and "crawled a little ways" into the No. 6 to No. 7 crosscut, and although he was not sure, he believed that Mr. Cook was "a little bit past the rib" when he told him to go and get foreman Bailey and that "that place was down and the one on the left was down, too" (Tr. 122). Mr. Patton stated that he observed some tracks in the area but did not know the direction of travel (Tr. 122). Mr. Patton stated that Mr. Cook may have been four to five feet into the crosscut when he measured the area, but he could not remember. He marked the mine map (Exhibit R-3), with a red "x" mark to show where he and Mr. Cook were located (Tr. 123).

On cross-examination, Mr. Patton confirmed that he looked for a reflector with Mr. Cook and although a reflector (streamer) was laying on the ground, he could not recall the particular location (Tr. 124). Mr. Patton confirmed that he

remembered the citation that was issued for unsupported roof, but did not remember the one concerning the reflectors (Tr. 126). He acknowledged that he was mistaken when he marked the mine map location where he and Mr. Cook were at and stated that "I must have been one back, because that hadn't been drove up yet, I guess" (Tr. 127).

In response to questions concerning the two cited roof locations in the No. 6 entry and the No. 6 to No. 7 break, which are marked in orange and blue on the mine map (Exhibit R-3), Mr. Patton recalled that a five or ten foot cut had been made in the No. 6 entry and it was not supported. With regard to the break, he stated that "it seemed like it might have been a row or something in it there. I can't remember". (Tr. 129).

Guvenc Argon, respondent's president, testified that he holds a master's degree in mining engineering from Achen, West Germany Technical University, and that he has worked in the mining industry for 34 years. He stated that he was familiar with the three contested violations in question, and that he has read the orders and citation issued by Inspector Cook. He stated that he prepared the mine map (Exhibit R-3), as part of his "investigation" to determine the locations of the violations and that he used the surveyors notes and foreman's daily reports from April 11, 1991 through April 15, 1991, to prepare the mine legend and to determine where mining had taken place on those days, including the number of cuts taken and the mining footage. He explained what he believed had been done up to the morning of Tuesday, April 16, 1991, and confirmed that the map reflects the status of mining at 7:00 a.m., that day (Tr. 130-141).

Mr. Argon speculated that Mr. Cook may have been in the No. 7 to No. 8 intersection rather than in the No. 6 to No. 7 break and if he were in fact in the No. 6 and No. 7, Mr. Argon did not believe that Mr. Cook could have measured 20 feet, and that the maximum measurement would have been 14 feet (Tr. 143-144). Relying on the records, Mr. Argon concluded that Mr. Steve Bailey made the last cut in the break from the No. 6 to the No. 7 entry late in the evening on Saturday, April 13, 1991 (Tr. 141-145).

On cross-examination, and in response to questions as to how far past the last row of roof bolts may have been mined into the No. 6 heading, Mr. Argon stated that "I was not there. I did not see it" (Tr. 153). Based on the map measurements, he concluded that mining may have advanced one or two feet beyond the corner (Tr. 153). Mr. Argon also explained some of the information contained in the examination reports that he used to prepare his mine map (Tr. 155-157).

Findings and Conclusions

Docket No. WEVA 92-246

Fact of Violation, Citation No. 3740213, 30 C.F.R. 75.220(a)(1)

Inspector Cook issued the citation after concluding that the respondent had violated its approved roof control plan by failing to provide roof support at two openings of an intersection where mining had advanced . The inspector cited the respondent with a violation of 30 C.F.R. 75.220(a)(1), which provides as follows:

> Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

The applicable roof control plan relied on by the inspector in support of Citation No. 3740213, is dated February 20, 1991 (Exhibit P-3). The inspector confirmed that the specific plan provision which was not followed is found at pg. 4, paragraph 3 of the plan, and it states as follows:

> 3. Openings that create an intersection shall be permanently supported or a minimum of one row of temporary supports shall be installed on not more than 4-foot centers across the opening before any other work or travel in the intersection.

In the course of the hearing, respondent's counsel introduced Exhibit R-1, which purports to be a copy of page 4 of the respondent's roof control plan (Tr. 90-91). Paragraph 3 of the document contains the same language found in the roof control plan relied on by the inspector except for the addition of a last sentence which reads as follows: "This does not preclude preshift and on-shift inspections". After further consideration, I reject the respondent's unsubstantiated version of page 4 of its plan, and I accept the approved plan as submitted by the petitioner and received in evidence in this case as the more credible and applicable plan provision (Exhibit P-3).

In the course of the hearing, respondent's counsel suggested that on April 16, 1991, Inspector Cook was confused and thought he was observing conditions in the No. 6 heading and the No. 6 to No. 7 break, when in fact he was looking at conditions at the No. 7 to No. 8 break and that he was confused as to exactly where he was and what he observed. Counsel asserted that there was no violation of the roof control plan because the No. 7 to No. 8 area was properly bolted before the No. 7 heading was mined

(Tr. 17-18). Counsel took issue with Inspector Cook's findings that both locations off the intersection in question were unsupported, and counsel maintained that "if you're bolted in one place or the other, you're legal. You can go to one or you can go to the other" (Tr. 48).

According to the respondent's approved roof control plan, the company official responsible for the plan was Safety Director Doug Pauley (Exhibit P-3). Although respondent's counsel indicated during the hearing that Mr. Pauley would be a witness, Mr. Pauley was not called to testify (Tr. 90). However, in response to certain bench comments, respondent's counsel stated that "Doug Pauley was able to get underground about four or five hours after all this happened. We had already had bolts put up, temporary supports put up. There had been numerous abatements measures taken already" (Tr. 148). Inspector Cook testified that temporary supports were installed after he issued the citation, and that when he next returned to abate the violation, both cited locations were permanently supported (Tr. 37).

In support of the suggestion that Inspector Cook may have been confused as to where he was in the mine at the time of his inspection on April 16, 1991, and that he was observing conditions at a location different from the one described in his citation, the respondent presented the testimony of union fire boss Richard Patton, who was with Mr. Cook during the inspection, and company president Guvenc Argon, who was not with Mr. Cook and did not view the cited conditions, and who reconstructed the conditions after reviewing the citation and certain mine records and reports.

Although Mr. Patton initially testified that he and Mr. Cook were at an intersection in the No. 6 entry different from the intersection identified by Mr. Cook on the mine map (Exhibit R-3), Mr. Patton acknowledged on cross-examination that he was mistaken, and he "guessed" that the location that he had initially placed on the mine map had not as yet been driven (Tr. 127). Further, Mr. Patton specifically recalled the roof plan citation and he confirmed that a five or ten foot cut had been made in the No. 6 entry and that it was not supported (Tr. 128). With respect to the second location cited by Inspector Cook, Mr. Patton stated that "it seemed like it might have been a row or something in it there. I can't remember" (Tr. 129).

Insofar as Mr. Argon's testimony is concerned, I am not persuaded or convinced that it provides a credible basis for establishing that Inspector Cook was at some location other than the one he cited and testified about. During a bench colloquy concerning Mr. Argon's testimony, respondent's counsel characterized the testimony "as speculation that perhaps he (Cook) was in the wrong entry" (Tr. 148). Further, although

respondent's counsel indicated that Mr. Argon's testimony was presented to address foreman Steve Bailey's belief that mining only progressed to a certain point on April 13, 1991, and that Mr. Bailey might be called to testify, Mr. Bailey was not called (Tr. 158).

Although Mr. Cook acknowledged that his inspection of April 16, 1991, was his first visit underground at the mine, and that he initially believed that he was in the No. 1 entry, he testified credibly that in order to make sure of his location before issuing the citation, he asked both Mr. Patton and Mr. Clyde Bailey about it and they told him that he was in the No. 6 entry (Tr. 42). Mr. Cook also testified credibly that after issuing the citation and subsequent order, Clyde Bailey assembled the crew so that he (Cook) could speak with them about the violation, and that no one spoke up to dispute his findings (Tr. 36).

After careful consideration of all of the testimony and evidence in this case, I reject the respondent's suggestion that Inspector Cook may have been at a location different than the one described in his citation at the time he viewed the unsupported roof areas in question. I conclude and find that Inspector Cook was at the location described in the citation which he issued.

The respondent's applicable roof control plan provision required all openings creating an intersection to be permanently supported or temporarily supported with a minimum of one row of supports on not more than 4-foot centers across the openings before any work or travel in the intersection. Although Inspector Cook confirmed that if one of the cited roof locations had been supported in compliance with the roof control plan, the failure to support the other location would not have been a violation, I find no credible evidence establishing that any of roof locations cited by Inspector Cook were supported. Inspector Cook's credible testimony that the cited roof location in the No. 6 entry was unsupported was corroborated by fire boss Patton. With regard to the second location, the No. 6 to No. 7 crosscut break, the inspector's testimony that it too was unsupported is corroborated by the preshift examination report of examiner Ronald Kennedy (Exhibit R-2), and Mr. Kennedy's testimony confirming that the break was not bolted or temporarily supported. Under the circumstances, I conclude and find that both of the cited roof locations off of the intersection in the No. 6 entry, and in the No. 6 to No. 7 crosscut break, were unsupported and the inspector's findings in this regard are affirmed.

Although Inspector Cook confirmed that he had no evidence that anyone had gone out under unsupported roof in the two cited locations, he nevertheless concluded that someone had performed work and travelled through the supported intersection past the

unsupported roof areas off of the intersection. Mr. Cook's conclusion in this regard was based on his observations of "ridges of coal" accumulations which had apparently been pushed into the crosscut between the No. 6 and No. 7 entries, rubber-tired scoop or tractor tracks going down the No. 6 heading, and his belief that miners had to pass by one of the openings off of the intersection to mine the other opening. Fire boss Richard Patton and electrician Ronald Kennedy confirmed that they observed the tire tracks, but did not know the direction in which they travelled. Mr. Kennedy believed that a pump car may have been in the area, but he could not recall for certain. However, he confirmed that he had to travel the intersection to conduct his preshift examination (Tr. 116).

I conclude and find that the credible testimony of Inspector Cook establishes that the two cited locations off of the intersection in the No. 6 entry as shown on the mine map, (Exhibit R-3), were not supported as required by the respondent's approved roof control plan, and that work or travel had been performed in those areas without the required additional roof support. Under the circumstances, I conclude and find that the petitioner has established a violation by a preponderance of the evidence, and the violation IS AFFIRMED.

Fact of Violation, Order No. 3740214, 30 C.F.R. 75.208.

Inspector Cook issued the violation after finding that the unsupported roof areas which he previously cited in Citation No. 3740213, were lacking the readily visible warning devices required by mandatory safety standard 30 C.F.R. 75.208, which provides as follows:

Except during the installation of roof supports, the end of permanent roof support shall be posted with a readily visible warning, or a physical barrier shall be installed to impede travel beyond permanent support.

Inspector's Cook's credible and unrebutted testimony clearly establishes that at the time he inspected the intersection and the adjacent two cited unsupported roof areas, there were no readily visible warnings posted to warn miners not to enter those areas. As a matter of fact, in the course of the hearing, respondent's counsel conceded that "there was no reflector in the intersection" when the inspector was at that location at 7:15 a.m., and counsel asserted that the respondent has "never taken the position that there was a reflector there. There wasn't" (Tr. 18, 163). The failure to post such reflectors, or other appropriate warning devices, constitutes a violation of section 75.208. See: Day Branch Coal Co., Inc., 12 FMSHRC 247 (February 1990); Ramblin Coal Co., 14 FMSHRC 1025 (June 22, 1992). Under all of these circumstances, I conclude and find that the petitioner has established a violation of

section 75.208, by a preponderance of the credible evidence adduced in this matter, and the violation IS AFFIRMED.

Docket No. WEVA 92-247

Fact of Violation. Order No. 3739989, 30 C.F.R. 75.400.

Inspector Cook issued the violation after finding accumulations of loose coal and coal dust at the locations described in the order, and he cited a violation of 30 C.F.R. 75.400, which 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.

I conclude and find that the credible testimony of Inspector Cook with respect to his observations and measurements of the accumulations in questions has not been rebutted by the respondent and it clearly establishes the existence of the accumulations. Indeed, in the course of the hearing the respondent's counsel conceded that the cited accumulations did in fact exist (Tr. 19, 164). However, in closing arguments, counsel raised the issue as to whether or not accumulations of loose coal and coal dust which are not combustible may support a violation of section 75.400 (Tr. 164-165).

Inspector Cook testified that notwithstanding the absence of any ignition sources, accumulations of loose coal and coal dust are still considered to be combustible materials that will burn if ignited by an ignition source (Tr. 101, 103). He acknowledged that he did not sample the coal or make any combustibility tests because he had no way to make that determination with the damp and wet coal which was present (Tr. 105). Mr. Cook also acknowledged that in his prior deposition, he answered "no" in response to a question as to whether he believed the cited accumulations were combustible (Tr. 103). In explanation of that answer, Mr. Cook suggested that his answer may have been taken out of context, and that the question may have been preceded by other questions dealing with his "S&S" finding (Tr. 103-104).

The respondent's suggestion that the violation should be dismissed because of the inspector's failure to establish that the coal accumulations were in fact combustible IS REJECTED. Although the inspector agreed that no ready sources of ignition were present, he testified credibly that although the coal accumulations were damp, they were nonetheless combustible. See: R.B.M Enterprises, Inc., 13 FMSHRC 222 (February 1991), holding that wet and muddy mine conditions did not preclude a

violation of section 75.400, since wet accumulations are still combustible. See also: Secretary v. Black Diamond Coal Mining Company, 7 FMSHRC 1117 at pgs. 1120-1121 (August 1985); and Utah Power & Light Company v. Secretary, 12 FMSHRC 965, at pgs. 968-969 (May 1990), where the Commission observed that even though coal accumulations may be damp or wet they are still combustible.

I conclude and find that Inspector Cook's credible and unrebutted testimony with respect to his personal observations and measurements of the cited coal accumulations establishes that they existed as charged in the notice of violation served on the respondent. With regard to the issue of combustibility, while it is true that Mr. Cook testified at his deposition that he did not believe the accumulations were combustible, after reviewing the deposition page submitted by the respondent's counsel, I agree with Mr. Cook's assertion that his response, taken in contest, was in connection with other questions concerning his "S&S" finding. In any event, it seems clear to me from Mr. Cook's credible and unrebutted hearing testimony that while wet and damp coal cannot be ignited in the absence of an ignition source, such accumulations are nonetheless still combustible.

In view of the foregoing, and after careful consideration of all of the evidence in this case, and in the absence of any credible rebuttal by the respondent, I conclude and find that the cited coal accumulations were combustible and constituted a violation of section 75.400, and the violation is therefore 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 U.S.C. 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).

Citation No. 3740213

In support of his significant and substantial (S&S) finding Inspector Cook took into account his prior knowledge of fatal and serious accidents (not at respondent's mine) resulting from mining past an opening that is not supported. Although Mr. Cook did not personally observe anyone under unsupported top, based on his observations of coal accumulations and tire tracks, he concluded that the coal had been pushed through the breakthrough and that someone had passed by the unsupported roof area while travelling through the area doing this work. He also indicated that the two unsupported roof areas had been mined, and that in the next step in the mining cycle miners would go to those areas to support the roof before cleaning up the coal accumulations. Mine Electrician Kennedy confirmed that he had to travel through the intersection while performing his preshift examination, and this was before Mr. Cook arrived in the area.

Although Mr. Cook confirmed that he saw no evidence that the roof was dripping and did not believe that there was an immediate danger of the roof falling, he nonetheless confirmed that he was concerned that the unsupported top could fall, and if it did, it could "ride back past your permanent supports" (Tr. 29).

Further, even through he acknowledged that he observed no one in the area, he was still concerned that miners had been exposed to the unsupported roof areas when they were mined and he did not want the miners exposed again to unsupported roof areas because "the more times you expose miners to this type of areas leads them up to having more chances of them getting roof on them" (Tr. 63).

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, Roof 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 1366 (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, 3FMSHRC at 825; U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

I agree with Inspector Cook's credible and unrebutted testimony that in the context of continued mining operations on the section, miners would be exposed to the hazards of a roof fall in the two cited unsupported roof areas adjacent to the intersection in the No. 6 entry, and that if the roof was to fall it could ride back past the supported intersection. If this were to occur, I believe one may reasonably conclude that any miners working or travelling the intersection would be exposed to the hazards of a roof fall. If a roof fall had occurred, I further believe that that it was reasonably likely that the affected miners would sustain injuries of a reasonably serious nature. Under all of these circumstances, I conclude and find that Inspector Cook's "S&S" finding was both reasonable and proper, and IT IS AFFIRMED.

Order No. 3740214

Inspector Cook based his "S&S" finding on his belief that in the absence of a visible warning device someone could venture out beyond the supported intersection into the areas of unsupported roof in the No. 6 entry and the No. 6 to No. 7 crosscut break where coal accumulations had been pushed. Since the areas in question were in an active working section, Mr. Cook believed that anyone could have gone into these areas under unsupported roof and exposed themselves to the hazards of a roof fall. Although Mr. Cook did not believe that there was an immediate danger of the unsupported roof areas falling, he nonetheless believed that under normal mining operations the absence of visible warnings to alert miners to stay out of the unsupported roof areas exposed them to a hazard and increased the chances of a fatality if the roof were to fall.

The obvious purpose of requiring visible warnings is to alert miners to stay out of areas where the roof is not supported. Although preshift examiner Kennedy's testimony reflects that he found a warning tape installed at the No. 6 to No. 7 break when he conducted his preshift approximately two hours before Inspector Cook observed the area, I take note of the fact that Mr. Kennedy confirmed that no warning was posted in the No. 6 entry. However, the fact remains that Inspector Cook found no warning devices in place at either location when he inspected the areas. Under the circumstances, I agree with Mr. Cook's safety concerns, and I conclude and find that in the course of continued normal mining operations a measure of danger to safety was contributed to by the violation, and that it was reasonably likely that miners would venture beyond the unsupported areas which were not posted with visible warnings, thereby exposing

them to the dangers of fall of unsupported roof. If the unsupported roof were to fall on a miner, I believe it would result in a fatality, or injuries of a reasonably serious nature. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

Order No. 3739989

In the course of the hearing, petitioner's counsel requested that the prior "S&S" finding made by the inspector be modified to non-"S&S" (Tr. 16, 97). In support of the request, counsel stated that the inspector has now determined that the violation was not significant and substantial (Tr. 16-17). Inspector Cook confirmed that this was the case, and he stated that in the absence of any ignitions sources, and any history of excess liberation of methane, he did not believe that the cited damp and wet coal accumulations constituted a significant and substantial violation (Tr. 104-105) Respondent's counsel agreed that in the absence of any ignition sources, the accumulations which were present in the damp return entry did not constitute a significant and substantial violation (Tr. 19). Under the circumstances, the petitioner's request to modify the violation to non-"S&S" was granted from the bench, (Tr. 97), and my decision in this regard is herein reaffirmed.

Unwarrantable Failure Violations

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 subsequent 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." Emery 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. * * *

Citation No. 3740213

Inspector Cook testified that he considered the violation to be an unwarrantable failure because the approved roof control plan is the respondent's plan and everyone working on the section should review it and know what the plan requires (Tr. 32-33; 40). Mr. Cook also testified that when he assembled the crew after the citation was issued to speak to them about the matter, they acknowledged that they were aware of the roof control plan for supporting the cited locations and no one spoke up to the contrary or suggested that a violation had not occurred (Tr. 35-37).

Inspector Cook had no knowledge as to which production crew may have last mined the cited areas and he confirmed that he did not review any mine production records to determine when anyone was last present in those areas. Based on the reconstructed mine map and legend produced by the respondent (Exhibit R-2), Mr. Cook stated that it would appear that mining took place in the area three days prior to his inspection (Tr. 87). Although Mr. Cook believed that a water pump car may have travelled through the

area, and he observed coal pushed into the break adjacent to the intersection in the No. 6 entry, he had no evidence to establish when these events may have occurred, and he conceded that these activities would have occurred under supported roof in the intersection, and he had no evidence that anyone actually travelled under unsupported roof.

The cited roof control plan requires roof support across an intersection opening before any other work or travel in the intersection. Thus, it would appear that such support is not required until such time as men are expected to work or travel in the intersection. Mr. Argon testified that the foreman's report for April 12, 1991, shows that the No. 6 entry was bolted, but that the April 13, 1991, report shows that it was not bolted. Mr. Argon could not further explain these entries and he deferred to foreman Steve Bailey, the individual whose signature appears on the reports. However, Mr. Bailey was not called or subpoenaed for testimony and it does not appear that he was deposed. In the absence of any credible testimony from witnesses who were actually present during the mining activities which may have taken place during the days prior to Mr. Cook's inspection, I find no credible evidence to establish that the respondent deliberately and consciously failed to act, or engaged in conduct which one may reasonably conclude was aggravated. I also note the absence of any prior violations of section 75.220(a)(1). Under the circumstances, and coupled with the inspector's belief that the violation was an unwarrantable failure because the respondent "knew or should have known" about the requirements of its own roof control plan, I cannot conclude that the petitioner has carried its burden of proof to establish that the violation was in fact an unwarrantable failure violation within the parameters established by the Commission's decisions. Accordingly, the inspector's unwarrantable failure finding IS VACATED, and the section 104(d)(1) citation IS MODIFIED to a section 104(a) citation.

Order No. 3740214

Inspector Cook testified that the requirement for visible warning devices at the end of permanent roof supports was a part of the respondent's roof control plan until it was enacted as a part of MSHA's mandatory safety standards. Mr. Cook based his unwarrantable failure finding on his belief that the respondent should have known about any roof control requirements as well as the regulatory standards pertaining to roof control (Tr. 73). However, Mr. Cook confirmed that after reviewing the preshift inspection book for April 16, 1991, he assumed that someone had placed warning reflectors in the areas shown in the book entries (Tr. 86). Further, although his prior deposition testimony that one warning reflector placed in the middle of the intersection would suffice to comply with section 75.208, was contrary to his hearing testimony that two reflectors would be required (one at

each cited location), Mr. Cook candidly conceded that he would not consider this to be an unwarrantable failure violation because "they at least tried to post it off" (Tr. 81).

I accept as credible the unrebutted testimony of mine electrician Ronald Kennedy who conducted a preshift examination on April 16, 1991, approximately two hours before Inspector Cook arrived on the section to conduct his inspection. Mr. Kennedy testified that he observed a reflector at the No. 6 to No. 7 break and that the inspection book contained no additional notations as to what he may have observed in the No. 6 entry. I take note of the fact that the foreman's reports for the three or four days prior to the inspection on April 16, 1991, contain no information that reflectors were needed at the cited locations in question (Exhibit R-3). I also note the absence of any prior citations for violations of section 75.208, in the respondent's history of prior violations (Exhibit P-1).

After careful consideration of all of the evidence and testimony in this case, I find no credible evidence of any egregious or aggravated conduct on the part of the respondent in connection with this violation. In my view, the inspector's belief that the respondent knew or should have known about the requirements found in section 75.208, falls short of the standard of conduct required by the Commission's decisions to support an unwarrantable failure violation. Accordingly, the inspector's unwarrantable failure finding IS VACATED, and the contested order IS MODIFIED to a section 104(a) citation.

Order No. 3739989

In support of the order in question, Inspector Cook relied on the previously issued section 104(d)(1) Citation No. 3740213, which has been modified to a section 104(a) citation. With regard to his prior "S&S" finding with respect to the order, Inspector Cook changed his position and agreed that the violation was non-"S&S", and the order was modified accordingly. Inspector Cook agreed that if the section 104(d)(1) citation which he cited in support of the order is found not to be an unwarrantable failure citation, the order would not be an unwarrantable failure order and the violation would not be "S&S" because it has been modified to a non-"S&S" violation (Tr. 100).

In its posthearing brief the respondent argues that the order was issued at the end of a "d-chain" beginning with Citation No. 3740213, and it believes that this citation, as well as Citation No. 3740214, should be modified to section 104(a) citations. Assuming that this is done, the respondent further believes that Order No. 3739989, is no longer part of a "d-chain" and should initially be considered as a section 104(d)(1) citation and nor an order. However, the respondent concludes that a section 104(d)(1) citation must describe a significant and

substantial condition, and that since the cited condition has been modified to a non-significant and substantial violation, it concludes that a section 104(d)(1) citation cannot stand as a matter of law and that the order should be modified to a section 104(a) citation.

After careful review of all of the facts and circumstances surrounding the issuance of the order in question, and the arguments presented by the parties, I agree with the respondent's position and adopt its aforementioned arguments as my findings and conclusions. Accordingly, the contested section 104(d)(1) order IS MODIFIED to a section 104(a) non-"S&S" citation.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue to Business.

The parties have stipulated that the respondent is an average sized mining operator and that the imposition of appropriate civil penalty assessments will not adversely affect its ability to continue in business. I conclude and find that the civil penalty assessments which I have imposed for the violations which have been affirmed are appropriate and will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The parties stipulated that the respondent has a low history of prior violations, and I cannot conclude that its compliance record is such as to warrant any additional increases in the civil penalty assessments which I have made for the violations in question.

Gravity

On the basis of my "S&S" findings and conclusions, I conclude that the roof control and warning device violations (Citation Nos. 3740213 and 3740214) were serious violations, and that the coal accumulation violation (Citation No. 3739989) was non-serious.

Negligence

I conclude and find that the roof control and warning device violations were the result of the respondent's failure to exercise reasonable care to prevent the violative conditions which it knew or should have known existed on the section and that this amounts to ordinary or moderate negligence. With regard to the coal accumulations violation, I conclude and find that the inspector's credible testimony concerning the duration of the existence of the cited accumulations, including his testimony that the coal was pushed into piles and left unattended

and not cleaned up, supports a finding of a high degree of negligence for this violation. I therefore conclude and find that the violation resulted from a high degree of negligence on the part of the respondent because of its failure to promptly clean up and remove the cited accumulations in question.

Good Faith Compliance

The parties stipulated that the respondent exhibited good faith in timely abating the violations in question and I adopt this as my finding and conclusion with respect to all of the violations.

Civil Penalty Assessments

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

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Citation No.	Date	30 C.F.R. Section	Assessment
3740213	4/16/91	75.220(a)(1)	$275
3740214	4/16/91	75.208	$150

Docket No. WEVA 92-247

Citation No.	Date	30 C.F.R. Section	Assessment
3739989	4/29/91	75.400	$225

ORDER

IT IS ORDERED THAT:

1. The initial section 104(d)(1) "S&S" Citation No. 3740213, April 16, 1991, citing a violation of 30 C.F.R. 75.220(a)(1), IS MODIFIED to a section 104(a) "S&S citation, and as modified, IT IS AFFIRMED.

2. The initial section 104(d)(1) "S&S" Order No. 3740214, April 16, 1991, citing a violation of 30 C.F.R. 75.208, IS MODIFIED to a section 104(a) "S&S" citation, and as modified, IT IS AFFIRMED.

3. The initial section 104(d)(1) "S&S" Order No. 3739989, April 29, 1991, citing a violation of 30 C.F.R. 75.400, IS MODIFIED to a section 104(a) non-"S&S" citation, and as modified, IT IS AFFIRMED.

4. The respondent shall pay civil penalty assessments in the amounts shown above for the three (3) violations which have been affirmed. Payment is to be made to MSHA within thirty (30) days of these decisions and Order, and upon receipt of payment, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

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