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SOL (MSHA) V. DOSS FORK COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 93-129
	:	A.C. No. 46-07751-03542
v.	:	
	:	Seminole Mine
DOSS FORK COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Pamela Silverman, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
David Hardy, Esq., Jackson and Kelly, Charleston, West Virginia, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," charging Doss Fork Coal Company, Inc. (Doss Fork) with eight violations of mandatory standards and seeking civil penalties of $19,800 for those violations. The general issue is whether Doss Fork violated the cited standards and, if so, what is the appropriate civil penalty to be assessed. Additional specific issues are addressed as noted.

Order No. 2723744

This order, issued pursuant to section 104(d)(1) of the Act,(Footnote 1) alleges a violation of the mine operator's approved roof

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1 Section 104(d)(1) provides as follows:
"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significant and substantially contribute to the cause and effect of a coal or other mien safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety

control plan under the provisions of 30 C.F.R. 75.220 and charges as follows:

> The approved roof control plan No. 4-RC-9-89-12051-5 dated July 22 and 23, 1992 page No. 4 Statement No. 3 was not being followed on 2 left section in that a cut had been mined No. 5 face off No. 6 entry mains and only 3 roof bolts had been installed on the left side of the place. Spot bolting was being performed outby and clean up with a scoop. The roof bolter and scoop had traveled through said area. The plan requires that such area be permanent [sic] supported or a minimum of one (1) row of temporary support on 4-foot centers be installed in such area, before such work or travel.

The Secretary maintains that the cited conditions constituted a violation of paragraph 3 page 4 of the approved roof control plan (Gov't Exhibit No. 22) which provides that "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 four-foot centers across the opening before any other work or travel in the intersection."

Roof control specialist Herbert McKinney of the Mine Safety and Health Administration (MSHA) issued the order at bar on the morning of October 21, 1992. He was accompanied during this inspection by Mine Superintendent John Dillon and West Virginia mine inspector Clyde Sowder. McKinney described the cited intersection on the 2 left section where a cut had been mined as the No. 5 face off the No. 6 entry. McKinney testified that the cut was approximately 18 feet wide and had neither temporary nor permanent support (Gov't Exhibit No. 23). According to McKinney, either four posts on not more

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fn. 1 (continued)
standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from,a nd to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

than four-foot spacing across the mouth of the intersection or four rows of roof bolts were needed to provide the support required by the roof control plan.

McKinney also found the violation to be "significant and substantial." A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981). In Mathies Coal Co., 6 FMSHRC 1,3-4 (1984), the Commission explained:

> In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary 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.
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> See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (1987) (approving Mathies criteria).

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 (1984), and also that in the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc., 6 FMSHRC 1473, 1574 (1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (1986) and Southern Oil Coal Co., 13 FMSHRC 912, 916-17 (1991).

According to McKinney this unsupported roof was a particular hazard because a roof fall in the cut would tend to break through into, and expose miners in the entry. The roof would be "swinging" and there would be nothing to cut off a roof fall in the No. 5 face from the entry. According to McKinney, such a roof fall was reasonably likely to occur because of "cloud rock" present in the roof. Cloud rock is a rock formation without a grain and, according to McKinney, deteriorates and separates when wet. The record further shows that the roof in this intersection had been "potting out" between roof bolts in the entry thereby creating a cavity. McKinney concluded that, under the circumstances, crushing injuries resulting in permanent disability would likely result.

Five miners, including the miner operator, the miner operator helper, two shuttle car operators, a foreman and an electrician, would be expected in the cited area. Indeed, a scoop and roof bolter were seen passing through the intersection.

McKinney also concluded that the violation was the result of high negligence and "unwarrantable failure" to comply with the roof control plan. "Unwarrantable failure" has been defined as conduct that is "not justifiable" or is "inexcusable." It is aggravated conduct by a mine operator constituting more than ordinary negligence. Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (1987); Emery Mining Corp., 9 FMSHRC 1997 (1987). In this regard McKinney testified that he discussed this violation with Section Foreman John Webb in the vicinity of the intersection before he issued the order at bar. According to McKinney, Webb told him that he (Webb) knew he was not supposed to be working inby the cited intersection.

Clyde Sowder, a West Virginia state roof control inspector, corroborated McKinney's testimony in essential respects. Sowder cited the same condition for a violation under the state law of the same provision of the roof control plan (Gov't Exhibit No. 24).(Footnote 2) Sowder observed the opening at the No. 5 face and he too found no roof support except in the main entry. Sowder noted that the roof in the area was loose, broken and drummy and con-cluded that there was a good chance of a roof fall in the cut extending into the entry. Sowder opined that it was highly likely for injuries to occur as a result of the condition and that such injuries would be permanently disabling. Sowder also observed, while he was in the vicinity of this cut, that a shuttle car passed through the intersection.

Sowder also was present when MSHA Inspector McKinney asked Foreman Webb if he knew of the existence of the condition and if he knew that such condition was a violation by tramming the roof bolter through the intersection. Sowder heard Webb's response admitting the existence of the condition but stating that it had "slipped his mind." While Webb did admit in Sowder's presence that he was aware of the violation, Sowder charged the violation as an "unknowing" violation under West Virginia law because he believed that Foreman Webb had "just forgot about the violation."

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2 The notice of violation (Gov't Exhibit No. 24) issued by State Inspector Sowder on October 21, 1992, for the same conditions cited by Inspector McKinney in the order at bar and for violation of the same provisions of the roof control plan, was not challenged and therefore became final under West Virginia law.

Within the above framework of credible evidence, I find that indeed the violation was committed as charged and that the violation was "significant and substantial." I further find that the violation was the result of the operator's "unwarrantable failure" to comply with the law. It is not mere inattention or inadvertence when the foreman intentionally removes a bolting crew before their job is completed. Here Foreman Webb acknowledged that only 15 minutes before the inspection party reached the cited intersection, he reassigned the crew which was bolting the intersection to another job. For the same reasons, I also find that the violation was the result of high operator negligence.

In reaching these conclusions I have not disregarded Doss Fork's evidence that, contrary to the testimony of McKinney and Sowder, there were actually 11 roof bolts in the intersection of the No. 5 face inby the entry (Operator's Exhibit No. 2). This evidence comes from Foreman Webb and roof bolter operator James Wright who both testified that there were actually 11 bolts provided as permanent support in the cited intersection. I can, however, give this evidence but little weight in light of the credible confirming testimony of both Federal Inspector McKinney and State Inspector Sowder. The failure of Doss Fork to have challenged the state notice of violation for the precise condition charged in the order here at issue adds credence to the testimony of the inspectors.

Under the circumstances and considering all relevant criteria under Section 110(i) of the Act I find that the penalty proposed by the Secretary of $3,000 is appropriate for the violation charged in Order No. 2723744.

Order No. 3554286

This order, also issued pursuant to Section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. 75.400 and charges as follows:

> Loose coal and coal dust was allowed to accumulate on the 002-0 section in the No. 1 and No. 2 entries starting at the face and extended outby a distance of approximately seven cross-cut lengths also in the No. 3, No. 4, No. 5 entries starting at the face and extended outby to the section dumping point. Area affected measured approximately 600 feet in No. 1 and No. 5 entries and 200 feet in No. 3, No. 4 and No. 5 entries. The accumulation ranged in depth of up to 30 inches.

The cited standard provides that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and combustible materials, shall be cleaned up and not permitted to accumulate in active workings, or on electric equipment therein."

MSHA Inspector James Graham was performing an inspection of the Seminole Mine on October 21, 1992, accompanied in part by Foreman Carl Dalton. During the course of this inspection Graham purportedly observed loose coal and coal dust in a number of areas, including the No. 1 and 2 entries outby seven cross-cuts for approximately 600 feet and in the No. 3, 4 and 5 entries outby approximately 200 feet to the section dumping point. According to Graham there was also loose coal in the crosscuts and at the feeder, in the No. 6 crosscut outby the face of No. 1 entry and in the fifth crosscut in particular. The accumulations at the feeder where coal is dumped onto the conveyor belt were "pretty extensive" and partly on top of the control box.

Graham further testified that he measured these accumulations at three locations with a tape measure, including a deposit of 30 inches near the coal feeder and at areas depicted in dark green on the mine map in evidence (Gov't Exhibit No. 3). Graham also found the coal in the crosscuts to be approximately 30 inches deep based on his observation that it was near the 36 to 40-inch-high roof. Graham testified that he physically handled the material and dug into it to determine that it was in fact coal dust and loose coal. While acknowledging that there was some rock in the material he concluded that there was more coal than rock. The accumulations in the Nos. 1, 2 and 3 entries were primarily dry, whereas the remaining accumulations were indeed wet.

Graham opined that the violation was "significant and substantial" due to the ignition sources from electrical equipment and trailing cables in the section. In particular, he observed a roof bolter and personnel carrier operating that day. In addition, while coal was not then being mined, electric trailing cables were lying along the rib line of an entry. Graham identified electrical heat from the roof bolter machine generated from defective electrical motors, potential explosion of batteries and the burning of hydraulic oil as potential ignition sources. Graham also identified the electric motor and hydraulic fluid as potential ignition sources at the feeder and friction from defective bearings as a potential ignition source at the tail pulley.

Based on the above observations, Graham concluded that a fire or smoke resulting from ignition of the accumulations would reasonably likely result in smoke inhalation and burn injuries,

which would result in lost work days or restricted duty. He noted that six persons were working on the section and could be affected by such fire or smoke.

On cross-examination Graham acknowledged that, while there was no production on October 21, when he issued the instant order, the equipment was energized and the roof bolter and battery powered personnel carrier were in operation. He further acknowledged that the ventilation was above the required amount and that no methane was found. In addition, Graham inspected the Joy shuttle car and found no ignition sources, violations or hazards in its trailing cable.

Inspector Graham also opined that the violation was the result of high negligence and "unwarrantable failure." According To Graham, the area of accumulations was extensive and, due to the amount, was "very obvious." He also relied upon statements by Section Foreman Carl Dalton that he knew the section needed cleaning and that it had been in this condition for at least five days. According to Graham, Dalton advised him that he intended to clean up the accumulations and complete rock dusting but wanted to complete roof bolting first. The evidence that accumulations had been "packed" into the crosscut and that there had been a previous citation for three violations of accumulations on June 3, 1992, were also considered.

MSHA Inspector Herbert McKinney also testified that during his inspections on October 15, 1992, of the same drainway section cited for the accumulations herein, he observed accumulations of loose coal and coal dust three crosscuts outby the feeder, inby the feeder along the roadways and in side cuts used for storage of supplies. Apparently he was told that this was "dirty coal" and was being stored as a result of cleaning the bottom. According to McKinney he did not cite these alleged accumulations because he did not carry a dust sample kit, but he purportedly advised Foreman Dalton of the need for cleanup and rock dusting.

Section Foreman Carl Dalton testified that on October 21, 1992, he was in charge of the drainway section at issue and noted that it was generally a wet section since it provided drainage for the entire mine. According to Dalton, Mine Foreman Dillon told him to do nothing else but spot bolt the section so, accordingly, he did no cleanup or rock dusting work following McKinney's visit on October 15, 1992. He maintains that his crew was split up from October 15 through October 19 performing spot bolting work as a result of a violation issued by McKinney on October 15, 1992. He maintains that he could not "take a chance" on doing anything else in light of the "high disregard" violation issued by McKinney on October 15. He recalled that McKinney returned on October 19 to check on the spot bolting activity and told him that he had

"a bit of spillage." Dalton maintains that he told McKinney he would clean up the spillage as soon as he finished the required bolting.

Dalton also disagreed that the accumulations were as extensive as cited by Inspector Graham while admitting that "you are going to have coal" and it would have to be mud and rock mixed in. He also claimed that the material in the entries was wet. Indeed, he maintained that you could not have burned it in a "blast furnace." He further maintained that, while it did need cleaning at the feeder and there was some spillage at that location, there was not a serious accumulation. Dalton also testified that there were no electrical cables in the cited area except for the roof bolter cable which was "brand new."

According to Mine Operator John Dillon, the cited material was not deep and was not even "dirty coal." He maintains that it was nothing more than rock and mud and created no hazard because the only potential ignition source was the pinning machine which had a new trailing cable. He did admit, however, that in the course of mining, a scoop, two shuttle cars, a continuous miner and roof bolter would operate in the area. He concluded that the cited material which consisted of pure rock and mud could not burn with a "blow torch."

Giving due credit to the expertise and credible observations of MSHA's witnesses and indeed of corroborating testimony by Foreman Dalton himself, I conclude that indeed coal accumulations did in fact exist in sufficient quantities to support the order at bar. In addition, I find that the cited accumulations constituted a "significant and substantial" violation. In reaching this conclusion, I again credit the disinterested testimony of Inspector Graham of the existence of loose coal and coal dust, at least some of which was dry and in proximity to potential ignition sources.

I also agree with the Secretary that the violation was the result of high negligence and "unwarrantable failure." Clearly, mine management was informed by Inspector McKinney several days prior to the issuance of the instant order of the existence of at least some of the cited accumulations. I credit McKinney's testimony that management was also then told that it would be necessary to clean those up. The failure of management to clean up those accumulations for as long as five days after being so warned indeed shows such a reckless disregard as to constitute high negligence and "unwarrantable failure."

While the operator's witnesses maintain that they were under a directive from Inspector McKinney to perform only roof bolting following his October 15, 1992 citation for violating

its roof control plan, I find the attempted defense to be disingenuous. Firstly, Inspector McKinney denies the allegation. Moreover, it is unreasonable to expect that an inspector would advise a mine operator to ignore other hazardous conditions while abating an unsupported roof citation. It is clear that the operator had another work crew available in another section of the mine which could have been utilized to clean up the accumulations within the five day period following the rebolting by the split crew assigned to abate McKinney's October 15 violation. Even if the operator understood it was to give priority to supporting the roof there was ample time over the five days to commence clean up as roof support work progressed.

Under the circumstances, and considering the criteria under section 110(i) of the Act, I find that a civil penalty of $2,000 is appropriate for the violation charged in the order at bar.

Order No. 3554287

Order No. 3554287, also issued pursuant to section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.403 and charges as follows:

> Rock dusting was not adequate in the No. 1, No. 2, No. 3 and No. 4 entries on the 002-0 section starting at the face and extended outby a distance of approximately 600 feet. Spot samples were collected in the area to substantiate this action.

The cited standard provides as follows:

> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return air courses shall be no less than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible content of such combined dusts shall be increased 1.0 and 0.4 per centum for each 0.1 per centum of methane where 65 and 80 per centum, respectively, of incombustibles are required.

According to Inspector Graham, during the course of his October 21, 1992 inspection, he observed in the No. 1 and 2 entries, extending from the face to 100 feet outby, that the entry was black in color. In addition, outby this area the mine floor continued to be black and only spotty with

previous rock dusting. This condition extended for a linear distance of 600 feet in the No. 1 and 2 entries. In addition, Graham observed in the No. 3 and 4 entries from the face outby, that although there was evidence of prior rock dusting on the roof and ribs, the mine floor was black. Samples from the rock dusted areas (Gov't Exhibit No. 7) showed an incombustible content of 21 percent, 12 percent and 12 percent respectively for the samples taken.

According to Graham it was reasonably likely for a fire to result from the combination of accumulations, lack of rock dust and ignition sources from electrical equipment. He further concluded that injuries would be reasonably likely from smoke inhalation or burns.

Graham concluded, finally, that the violation was the result of high operator negligence and "unwarrantable failure." According to Graham, Carl Dalton, the section foreman, told him that the section had been in this condition for five days and that he knew it needed to be rock dusted. Ignition sources described by Graham in reference to the preceding order were, according to Graham, equally applicable to the instant situation.

As previously noted, Inspector Herbert McKinney had also been on the section on October 15 and October 19, 1992, in connection with a roof inspection. McKinney testified that he observed the inadequate rock dusting in areas of the section during these inspections. Indeed, Section Foreman John Dillon acknowledged at hearing his agreement with McKinney that on October 19 the area did in fact need additional cleaning and rock dusting, particularly around the face. According to Dillon, however, he intended to first complete roof bolting operations to abate the violation cited by McKinney on October 15 before rock dusting on October 21, 1992. I have previously rejected this defense and for the same reasons again reject it. Within the above framework of evidence, it is indeed clear that the violation existed as charged and that the violation was "significant and substantial" and of high gravity. See Mathies Coal Co., supra.

It is also apparent that the violation herein was the result of high negligence and "unwarrantable failure." Two days before the condition was cited by Inspector Graham, McKinney observed inadequate rock dusting in the same section and informed Dalton of the need to clean and rock dust the section. In addition, the fact that Dalton himself acknowledged on October 19, that the area needed additional cleaning and rock dusting shows knowledge of the violative condition two days prior to its citation. Failure to even begin cleaning up and

rock dusting the cited area under the circumstances constitutes high negligence and "unwarrantable failure." Emery Mining Corp., supra.

In reaching this conclusion, I have not disregarded the assertions by John Dillon, Doss Fork's Superintendent at the time, that he was in essence forbidden by McKinney's order to perform any cleanup or rock dusting operations until completion of roof bolting. As previously noted, however, I do not find these contentions credible.

Considering the above evidence and the criteria under Section 110(i) of the Act, I find that a civil penalty of $2,000 is appropriate.

Order No. 3554291

Order No. 3554291, also issued pursuant to section 104(d)(1) of the Act, alleges a significant and substantial violation of the standard at 30 C.F.R. 75.202(a) and charges as follows:

> The mine roof in the right return aircourse is not adequately supported at several spot locations starting at 4 cross-cuts inby the right return portal and extended [sic] inby this point to within approximately 6 cross-cuts of the face on the 001-0 section, a distance of approximately 1,600 feet. There were several roof bolts at each location that were damaged to a point that they no longer provided adequate support for the mine roof.

The cited standard provides that "the roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards relating to falls of the roof, face or ribs and coal and rock bursts."

According to MSHA Inspector James Graham he was conducting an inspection of the cited area on October 26, 1992, accompanied by his supervisor Clyde Ratcliff. Within this area Graham found what he described as large sections of unsupported roof. More specifically, in one area, four crosscuts inby the surface portal, there were 16 damaged roof bolts. The rock had spalled away from the bolt heads, the bolts were hanging down exposed, and a portion of rock 5 feet long and 2 feet thick had fallen out. There were areas where rock was hanging from the roof, cavities in the roof and rock lying on the mine floor. One of these bolts had 30 inches of the six foot bolt exposed. A second area Graham described was 50 feet inby survey station No. 305 where five bolts in a row were damaged. These bolts were bent and hanging down with approximately 18 inches exposed.

Graham noted that the roof bolts were required to have bearing plates in contact with the mine roof to prevent sloughage. The hazard under the circumstances, according to Graham, was from roof falls exposing anyone traversing in the area to crushing injuries. Graham observed that such injuries would be reasonably likely since the area must be traveled at seven day intervals for inspection and other employees would enter the area for maintenance, to pump water and to maintain ventilation.

Inspector Graham also concluded that the violation was the result of high negligence and "unwarrantable failure." According to Graham, the conditions were "very obvious." In addition, Foreman Carl Dalton reportedly told Graham that he did the weekly exam himself and that he knew of the unsupported roof. Dalton told Graham that he did not have enough men, however, to perform the "outby work" and that he was disgusted and ready to quit the job because of that.

MSHA Supervisory Inspector Clyde Ratcliff accompanied Inspector Graham during his examination of the right return air course and observed the same conditions and corroborated the testimony of Graham. There was roof material on the floor and roof bolts were not secured to the roof. They were jutting out with roof material spalled away. Ratcliff testified that he did not count the damaged roof since there were too many to count. Ratcliff confirmed that Foreman Dalton stated that he was aware of these adverse roof conditions but that he did not have enough men to correct these conditions and continue with production at the same time.

Ratcliff further opined that the subject Pocahontas No. 3 coal seam is composed of a heavy unconsolidated material. He considered a roof fall likely based upon the history of roof falls in this seam and his observations of the roof material. He concluded that injuries were reasonably likely under the circumstances.

Within the above framework of evidence, it is clear that the violation is proven as charged, that the violation was "significant and substantial" and that it was the result of high negligence and "unwarrantable failure."

In reaching these conclusions I have not disregarded the testimony of Section Foreman Carl Dalton who claims that he told Graham and Ratcliff that he in fact said he did not know of the unsupported roof in the right return entry. The cross corroborating testimony of both Ratcliff and Graham regarding the admission made by Dalton that he was aware of the roof conditions is however the more credible.

I have also evaluated Dalton's testimony that it was not unusual to see sloughage from the bolts in the areas cited and that the condition did not present a hazard since a resin bolt does not need a bearing plate for anchorage. However, Dalton misconstrues the nature of the hazard described by Graham and Ratcliff. Graham and Ratcliff were particularly concerned by the fact that roof material had sloughed and was continuing to slough from the bearing plates thereby creating a hazard of falling rock from such sloughage.

Under the circumstances and considering the criteria under Section 110(i) of the Act, I find that a civil penalty of $2,300 is appropriate for the violation.

Order No. 3554292

Order No. 3554292, issued pursuant to Section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.400 and charges as follows:

> Loose coal and coal dust was stored at spot locations in the left and right cross-cuts in the right return air course starting 1 cross-cut inby survey station No. 375 and extended inby this point to within ten crosscuts of the face on the 002-0 section, a distance of approximately 1,200 feet. The loose coal and coal dust ranged in depth of up to 26 inches.

Inspector Graham testified that during the course of his continuing inspection on October 26, 1992, he found accumulations of loose coal pushed into the crosscuts (areas colored purple on Gov't Exhibit No. 3). The accumulations pushed into these ten crosscuts were up to 26 inches deep. Graham handled and scrutinized the materials and observed that indeed it was loose coal mixed with pieces of rock. Graham described the hazard from fire that could result from such accumulations as a result of ignition sources from a mantrip operating in the return. Graham concluded that injuries were reasonably likely based on the amount of accumulations and the type of electrical equipment operating, i.e., a scoop tractor and a mantrip, for a fire causing smoke to result.

Graham also concluded that the violation was the result of high negligence and "unwarrantable failure" because of what he considered to be the obvious nature of the condition. Section Foreman Dalton purportedly told Graham that the accumulations were "dirty coal" and that he cleans it out when he gets a chance. According to Graham, Dalton advised him that he knew it was dirty coal.

MSHA Supervisor Ratcliff accompanied Graham during this phase of his investigation and he also recalled piles of coal to the left and right in the crosscuts in the cited area. While he also observed some rock in the material on the left, he did not see any rock in the material on the right. Ratcliff also observed that some areas in the return were in fact wet. Ratcliff also found a hazard from explosion or fire and concluded that it would be reasonably likely to have injuries from smoke inhalation causing death.

Dalton conceded that accumulations did exist in the cited areas, but because they were mud and rock, claims the conditions were not hazardous. He denied, however, that there were any ignition sources in the area, i.e., no power lines and no power equipment, and that the area was well rock dusted. I conclude, however, from the credible and disinterested testimony of Graham and Ratcliff that the material did in fact constitute violative accumulations. I do not find, however, that the Secretary has sustained his burden of proving that the violation was "significant substantial" or the result of "unwarrantable failure." There is insufficient evidence of the combustibility of this admitted mix of rock, mud and coal and of the likelihood of an ignition source to support a significant and substantial finding. The testimony of Dalton that the material had only recently been pushed into the crosscuts is also undisputed. I give weight to his apparent good faith belief that the material was not a violative "accumulation." Accordingly, I do not find the condition to have been the result of "unwarrantable failure " or high negligence. The order is accordingly modified to a citation under section 104(a) of the Act.

Considering the criteria under Section 110(i) of the Act, I find that a penalty of $500 is appropriate for this violation.

Order No. 3554293

Order No. 3554293, also issued pursuant to Section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.202(a) and charges as follows:

> The mine roof in the left return air course is not adequately supported at spot locations starting four crosscuts outby survey station No. 65 and extended outby this point to within three cross-cuts of the surface portal. There were several roof bolts at each location that were damaged to a point they no longer adequately supported the roof.

As previously noted, 30 C.F.R. 75.202(a) provides that "the roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

During his inspection on October 26, 1992, Inspector Graham found in the left return air course several places where roof bolts were hanging down and exposing 24 inches between the roof and the plate. Other areas had groups of damaged bolts. He recalled, in particular, three areas, one of which was four crosscuts outby survey station No. 65, consisting of a group of six consecutive defective bolts. In addition, at a location six crosscuts outby survey station No. 65, there was a group of ten adjacent bolts where rock had fallen away. Finally, he remembered a group of twelve bolts that were "defective" at a location 11 crosscuts outby survey station No. 65. Graham testified that, in addition, there were many bolts damaged throughout the area with cracked and loose rock in the roof with much of the loose roof left hanging.

Graham testified the roof fall hazard in this area would cause crushing and fatal injuries. The weekly examiner, State and Federal inspectors, and anyone working on roof support or removing roof fall material would be exposed to the hazard. Graham opined that it was reasonably likely for one person to be so injured because of the extensive area involved and deteriorating roof condition.

Graham further opined that the violation was the result of high negligence and "unwarrantable failure" based upon the extensive area involved. He also concluded, based on the state of deterioration that the conditions had existed for at least several weeks. Finally, Graham noted that the examination reported for the area was dated October 21, five days before his inspection.

Graham's testimony is corroborated in essential respects by the testimony of Graham's supervisor, Clyde Ratcliff. Ratcliff accompanied Graham and was "greatly surprised" by the amount of fallen material in the left return air course and the number of protruding roof bolts. According to Ratcliff, there were large sized rocks, baseball size up to the size of a pickup truck bed on the floor consistently over the entire area. In addition, some roof bolts were broken and others showed spalling around the plates. He also noted that the cavities where the roof had fallen out were extremely high.

Ratcliff opined that falling material would cause severe injuries to a miner or inspectors and that it was highly likely for serious injuries to result. He also opined that the cited conditions had existed for "weeks" based on the extensive nature of the problem.

While the evidence clearly supports a finding that the violation was "significant and substantial," I cannot find that the Secretary has sustained her burden of proving that the violation was the result of high negligence or "unwarrantable failure." Section Foreman Carl Dalton testified that he had performed the weekly examination in the return air courses on October 17, 1992, and at that time did not observe any hazardous roof conditions. It is further acknowledged that the mine roof in this area of the mine could deteriorate rapidly. Under the circumstances I do not find that the Secretary has sustained her burden of proving that the deteriorated conditions found on October 26 had existed at the time of the previous weekly examination and that accordingly Doss Fork officials were therefore on notice of the existence of such conditions. Accordingly, I cannot find that the violation was the result of high negligence or "unwarrantable failure." The order is therefore modified to a citation under Section 104(a) of the Act.

Considering the criteria under section 110(i) of the Act, I find that a penalty of $500 is appropriate.

Order No. 3554294

Order No. 3554294 alleges a violation on October 26, 1992, of the standard at 30 C.F.R. 75.305. However, since no mandatory standard identified as 30 C.F.R. 75.305 existed at the time the instant order was issued on October 26, 1992, there could not have been any violation of the standard cited. The provisions of 30 C.F.R. 75.305 were no longer effective after August 15, 1992. See 57 F.R. 20868 and 20914, May 15, 1992. Under the circumstances, the order must be vacated.

Citation No. 3981551

Citation No. 3981551 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.202(b) and charges as follows:

> A roof bolt machine operator was observed traveling inby permanent roof supports in the face of the No. 3 cross-cut on the 001-0 section. The roof bolting machine had been moved into the face of the No. 3 cross-cut and the machine operator traveled inby permanent roof supports to position a metal roof support strap before the T.R.S. had been installed

against the roof. This citation is the factor in the issuance of Imminent Danger Order No. 3981550 therefore no abatement time was set.

30 C.F.R. 75.202(b) provides that "no person shall work or travel under unsupported roof unless in accordance with this subpart."

MSHA Inspector James Graham testified that he observed the roof bolter move into the crosscut and the miner on the right side of the roof bolter proceed under unsupported roof, reach for the roof support strap and pull it over the roof bolting machine. Under the circumstances, roof bolter operator James Wright, was exposed to unsupported roof. Inspector Trainee Roy Walls also observed that Wright had his entire body beyond the roof strap. In particular, Walls recalled that Wright's head was inby the last bolt by six inches. Graham opined that because of the dangerous nature of the roof in this mine, which subjected it to falls at any time, it was highly likely for injuries from crushing to result in death.

Graham also concluded that the violation was the result of high negligence. According to Graham, Superintendent Dillon told him enroute to the section that the straps could not safely be installed and that it was causing the workers to go inby permanent supports. In addition, the roof bolter operator who was observed proceeding beneath unsupported roof purportedly told Inspector Graham that this procedure had been necessary ever since they had begun using straps.

MSHA Supervisor Ratcliff testified that on November 16, 1992, he received a telephone call from Mine Superintendent John Dillon about the problems the installation of the metal straps was causing at Doss Fork. According to Ratcliff, Dillon complained about the necessity of miners to go inby the last row of permanent support in order to install the straps.

James Wright admitted that he had to reach inby the last row of bolts in order to set up the roof straps and that he had been performing this procedure for two or three weeks prior to the issuance of the instant citation.

Within the framework of this evidence, it is clear that the violation is proven as charged and that the violation was "significant and substantial" and the result of high operator negligence. In reaching these conclusions, I have not disregarded the testimony of Superintendent Dillon that he did not in fact discuss with Inspector Graham or Ratcliff anything about employees going inby permanent roof support to set the straps. However, in light of the clear recollection and the disinterested testimony of both Graham and Ratcliff, I can only conclude that

Mr. Dillon's recollection was deficient. Citation No. 3981551 is accordingly affirmed with its "significant and substantial" findings.

Considering the criteria under Section 110(i) of the Act, I find that a civil penalty of $3,000 is appropriate.

ORDER

Order No. 3554294 is hereby VACATED. Order Nos. 3554292 and 3554293 are hereby modified to citations under section 104(a) of the Act. Doss Fork Coal Company is hereby directed to pay a civil penalty of $500 each for the violations in those citations within 30 days of the date of this decision. The remaining citation and orders are hereby AFFIRMED and Doss Fork Coal Company is hereby directed to pay the following civil penalties for the violations charged therein within 30 days of the date of this decision:

Order No. 2723744	$3,000
Order No. 3554286	$2,000
Order No. 3554287	$2,000
Order No. 3554291	$2,300
Citation No. 3981551	$3,000

Gary Melick
Administrative Law Judge

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