CCASE:
SOL (MSHA) V. CROSS 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 PROCEEDINGS
	:	Docket No. SE 93-108
	:	A.C. No. 40-02971-03584
v.	:	
	:	Docket No. SE 93-244
CROSS MOUNTAIN COAL INC., Respondent	:	A.C. No. 40-02971-03595
	:	Docket No. SE 93-245
	:	A.C. No. 40-02971-03597
	:	
	:	Docket No. SE 93-255
	:	A.C. No. 40-02971-03596
	:	
	:	Mine No. 6

DECISION

Appearances: Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Edward H. Adair, Esq., Reece and Lang, London, Kentucky, for the Respondent.

Before: Judge Barbour

The above captioned cases were brought pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), 30 U.S.C. 815, 820, when the Secretary, on behalf of the Mine Safety and Health Administration (MSHA), filed petitions for the assessment of monetary civil penalties against Cross Mountain Coal Co., Inc. (Cross Mountain) for violations of various safety and health standards promulgated pursuant to the Act and found in 30 C.F.R. Part 75. The Secretary alleged that the violations occurred at Cross Mountain's No. 6 Mine, a bituminous coal mine located in Campbell County, Tennessee, and that several constituted significant and substantial (S&S) violations to mine safety hazards caused by Cross Mountain's unwarrantable failure to comply with the cited regulations. Cross Mountain denied the Secretary's allegations.

The matters were consolidated and were heard in London, Kentucky. At the commencement of the hearing counsels stated they had settled several of the violations. Counsel for the Secretary also stated that two of the citations in which violations were alleged had been or would be vacated. I will approve the settlements and note the citations to be vacated

when I discuss the dockets to which they pertain.

STIPULATIONS

Counsels stipulated as follows:

1. Cross Mountain is subject to the Act.

2. Cross Mountain's No. 6 Mine has an effect on interstate commerce within the meaning of the Act.

3. Cross Mountain and its No. 6 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and the Administrative Law Judge has the authority to hear these cases and issue a decision.

4. Cross Mountain is a large-sized operator.

5. A reasonable penalty will not affect Cross Mountain's ability to remain in business.

DOCKET NO. SE 93-108

Citation	Date	30 C.F.R.	Proposed Assessment
3824679	10/14/92	75.902	$4,400

Section 75.902 essentially restates section 309(c) of the Act, 30 U.S.C. 862(c), and requires in pertinent part:

> [L]ow- and medium-voltage resistance grounded systems shall include a fail-safe ground check circuit to monitor continuously the grounding circuit to assure continuity which ground check circuit shall cause the circuit breaker to open when either the ground or pilot check wire is broken ... .

Citation No. 3824679, issued pursuant to section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1), states:

> Two ground mon[i]tors had been jumped out with copper wire on the 001 section power centers. The mon[i]tor for the 001 section head drive and the No. 1 battery charger.

(Gov. Exh. 7). The inspector found that the alleged violation of section 75.902 was S&S and the result of Cross Mountain's unwarrantable failure.

THE TESTIMONY

The citation in question was issued by MSHA inspector Stanley Sampsel. Sampsel, who is not a certified electrician, stated that a ground wire is a safety feature within a machine's power system. It is a wire that runs from the origination point of the power system to the frame of the machine. If there is a short circuit in the machine, or in the cable to the machine, the voltage feeds back on the ground wire to the origination point of the power causing circuit breakers or other disconnects to trip the power. This eliminates the shock hazard created by the short circuit (Tr. II 205-206, 217).

Sampsel also described a ground monitor. He stated that it is a "second ground system that creates a loop circuit through the cable to the machine and back to the power system" (Tr. II 206). This system monitors the integrity of the ground system. However, the ground monitor system's short circuit protection can be defeated by installing a wire in the cable receptacle to provide a path around the system for electricity (Tr. II 208-209). (This practice is referred to as "jumpering.")

Sampsel conducted an inspection of the 001 section of Mine No. 6 on October 14, 1992. The section had recently resumed development operations and there were two power centers on the section. A few days before the inspection an anonymous note had been left on Sampsel's car while it was parked in the mine parking lot. The note stated that it was a practice on the section to jumper the short circuit protection. Therefore, Sampsel went to the section to look for evidence of jumpering (Tr. II 220-221, 237-239).

There were two power centers on the section (Tr. II 211). At the first power center Sampsel examined the cable that ran from the power center to the section belt drive (Tr.II 217). Sampsel initially testified that the cable coupler was positioned so that power was not flowing through the cable to the belt drive. In effect, the cable and belt drive were disconnected (Tr. II 212). (Later, Sampsel appeared to change his testimony when he stated that there was power running to the belt drive at the time he came to the power center (Tr. II 217).)

Sampsel had the cable coupler removed from the receptacle. He could not recall whether he or Steve Cox, the mine superintendent and company representative, removed it (Tr. II 225). When the coupler was removed Sampsel saw a piece of copper wire fall from between the coupler and the receptacle (Tr. II 212, 223). According to Sampsel, the wire "conformed to the configuration needed to complete a jumper wire" (Tr. II 212, 213). In his opinion it had been used to connect the frame of the receptacle to the ground monitor lug and thus to jumper the ground monitor system (Tr. II 212).

Cox was on Sampsel's right and Sampsel believed that Cox saw the copper wire fall when the coupler was removed from the receptacle (Tr. II 214). Sampsel explained, "[Cox] was right beside me. We was there for the sole purpose of looking at these. That was my intentions and that's what I told him my intentions were" (Tr. II 224). Sampsel further explained that when he told Cox the wire had fallen from the receptacle, Cox replied he had not seen it (Tr. II 224). Because the wire was lying directly beneath the receptacle, Sampsel picked it up and showed it to Cox. Cox reiterated he had not seen the wire fall and added that he had not observed the wire in the coupler (Tr. II 215).

Sampsel then inspected one of the couplers at the second power center. Sampsel was uncertain if Cox went with him (Tr. II 219, 227). The coupler was connected to a power cable that provided electricity to a battery charger (Tr. II 218). When the coupler was removed from the receptacle, Sampsel found a copper wire of the same length as the previous one. The second wire did not fall, rather it remained in the coupler. Sampsel believed it had been used to defeat the ground monitor system of the battery charger (Tr. II 216).

Sampsel spoke with whoever was with him at the time about the wire and a company employee removed the wire from the receptacle (Tr. II 229. Sampsel told the company representative the wire should not have been there, that it was a violation and that he would issue a citation (Tr. II 230).

Sampsel stated that the company's certified electricians were responsible for working on the couplers and receptacles at the power centers (Tr. 218-219).

In Sampsel's view, the purpose of section 75.902 is to ensure that any short circuit or ground fault will result in the automatic deenergizing of the machinery and thus to eliminate instantly the hazard of shock or electrocution (Tr. II 216-217). He stated that he believed it was "highly likely" that both jumperings would have resulted in an electrocution (Tr. II 218). He added that the hazard depended "more or less ... [on] how well the cables [and] equipment ... [were] being maintained" (Tr. II 218).

Foster Brock, an MSHA electrical inspector, gave a somewhat different explanation of what happens when the ground monitor system is jumpered. Brock explained that the system is defeated by providing a connection between the ground monitor system and the ground system so that the ground monitor only monitors the ground in the new and smaller circuit between the jumpering wire and the power center. The circuit from the jumper to the equipment is not monitored (Tr. II 277, 279). In this situation, there is no way for a miner to be assured that the grounding

system actually will trip the power in the event of a fault (Tr. II 280, 294). Brock summarized the purpose of the ground monitor system as "... a safety system that ensures that you have a ground wire ... . When you jumper out a ground check monitor you're taking that one safety feature and doing away with it" (Tr. II 289).

Steve Cox, Cross Mountain's superintendent, testified that he was with Sampsel during the October 14 inspection. He explained that in order to inspect the power center for the head drive, both he and Sampsel had to crawl, because the floor to ceiling height was 40 inches (Tr. II 244). Three couplers were plugged into the power center in close proximity to one another (Tr. II 251; see Resp. Exh. 5-B). When Sampsel told Cox that he wanted to inspect the grounding system on the belt drive, Cox unplugged the belt drive cable coupler. Because the coupler weighed about 35 to 40 pounds, and because he was on his knees, Cox had to move his body over the coupler to unlatch it (Tr. II 245; Resp. Exh. 5-A).

According to Cox, he unplugged the coupler, laid it down and Sampsel told him there was a wire present. Cox told Sampsel he did not see a wire. When Sampsel responded that the wire had been used to jumper the grounding, Cox disagreed because the circuit breaker was working properly and there was no need to jumper the system (Tr. II 252). There were no reports that anything was wrong with the system (Tr. II 257, 258, 260). Cox stated, however, that the wire could have been used to jumper the system and that whoever did it had neglected to remove the wire, but Cox did not believe this was likely (Tr. II 258). Cox maintained that electricians frequently left pieces of wire laying around power centers (Tr. II 262).

Cox testified that he and Sampsel then traveled to the power center for the battery charger. Cox believed that they were joined by the section electrician who unplugged the coupler to the battery charger. Cox stated that he did not see a wire in the coupler or receptacle. If one had been present, he would have noticed (Tr. II 263, 265).

Cox stated that Sampsel did not ask him to remove a wire from the coupler and that if Sampsel asked the section electrician to remove one, he (Cox) did not hear the request (Tr. II 264). However, Cox agreed there was a lot of noise at the power center. "[I]t's buzzing like a beehive," he said. Id. Cox was not standing beside Sampsel, but rather was about one foot from the section electrician, who was about five feet from Sampsel (Tr. II 265).

THE VIOLATION

The parties agree that the electrical systems for the section head drive and the battery charger required ground check monitor circuits. The circuits must continuously monitor the equipment's grounding circuits. I accept the testimony of the Secretary's witnesses that if a ground check monitor circuit is jumpered, it can no longer effectively monitor the grounding circuit. In sum, and as Foster Brock persuasively testified, such jumpering defeats the purpose of the ground check monitor system (Tr. II 208-209, 277-280).

The question of whether a violation existed hinges upon whether the Secretary established, in either instance, that the ground check monitor systems were in fact defeated. Put another way, the question is whether or not the wires were used to jumper one or both of the systems.

Sampsel was certain that when Cox removed the belt drive cable coupler from the receptacle at the first power center a copper wire fell from between the coupler and receptacle (Tr. II 212, 233). Sampsel was equally certain the wire had been used to short circuit the belt drive ground monitor circuit. Cox did not dispute the presence of the wire. Rather, he testified he did not see the wire fall. He suggested that the wire might have been left in the area by a company electrician who was trouble-shooting the equipment. However, he also agreed it was possible the wire had been used to jumper the system prior to the inspection and that it had not been removed because the person who inserted it forgot about it (Tr. II 258).

I credit Sampsel's version of events. Unlike Cox, Sampsel was certain the wire had fallen from between the coupler and the receptacle (Tr. II 212, 223). Cox removed the coupler from the receptacle. Because of the low height at the power center Cox and Sampsel had to crouch. Further, because of the weight of the coupler, Cox had to place his body up and over the coupler (Tr. 245; see also Resp. Exh. 5-A). Given this position and, given the fact Cox was intent on removing the coupler, whereas Sampsel was intent upon looking for evidence of jumpering, it is not surprising Cox did not see the wire until it was pointed out to him.

Having accepted as fact that the wire fell as Sampsel described, the question is what purpose the wire served. I accept Sampsel's unchallenged testimony that the configuration of the wire was that which would have been needed to jumper the ground monitor system (Tr. II 212-213). Cox suggested the wire might have been the subject of legitimate use by an electrician. However, he also agreed it was possible it was used as a jumper wire. In my view, the most reasonable inference to draw from the testimony is that it was being used to jumper the ground

monitor circuit. Cox's suggestion that the wire might have been used for troubleshooting is undermined by his repeated assertions that there was nothing wrong with the belt drive's grounding system (Tr. II 252, 257-258, 260). I therefore find that the violation existed as charged at the first power center.

At the second power center Sampsel maintained that he found a similar copper wire in the receptacle for the cable to the battery charger when the coupling was unplugged from the receptacle (Tr. II 216). Sampsel also testified that at his direction a company employee removed the wire from the receptacle (Tr. II 229). Again, Cox testified that he did not see the wire. He believed he would have seen it if the wire had been where Sampsel stated it was located (Tr. II 263, 265). Further, Cox did not hear Sampsel ask the section electrician, the only other company employee with Sampsel and Cox, to remove the wire from the receptacle (Tr. II 264).

I find both Sampsel's and Cox's testimony to be credible. I also find, however, that accepting Cox's testimony does not preclude a finding the wire was present. Cox described himself as being about five feet from Sampsel, rather than immediately next to him (Tr. II 265). He agreed that it was noisy at the power center (Tr. II 264). It is reasonable to conclude that the distance between Sampsel and Cox, together with the buzzing of the power center, could have afforded Cox less than a clear view of the coupling and receptacle and prevented Cox from hearing Sampsel ask the other employee to remove the wire.

As with the situation at the belt drive power center, I conclude the weight of the evidence establishes a finding the wire was located where Sampsel testified. The only plausible explanation offered for the presence of the wire was that it was used to jumper the system. Cross Mountain did not suggest a credible alternative reason. Therefore, I also conclude that a violation of section 75.902 existed with respect to the battery charger ground check monitoring circuit.

S&S and GRAVITY

The Commission has held a violation is "S&S" if, based on the particular facts surrounding the violation, there exists a "reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). The Commission stated:

> In order to establish that a violation of a mandatory safety 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.

I have concluded that a violation of mandatory safety standard section 75.902 existed as charged. Moreover, the testimony establishes there was a discrete safety hazard contributed to by the violation in that, with the ground check monitor defeated, there was no way to ensure the affected electrical equipment had short circuit protection. Without such certainty, a short could have lead to the shock or electrocution of anyone touching the equipment's frame or cable. This clearly meets the reasonably serious nature element of the Commission's S&S definition (Tr. II 208-209).

As is frequently the case when the Secretary alleges that a violation is S&S in nature, the question is whether the Secretary has established a reasonable likelihood the hazard in question would have resulted in an injury? In other words, if normal mining operations continued would there have been a reasonable likelihood of "an event in which there [would have been] an injury?" U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). After considering all of the evidence, I conclude that the Secretary has failed to meet his burden of proof.

Although Sampsel testified that he believed it "highly likely" that jumpering of the ground monitor circuits would have resulted in an electrocution, neither he nor Brock offered any testimony regarding the frequency of miners' exposure to the conditions (Tr. II 218, 235). In order for there to have been any likelihood of an injury or injuries from the hazards created by the violative conditions, miners had to be exposed to the conditions. When, as here, the record is silent in this regard, the Secretary has failed to prove the third element of the Mathies formula.

The fact that a violation fails to meet all of the tests required to support a finding of S&S does not mean it is a non-serious violation. The Commission has recognized that under the Mine Act the concepts of S&S and gravity are not identical, although they are frequently based upon the same or similar factual considerations. Quinland Coals, Inc., 9 FMSHRC 1614, 1622 n. 11 (September 1987). The dangers posed by the inability to rely on short circuit protection were grave in that in the event an undetected short circuit the violation could have resulted in the serious shock injury or electrocution of anyone touching the frames of the equipment, or the cables. I therefore find that the violation was serious in nature.

UNWARRANTABLE FAILURE and NEGLIGENCE

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, 20004 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 20007, 2010 (December 1987). The Commission has explained that this determination is derived, in part, from the ordinary meaning of the term "unwarrantable failure" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such are as a reasonably prudent careful person would use, characterized by "inadvertence," "thoughtlessness," and inattention."). Eastern Associated Coal Corporation, 13 FMSHRC 178, 185 (February 1991); citing Emery. 9 FMSHRC at 2001.

Brock offered no testimony regarding this issue, and Sampsel's testimony was limited. He stated he believed the company's certified electricians were responsible for maintaining the couplers and receptacles and that they performed all work on such equipment (Tr. II 218-219). Cox also testified that maintenance on the power centers would have been performed by certified persons (Tr. II 272-273). This testimony alone does not establish that the company's certified electricians jumpered the circuits. Sampsel was not asked who he thought installed the wires. Nor was he asked how long he thought the wires had been installed and whether the company should have known about them. Finding the violation was the result of more than ordinary negligence on the part of the company would require conjecture outside the record. I conclude, therefore, that the Secretary has not established that the violation was the result of Cross Mountain's unwarrantable failure to comply with section 75.902.

Although I cannot find Cross Mountain unwarrantably failed to comply with the cited standard, I can and do find that the company was negligent. No matter who jumpered the ground check monitor circuits, the company failed to meet the standard of care required of it by allowing the conditions to go undetected and corrected. Cross Mountain was responsible for ensuring the grounding systems on the equipment, including the ground check monitor systems, were operating properly. The integrity of the systems was the company's responsibility. In failing to discover and remove the wires, the company failed to meet the standard of care required of it.

DOCKET NO. SE 93-244

SETTLED VIOLATIONS

Citation No.	Date	30 C.F.R.	Proposed Penalty	Settlement
3824750	10/26/92	70.202(a)	$650	$500
3824751	10/26/92	70.202(a)	$650	$500

The Secretary alleged that respirable dust samples were not taken and submitted by a certified person as required by section 70.202(a). At the hearing, counsel for the Secretary stated that although the inspector found that these violations were the result of Cross Mountain's high negligence, in fact the company exhibited an ordinary or moderate lack of care and that the Secretary agreed to modify the citations accordingly (Tr. I 12). I accepted the settlements (Tr. I 13).

Citation No.	Date	30 C.F.R.	Proposed Penalty	Settlement
3824775	1/14/93	70.100(a)	$690	$0

The Secretary alleged that a roof bolting machine operator was working in a concentration of respirable dust that exceeded the allowable limit. The violation was based upon a single sample of respirable dust collected in the working environment of the miner. At the commencement of the hearing Cross Mountain's motion to vacate the citation was pending. Cross Mountain maintained the alleged violation was based upon an improperly obtained respirable dust sample. Counsel for the Secretary did not oppose the motion and stated that MSHA agreed to vacate the citation (Tr. I 8, 12-13). I dismissed the Secretary's petition with respect to the alleged violation on the understanding the citation was or would be vacated.

DOCKET NO. SE 93-245

Citation No.	Date	30 C.F.R.	Proposed Penalty
3824983	1/11/93	75.603	$6,500

Section 75.603, in pertinent part, states:

> Temporary splices in trailing cables shall be made in a workmanlike manner and shall be mechanically strong and well insulated .... As used in this section, the term "splice" means the mechanical joining of one or more conductors that have been severed.

Citation No. 3824983, issued pursuant to section 104(d)(1) of the Act, states:

> 001 Section No. 1 Fletcher roof bolter serial No. 89019 the trailing cable providing 440 v[olt] three phase power had not been properly spliced. A splice had been made that had not been effectively insulated and sealed, proper connectors were not used the wire had been twisted and tied together. Two of the three phases were exposed, the outer jacket was missing.

(Gov. Exh. 4) The inspector found the violation was S&S and the result of Cross Mountain's unwarrantable failure.

THE TESTIMONY

Sampsel stated he had been trained in the observation of trailing cables and their splices. Sampsel testified that a temporary splice is made in a cable so that production can resume until a permanent splice is completed (Tr. I 271, 275). (He further stated that permanent splices usually are made during a maintenance shift and that the maintenance shift is frequently the midnight shift. Id.)

There are five conductors inside a trailing cable, three phase wires, a ground wire and a ground monitor wire (Tr. I 277). Temporary splices are made by reconnecting and reinsulating the conductors when they have broken or otherwise separated. Temporary splices need to be well insulated because trailing cables are handled by miners. If a splice is not well insulated, a miner can be electrocuted by touching the splice (Tr. I 273).

When making a temporary splice the severed conductors inside the cable are reconnected and are reinsulated equivalent to their original insulation (Tr. I 277). This is the same way a permanent splice is made, except a permanent splice has a bonded rubber sleeve applied around the splice, whereas a temporary splice can be wrapped with tape (Tr. I 278, 302). Pursuant to section 75.603, a temporary splice must be made in a "workmanlike manner." A temporary splice is permissible for up two 24-hours after which it must be replaced with a permanent splice (Tr. I 279).

On January 11, 1993, Sampsel inspected the trailing cable of a roof bolting machine that was located on the 001 section of Cross Mountain's No. 6 Mine. (Sampsel could not recall inspecting the machine itself, other than to get the serial number off of it (Tr. I 298). Nor could he recall whether the machine was energized.) Upon examining the machine's

trailing cable Sampsel noticed a splice with exposed copper wires (Tr. I 283, 290). The copper wires were plainly visible and he did not have to pick up the splice to see them (Tr. I 304).

Closer observation revealed the copper wires were phase wires and that the splice was not properly made in that the wires were tied and twisted together. Electrical connectors had not been used to reattach the wires (Tr. I 283). Although the phase wires had been wrapped with tape, the splice "showed an extreme amount of wear" in that the tape around the conductors had been scraped off causing exposure of the copper wires (Tr. I 283-284, 309).

Sampsel could not recall the name of the person from Cross Mountain who accompanied him when he looked at the splice. He remembered, however, that someone from the company cut the splice out of the cable and that he was then able to pick it up and observe it closely (Tr. I 302). It was at this time that Sampsel found the splice had been "tied together and twisted and so on" (Tr. I 303). It was also at this time that Sampsel confirmed the wires he had seen were phase wires (Tr. I, 304). While Sampsel was examining the splice, company personnel were at work reconnecting the cable (Tr. I 306).

According to Sampsel, the splice violated section 75.603 in several respects. The copper wires were exposed, the tape was scraped away so that it was not insulated to the same extent as the original cable, and the phase conductors were tied together rather than joined with connectors (Tr. I 285). Tieing the wires was unacceptable because the splice was more likely to break apart and sharp ends of the spliced wire could poke through the insulation (Tr. I 287). If connectors had been used, there would have been an even strain on the wires and they would have been less likely to break. Further, the wires would have been enclosed within the sleeve of the connector and would not have poked through the insulation (Tr. I 287-288).

In view of the condition of the splice Sampsel believed that an injury was highly likely. The roof bolting machine was located in the active workings of the section, an area where miners were required to work and travel. He noted that scoops and the continuous mining machine had to travel past the cable and that the cable had to be hung for the equipment to get through (Tr. I 318). Moreover, the roof bolting machine operator frequently had to handle the cable (Tr. I 288-289). In Sampsel's view, the defective splice could very easily have been contacted by persons working in the area and a fatality or serious injury easily could have occurred (Tr. I 292). He therefore found the alleged violation was S&S in nature (Tr. I 292-293).

When asked why he found the condition to have been the result of Cross Mountain's unwarrantable failure to comply with section 75.603, Sampsel stated:

> I felt that the splice ... was made at the mines (sic.)...and...this type of splice being made at the mine, the people are required to be recertified yearly. It's common knowledge to electrical people as well as inspectors that square knotting or granny knotting or twisting cables together is not an acceptable method of making a splice.
>
> * * * *
>
> [T]his type of splice was intentionally made improperly. (Tr. I 294-295)

In Sampsel's view, a certified electrician acts on behalf of the operator. Therefore, the negligence of the electrician who made the splice was attributable to Cross Mountain (Tr. I 320-321). Although making the splice was the type of work that Sampsel believed "could show up in an electrical examination book," Sampsel did not know if he had reviewed the book on the day of the inspection (Tr. I 298, 299). (When Sampsel was shown a page of the book for January 11, 1993, he agreed that he had looked at the book, although he could not state that everything appearing on the page was there at that time (Tr. I 300; Resp. Exh. 3.)

The Secretary also called electrical inspector Foster Brock as a witness. Brock testified that the problem with the splice was that twisted wires could pull loose if the cable was hung (Tr. II 138). Where the wires were tied with square knots, the knots created more heat than connectors, and the heat caused the wires to break at the end of the knots. In addition, the knots created a splice that was larger in size than one made with connectors. The larger splice was subject to more wear and tear (Tr. II 143, 144-145, 146). Because of these problems MSHA considered the use of twisting and square knots to be "unworkmanlike" (Tr. II 146). Brock admitted, however, that he had not conducted any tests to establish that conductors spliced with square knots created more heat (Tr. II 161). He had simply noticed that splices made with connectors lasted longer that those made with square knots (Tr.II 162).

Finally, Brock observed that when a coupler was connected to the power center, and the circuit breaker was off, the power could be turned back on by any miner. As Brock stated "[Y]ou don't have to be a certified electrician to energize a circuit breaker, that's in the regs. Anyone can put the breaker in" (Tr. II 156).

As its first witness, Cross Mountain called George Bob Smith, a certified electrician at the No. 6 Mine. Smith agreed

with Sampsel that the responsibility for making splices at the No. 6 Mine rested with the certified electricians (Tr. II 17). Smith stated that he accompanied Sampsel during the January 11 inspection. According to Smith, because of the low height on the section, he and Sampsel had to crawl. The cable was closer to the rib than to the middle of the entry, and as they crawled past the cable, they observed the temporary splice in question (Tr. II 19). Smith described the splice as "ragged but ... made strong" (Tr. II 20). It had mud and dirt on it and in some places the tape was torn (Tr. II 21). According to Smith, when he and Sampsel saw a wire sticking out of the splice they agreed the splice had to be examined (Tr. II 20). Smith did not get another look at the cable before Sampsel started cutting into it (Tr. II 84).

Smith believed the second shift mechanic made the splice in order to add additional cable so the roof bolting machine could be moved. The machine had been idle for three or four weeks. It was scheduled to be put back into production within three more shifts. The temporary splice would not have been present then because an electrical inspection was scheduled for the third shift on the same day the conditions were cited. As a result of the inspection, the temporary splice would have been replaced with a permanent splice (Tr. II 49-50, 70-71, 74).

Smith believed the roof bolting machine had been moved on the shift before he and Sampsel observed the splice (Tr. II 24-25). Smith highlighted on a map of the section the entries he believed the roof bolting machine had traveled (Tr. II 29; Resp. Exh. 2). The cable containing the splice was 700 to 750 feet long and, at the time the citation was written, 300 to 400 feet of the cable was piled within 25 feet of the power center (Tr. II 33-34). The splice was within 10 feet of the piled cable and the power center was 25 feet from the splice (Tr. II 32, 34).

Smith testified that the cable's coupler was plugged into the power center, but he did not know if the power was on (Tr. II 32). However, if the power was not on, he acknowledged that any miner could have gone to the power center and activated the roof bolter (Tr. II 58). In any event, the area containing the splice was not highly traveled and Smith did not think the cable was in an area where it would have needed to be moved, handled or hung out of the way of other equipment (Tr. II 34-35).

Smith and another mechanic cut the splice from the cable. When asked if he had a good opportunity to view the splice, Smith replied: "[A]fter we cut it out, we just laid it down ... it had tape, insulation on the phase wire of it. I do know that" (Tr. II 35). Smith testified that all of the wires were spliced with square knots (Tr. II 176, 180-181, 186). (Smith's testimony in this regard was confirmed by Patrick Graham, Cross Mountain's

Vice President for Health and Safety, who saw the knotted wires (Tr. II 193-192).)

Smith believed the exposed wire was the neutral ground wire. If phase wires also were exposed, he did not see them, and he believed he would have seen them because he was "right over top of ... [the splice] just looking at it" (Tr. II 46). Smith did not believe there was any hazard from handling an energized cable with an exposed neutral ground wire. "I don't see that you'd be executed or juiced" (Tr. II 38). There is no power in the ground wire, and if power ever did go through it, the power would trip the circuit breaker and the electricity would be disconnected (Tr. II 39).

Smith further testified that the splice had an outer covering of tape that probably had been wrapped three times around the splice. The tape was ragged and worn from being dragged along the mine floor and around corners (Tr. II 40, 43). In addition, the phase, ground and ground monitor wires were individually wrapped (Tr. II 40). The phase wires usually were wrapped with a half-lap of tape at least four or five times, which meant there were at least four or five thicknesses of tape wrapped around the phase wires (Tr. II 41). According to the manufacturer of the tape, it was one mil thick and a thickness of one mil provided protection against 1,000 volts (Tr. II 42). The phase wires in the cable carried 227 volts (Tr. II 44). Smith believed the cited splice was mechanically strong and well insulated (Tr. II. 45).

In Smith's opinion, square knots were used in the cable rather than connectors because the cable had to be pulled a long way and splices made with square knots were stronger than those made with connectors (Tr. II 44). When connectors were used, the wires were joined by crimping them together. If the cable was subject to a lot of tugging, the crimped wires tended to pull apart (Tr. II 45). Smith had seen splices made with connectors come loose many times (Tr. II 48-49). However, Smith also agreed that there were times when connectors were used. If an electrician had a connector on his or her person, and did not have to go the power center to get one, and if the trailing cable did not have added lengths to it so that it was dragged a lot on the mine floor, an electrician might use a connector (Tr. II 55).

Certified electrician Bobby Laymance was the company's next witness. Lamaynce was not present when Sampsel cited the alleged violation. However, he understood the roof bolting machine was idle at the time the violation was cited and had been idle for about four weeks (Tr. II 90). Laymance agreed with Smith that the roof bolting machine would have been put into use two or three shifts after the alleged violation was cited (Tr. II 108).

According to Laymance, he examined the roof bolting machine one week prior to January 11 (Tr. II 93-94). This was before the machine was trammed to its location on January 11 (Tr. II 96). Laymance did not think the cited splice was in the cable when he examined the machine. If it had been, he would have corrected the condition and noted his action in the electrical examination book (Tr. II 97-98). There was no such notation in the book (Tr. II 98).

Laymance was scheduled to examine the machine again on January 11 (Tr. II 112-113). During such examinations he always inspected the cable and he would have removed the temporary splice (Tr. II 114). He believed that the tramming of the roof bolter from the place he inspected it last to the place where it was positioned on January 11 could have caused the wear on the temporary splice that Sampsel found (Tr. II 103).

Laymance believed that the ground and ground monitor wires and phase wires were spliced by being tied in square knots rather then by being twisted (Tr. II 172). Laymance described why square knots were used in temporary splices. "Quick," he explained, "plus they are a whole lot stronger" (Tr. II 103). According to Laymance, connectors were used for permanent splices (Tr. II 121-122). Laymance also believed that the exposure of a ground wire would not have created a hazard (Tr. II 114-115).

THE VIOLATION

Section 75.603 defines a splice as "the mechanical joining of one or more conductors that have been severed" and it requires temporary splices in trailing cables to be "made in a workmanlike manner" and to be "mechanically strong and well insulated." The Secretary alleges the splice in the trailing cable to the roof bolting machine was not made in a workmanlike manner, was not mechanically strong and was not well insulated. The evidence establishes these contentions.

First, there is no doubt that the part of the cable Sampsel cited was a "splice." The witnesses who saw the cable agreed that the three phase conductors, the ground monitor wire and the ground wire had been severed and rejoined.

MSHA has a long and consistent history of interpretation of Section 75.603. This interpretation has guided both MSHA's inspectors and the nation's underground coal operators in resolving questions raised by the standard's practical application. In regard to one of the fundamental questions in this case, I note that more than fifteen years ago Commission Administrative Law Judge George Koutras, citing the 1978 Inspector's Manual, concluded that "[s]pliced conductor wires that have been tied in square knots or twisted together are

not made in a workmanlike manner and mechanically joined" and that "[t]he intent of the standard and the manual guidelines is to insure that such splices are uniformly made by means of mechanical devices such as rings and connectors to prevent their separating under stress and undue abuse." Empire Energy Corp., Docket No. DENV 78-442-P (December 8, 1978); reported at 1 MSHC (BNA) 1751.

The most recent instructions to MSHA's inspectors and the nation's operators are found in the Program Policy Manual (PPM). There, MSHA again clearly states that "splices made by twisting conductors together or by tying knots in conductors, splices that have bare or exposed conductors ... constitute noncompliance." V PPM Part 75 at 63-64 (July 1, 1988). While these prohibitions are stated with respect to the suitability of splices (30 C.F.R. 75.514), I believe they also apply to temporary splices i trailing cables since such splices too must be "suitable." Moreover, the manual requires that "[e]ach power conductor, grounding conductor, and ground-check conductor ... be individually spliced using a proper splicing sleeve, ring or clamp," devices that by their nature exclude the use of twisted wire and square knots.

I do not doubt that the use of square knots produces a splice that is less likely to pull apart, as Smith testified. However, I also do not doubt that heat produced by the knots makes conductors more likely to break at the end of the knots, as Brock testified. Brock's opinion was based on his many years of practical experience. I also accept as fact that splices made with knots are larger than splices made with connectors and therefore are subject to more wear and tear when dragged throughout the mine.

For all of these reasons, I conclude that the subject temporary splice was not made in a workmanlike manner as required by section 75.603.

In addition, the condition of the splice violated the "well insulated" requirement of the regulation. Sampsel and Smith agreed that there were wires extruding from the splice. Indeed, this is what initially attracted Sampsel's attention to the problem. The exposed wires signaled the inadequacy of the insulation.

I therefore conclude the violation existed as charged.

S&S and GRAVITY

I conclude the violation was S&S. As I have just found, there was a violation of section 75.603. Moreover, the evidence establishes a discrete safety hazard in that I accept the testimony of Sampsel that the wires poking through the temporary splice were those of a phase conductor and that this subjected a

miner who might touch the wires to the danger of serious shock injury or electrocution, consequences of a reasonably serious nature to say the least.

While Laymance and Smith believed the ground wires were exposed, Laymance was not present when Sampsel observed the violation and Smith, who was present, did not have as close a look at the splice as Sampsel. Sampsel actually held the splice and cut into it. Smith did not pick up the splice, and, though he stated he was over the splice when he looked at the cable, he was less than precise in describing what he was able to see (Tr. II 46, 84, see also Tr. II 35). Moreover, in my opinion, even if only the ground wire had been exposed, a discrete safety hazard still would have existed. If there had been a short circuit coupled with a failure of the short circuit protection, any miner touching the wire would have been subjected to the danger of serious electrical injury or electrocution.

Fortunately, a serious electrical injury or electrocution did not result. Nevertheless, I conclude that one was reasonably likely. It is not clear whether the roof bolting machine was energized when Sampsel found the defective splice. However, the roof bolting machine obviously was energized when it was moved, and it is reasonable to infer the splice became defective during the move and put miners who had to move the cable along with the machine in danger of serious injury or electrocution.

Cross Mountain takes the position that, in the context of continued mining, the defective splice would have been replaced with a permanent splice before the machine was put into service and that the electrical inspector on the oncoming shift would have corrected the condition (Tr. II 49-50, 70-71, 74). In my view, the reasonable likelihood of an injury existed independently of what might have happened in the future because the splice was present when the machine was moved to the position where it was located when the violation was cited.

Further, the machine was going to be put into use within the next three shifts and, as both Smith and Brock agreed, with its coupler plugged into the power center a miner could have energized the machine at any time (Tr. II 58, 156). The splice was located close to the power center. At least a few miners were required to travel and had traveled in the area. I accept Smith's explanation that the low height of the area meant that miners would have had to crawl by the splice. I conclude that regardless of whether miners ever had to hang the cable, they were likely to inadvertently touch the splice with their hands or bodies as they crawled passed it. Had Laymance neglected to replace the temporary splice before this occurred, a serious shock injury or electrocution was reasonably likely.

I also find that this was a serious violation. The likelihood of a significant injury or death resulting from the infraction made it so.

UNWARRANTABLE FAILURE AND NEGLIGENCE

Sampsel and Smith agreed that the splice was made by a certified electrician since all splices at the No. 6 Mine were so made (Tr. I 294-295; Tr.II 17). Cross Mountain offered no justification or excuse for the certified electrician who made the subject splice violating section 75.603, other than the fact that tying the conductors with square knots was quick, convenient and durable (Tr. II 44-45, 48-49, 103, 121-122). While this may be true, it is clear that such a splice was not permissible under the standard. The lack of an acceptable justification or excuse for the violation, together with the fact that it was deliberately committed by a representative of mine management, establishes that the violation was due to Cross Mountain's unwarrantable failure to comply with section 75.603.

In addition, Cross Mountain was obviously negligent in that its certified electrician failed to exhibit the standard of care required by the circumstances. Indeed, and, as I have found, the company's negligence in this regard was more than ordinary.

Citation Nos.	Date	30 C.F.R.	Proposed Penalties
3824999	2/2/93	75.202(a)	$7,000
3824998	2/2/93	75.220(a)(1)	$7,000

Section 75.202(a), in pertinent part, states:

> The roof ... of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof.

Section 75.220(a)(1), in pertinent part, states:

> 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.

Citation No. 3824999, issued pursuant to section 104(a) of the Act, and, in association with an imminent danger order of withdrawal, states in part:

> [In the] 001 section the roof where persons were required to work was not being properly supported or otherwise controled [sic] to protect persons from

> hazards related to falls of the roof. Only 8 of 25 required timbers had been set where the final two cuts were taken from the belt entry blocks of the pillar section.

Citation No. 3824998, which also was issued pursuant to section 104(a) of the Act and in association with the same imminent danger withdrawal order, states, in part:

> The operator was not complying with his approved pillar plan on the section shift[.] The final two cuts were take[n] from the belt entry blocks and only 8 of 25 timbers had been set[.] The wings between No. 16A and 18, 17 and 15A had also been removed. (Gov. Exh 2).

The inspector found the alleged violations were S&S and the result of Cross Mountain's "high" negligence.

THE TESTIMONY

Inspector Sampsel explained that on February 2, 1993, he was on a regular inspection at the No. 6 Mine (Tr. I 26-27). The company was engaged in mining the pillars on the 001 pillar section of the mine. Sampsel identified Cross Mountain's plan for pillar recovery (the pillar plan) (Joint Exh. 1; Tr. I 31-32). (The parties introduced a copy of the plan that was substantially similar to the plan in effect on February 2, 1993 (Joint Exh. 1).)

The pillar plan required pillars to be mined and posts to be set in a specific sequence (Tr. I 40; See Joint Exh. 1). Referencing the plan, Sampsel explained that when pillar Nos. 2 and 3 were mined, the plan required that a wing be left in each pillar. (A wing is a portion of the pillar about three feet wide and of varying length.) The wings offered additional roof support while portions of the pillar were extracted (Tr. I 38). As the wings picked up more and more weight and started to crush, they offered some warning as to when the roof would collapse (Tr. I 38-39). The same warning was given by posts as they started to break under pressure from the roof (Tr. I 75). Accord-ing to Sampsel, in addition to the wings, pegs were required to be left at the corners of the blocks. The pegs were small triangular pillars of coal that also served to support the roof until it caved in (Tr. I 53; Joint Exh. 1).

Sampsel maintained that when he positioned himself in the belt entry between pillar Nos 6 and 7 (X on Joint Exh. 1), he observed that the final cuts had been taken on pillar Nos. 2 and 3 (the two innermost pillars being mined), but that only eight of 25 required posts (Posts I and K on Joint Exh. 1) had been set (Tr. 1 62, 93). The eight posts were on one side, at I, located

between pillars 6 and 2 (Tr. I 63, 95). No posts had been set at K between pillars 3 and 7, although the plan called for 15 posts (Tr. I 63).

In Sampsel's opinion, the posts should have been set to protect those miners whose job it was to operate the remote controlled continuous mining machine and to extend the continuous haulage system. The posts were intended to stop a roof fall from encroaching on the miners (Tr. I 105-107; Joint Exh. 2). In addition, Sampsel believed that miners setting posts in preparation for the next mining sequence also were exposed to the danger of falling rock. He stated that if a roof fall had started it could easily have traveled down the track entry (Tr. I 69). Had the posts been set as required, they would have limited the fall up to the timbers and not let it progress into the belt entry intersection (Tr. I 73, 86, 88).

Sampsel maintained that not only was it a violation for Cross Mountain to fail to conform to its approved pillar extraction plan, but the company was mining without proper roof support because it had exposed an area of excessive unsupported roof (Tr. I 68). Sampsel described the company's failure to follow the plan as a "very big safety hazard ... especially when you don't follow it to the degree that this has not been followed" (Tr. I 71). If the violation continued, Sampsel believed it would have lead to a fatal injury (Tr. I 72).

In Sampsel's view, the section foreman who oversaw the removal of the pillars and the work of the crew and who had direct control of mining as it progressed was responsible for the violation (Tr. I 76, 81). He described the foreman as "constantly ... overseeing" the mining of the pillars (Tr. I 80, 84; See also Tr. I 115). In his experience, the foreman on duty usually had a copy of the roof control plan, as did other miners working on pillar extraction. (Cross Mountain stipulated that this was so (Tr. I 81, 83).)

Sampsel found the conditions created an imminent danger and that they constituted a violation of Sections 75.202(a) and 75.220(a)(1). (The imminent danger finding is not at issue.) In addition, he believed that the likelihood of a serious injury was "very high" (Tr. I 88) and that the violations were the result of the foreman's aggravated conduct (Tr. I 89).

Cross Mountain abated the violations by holding a safety meeting with all miners and discussed the roof control plan, as well as the hazards related to roof falls (Tr.I 89).

As its first witness, Cross Mountain called Bob Brandenburg, the general mine foreman. Although Brandenburg was not present when the 001 section was mined, he and Bobby Laymance accompanied Sampsel during the February 2, 1993 inspection (Tr.I 131-132,

146). After the second shift came out of the mine, the inspection party proceeded to the 001 section. Sampsel first checked the equipment for permissibility, then he inspected the faces. He began on the right hand side of the section and proceeded to the left side.

Brandenburg agreed that Sampsel observed the conditions he found to have been violations when he reached the belt entry. Brandenburg also generally agreed with Sampsel's description of where Sampsel had stood (the X between pillars 6 and 7 on Joint Exhibit 1) (Tr. I 134). The inspection party remained in the belt entry for approximately 25 to 30 minutes. Id.

Referencing Joint Exhibit 3, Brandenburg recalled the condition of pillar numbers 2 and 3 (the two pillars Sampsel believed had been mined). According to Brandenburg, cuts 15 and 15A had been taken in their entirety on pillar 2. Cuts 16 and 16A had been only partially taken on pillar 3 because draw rock had started to fall from the roof (Tr. I 136). (Brandenburg saw the rock on the mine floor (Tr. I 151).) Cut 17 on pillar 2 and cut 18 on pillar 3 had not been taken. Those parts of the pillars were still standing (Tr. I 136).

Brandenburg stated that between pillars 2 and 6 adjacent to the track entry (I on Joint Exh. 1) eight posts were set, just as depicted on Joint Exhibit 3 (Tr. I 140). According to Sampsel these would have been set immediately after cuts 15 and 15A had been completed (Tr I 141). In Brandenburg's opinion, if this was the case, the continuous miner operator would have been standing next to the inby corner of block 6 adjacent to the track entry, away from the roof fall hazard. (Brandenburg marked this position with a red X on Joint Exh. 2.) Further, he believed that when cuts 16 and 16A were taken the continuous miner operator would have been at the corresponding position with respect to block 7 (Tr. I 143). He stated the only other miner who might have been in the area would have been the section foreman (Tr. I 143).

In Brandenburg's opinion, the section foreman would have been present when posts were set and would have known whether all were set as required by the plan (Tr. I 147). After Cross Mountain's unsuccessful efforts to fully mine cuts 16 and 16A no miners would have been exposed to inadequately supported roof because the remote controlled continuous mining machine was withdrawn and posts were installed at L (Tr. I 144).

Brandenburg stated that after Sampsel observed the conditions Sampsel told Brandenburg that he was going to cite Cross Mountain for violations of its plan. Subsequently Brandenburg did not talk to Sampsel (Tr. I 138). He did not see any point in further discussion (Tr. I 157).

Brandenburg also did not speak with the section foreman about the area and did not ask him whether posts had been set as required by the plan or if cuts 17 and 18 had been made (Tr. 151). When asked why he did not speak with the foreman about the cuts, Brandenburg explained, in effect, that he did not ask because he could see the plan had not been violated. Further, in the days following the inspection he did not speak with the foreman because the foreman was suspended after the citations were issued (Tr. I 154, 159).

David Altizer, the resident engineer for Cross Mountain and author of the roof control plan for the No. 6 Mine, also testified. Altizer stated the plan was designed specifically to keep miners away from areas being mined. The continuous miner was remote controlled so that miners did not have to go near the pillar faces. Coal was removed by bridge conveyors and the miner who was responsible for the operation of the conveyors was approximately 84 feet from the face (Tr. I 167).

Altizer was not present on the day of the inspection and never observed the cited conditions. However, Altizer did not believe Cross Mountain was in violation of the plan. With regard to the number of posts set, Altizer believed that it had been decided not to take the two last cuts in the mining sequence, cuts 17 and 18, because draw rock had started to fall. Noting that the plan stated "[p]rior to mining Cut No. 17, Post K will be installed," Altizer maintained that if cut 17 was not mined, the posts at K need not have been set (Tr. I 172, 193-194). Concerning the posts at I, Altizer was unaware a citation had been issued because only eight posts were set in lieu of the ten required under the plan at that location. Id. Posts are set on four feet centers, therefore, in Altizer's view, if the width of the entry where posts I should have been located was 17.3 feet or less, rather than the normal 20 feet, eight posts would have complied with the plan (Tr. I 174). However, Altizer agreed he did not know the width of the entry (Tr. I 198).

Even if the crosscut in which posts I were located was cut 20 feet wide on the perpendicular, eight posts might have complied with the plan if they were "skew[ed] ... around ... so that they ran perpendicular to the ribs in the crosscut instead of parallel to the entry" (Tr. I 175).

Altizer stated that the typical height on a pillar section was 40 inches or less and that because of the low height Sampsel's perspective easily could have been distorted and he could have thought cuts 17 and 18 had been taken when, in fact, they had not been cut (Tr. I 177, 218).

Altizer also did not think there had been a violation of section 75.202. The standard states that the roof shall be supported to protect persons from roof falls. In Altizer's

view the only person who would have been in the crosscut when cuts 16A was mined was the continuous mining machine operator. The miner in charge of the bridge conveyor and the miner or miners setting the posts would be outby the crosscut. If cuts 17 and 18 had been mined, none of these people would have been exposed to a roof fall hazard in that everyone would have been even with the intersection of the belt entry and the cross-cut, if not completely outby it (Tr. I 183-184). (However, he did not believe cuts 17 and 18 had been mined because the roof had not fallen in the subject crosscut. If the cuts had been taken the roof probably would have collapsed (Tr. I 188, 218-219).)

Finally, Altizer agreed that if, as asserted by Sampsel, cuts 17 and 18 had in fact been mined and posts had not been set at K, the roof control plan would have been violated (Tr. I 196). In his opinion, the section foreman would have been present when cut 17 was taken and, if posts had not been set, the foreman would have been obligated to cease mining and to rectify the situation (Tr. I 213-214).

Mine superintendent Steve Cox testified regarding the suspension of section foreman David Sweeney. According to Cox, Sweeney was suspended pending the company's investigation of the circumstances leading to the order and citations. Following the company's review, it was determined that Sweeney had done nothing wrong and he was called back to work (Tr. I 228-230). Cox stated that Sweeney had no recollection of the events leading to the issuance of the withdrawal order and citations. Prior to Sampsel finding the alleged violations, Sweeney had left the section and gone to the mine telephone to call out the results of the preshift examination (Tr. I 229-230).

Bobby Laymance was the company's final witness. In addition to being a certified electrician, Laymance was in charge of the third shift maintenance crew. He testified that cuts 17 and 18 had not been taken and that cut 16A was only partially taken. In his view, mining had been discontinued because of the presence of draw rock (Tr. I 236). He also was of the opinion that the height of the section was about 36 inches (Tr. I 238).

According the Laymance, there were eight posts set at location I. He was certain because he, Sampsel, and Brandenburg had counted them (Tr. I 247-248). The posts were set as depicted on Joint Exhibit 3. They were parallel with the belt entry between blocks 2 and 6. See Joint Exh. 3. In Laymance's opinion, once cuts 16 and 16A had been mined, the crew had pulled back, posts had been set at L (the last posts required to be set under the plan) and no miners had re-entered the area.

THE VIOLATIONS

The alleged violations of sections 75.202(a) and 75.220(a)(1) arose out of the same factual circumstances and may be considered together. The Secretary charges that the roof control plan was violated (section 75.220(a)(1)) in that "[o]nly eight of 25 required timbers had been set where the final two cuts were taken from the belt entry blocks of the pillar section" (Gov. Exh. 1). In addition, these same conditions meant that "the roof where person were required to work was not properly supported or otherwise controlled to protect persons from hazards related to falls of the roof" (section 75.202(a)(1)).

Sampsel and Cross Mountain's witnesses are in agreement that the company was engaged in pillar recovery on the section. In addition, the parties are in agreement that under the approved roof control plan pillar recovery was governed by a pillar plan essentially identical to that set forth on Joint Exhibit 1. The plan contains the required sequence for the mining of the pillars and the setting of posts so that the roof will fall only in the area from which pillar support has been removed by mining. The posts break the fall of the roof to protect from falling roof miners who may be working in the crosscut between the pillar line being mined and the pillar line immediately outby. The posts also protect equipment located in the same area. In order to determine whether the company violated its pillar plan, and thus its roof control plan, the requirements of the plan must be compared with the factual conditions as established by the testimony.

The pillar plan, in pertinent part, states:

> 10.) After mining Cut No. 15A, and prior to mining Cut No. 16, Post I will be installed.
>
> 11.) Prior to mining Cut No. 17, Post K will be installed.
>
> 12.) After mining Cut No. 18, Post L will be installed.

(Joint Exh. 1) It further states: "The cut sequence shown is typical. Cuts may be deleted if roof conditions warrant, as determined by mine management" (Id).

The record establishes that there were no posts installed at K, that the eight posts referenced by Sampsel in the citations were installed at I. It is also clear from the testimony that posts required to be present at L were in fact there. The Secretary contends that the plan was violated in that only

eight posts were set at I, whereas the plan requires ten and that although cut 17 was mined, no posts were set at K. It is Cross Mountain's contention that eight posts were permissible at I, that cut 17 was not mined due to adverse conditions, and that no posts were required at K.

After weighing these contentions and the evidence, I conclude the Secretary has established that Cross Mountain violated the plan. First, I find that there should have been ten posts at I, rather than eight. This finding is based upon the plan itself. Joint Exhibit 1, which is substantially similar to the plan that was in existence on February 2, 1993, shows ten posts between pillars 2 and 6, and there is no dispute that only eight were present. The plan requires that the posts at I be installed "[a]fter mining Cut 15A, and prior to mining Cut 16" (Joint Exh. 1). Cross Mountain's general mine foreman viewed the area with Sampsel and he stated that cuts 15 and 15A had been mined in their entirety and that mining had started on cuts 16 and 16A (Tr. I 135-136). I am persuaded that, in fact, as both Sampsel and Brandenburg maintained, cuts 15A and 16 had been made. Therefore, under the plan the posts at I should have been installed.

In my view, the number of posts required was exactly as shown on the plan, that is to say, ten. The plan speaks for itself. If, as Altizer suggested, the plan allowed less than five posts per row, depending on the width of the entry and the direction of the post row; or, if the plan left discretion to the operator to determine the number of posts to be set, the plan should have so stated. (In this regard I note that the pillar plan specifically allowed management the discretion to delete cuts "if roof conditions warrant" (Joint Exh. 1).) As the plan's author Altizer presumably understood the importance of stating the requirements of the plan clearly and specifically.

The question of whether the lack of 15 posts at K violated the plan depends upon whether cut 17 was mined. The pillar plan states, "Prior to mining Cut No. 17 Post K will be installed" (Joint Exh. 1). Sampsel testified that he viewed pillar No. 2 and that cut 17 had been mined (Tr. I 62, 93). Brandenburg, who was with Sampsel and who viewed the same area, stated that cut 17 had not been mined (Tr.I 136). I credit Sampsel's testimony, and conclude that cut 17 had been taken and therefore that the lack of posts at K violated the plan. I find Brandenburg's description of the conditions to be less reliable than Sampsel's because of Brandenburg's admission that he did not try to convince Sampsel that no violation existed. It is inconceivable to me that if the general mine foreman believed the company truly was in compliance with its plan he would not have tried to convince the inspector of the same. Further, Brandenburg acknowledged that the section foreman would have known whether or not Cross Mountain complied with the plan, yet Brandenburg did

not discuss the matter with the section foreman (Tr. I 147, 151). Nor, for that matter, did Cross Mountain call the section foreman to testify, even though it concluded he "had done nothing wrong" (Tr. I 228). I find mine foreman Cox's explanation that the section foreman had no recollection of the conditions that lead to the alleged violation implausible. After all, the same conditions lead to an imminent danger order of withdrawal, which is hardly a garden variety incident at a mine. I infer that had the section foreman been called as a witness his testimony would have been adverse to the company (Tr. I 229-230).

I also discredit Laymance's testimony that cut 18 had not been taken (Tr. I 236). I find Sampsel's assertion to the contrary more believable and conclude cut 18 had been mined. I again note the lack of any on-site attempt to convince Sampsel he was wrong in his assessment of conditions on the 001 Section and the failure of the section foreman to testify.

In addition to the violation of section 75.220(a)(1), I conclude the Secretary has established a violation of section 75.202(a). The standard requires, in pertinent part, that the roof where persons work or travel be supported or otherwise controlled to protect persons from falls. A violation of the roof control plan does not necessarily establish in and of itself that the roof was not supported or controlled to protect persons from falls. Eight posts were present at I and, although ten were required under the plan, the record does not establish that eight would have failed to act as an effective breaker for the roof as it began to collapse following the mining of Cut 15A.

However, there were no posts at K. I agree with Sampsel that the total lack of posts endangered the miners who set the last posts in the sequence at L to the dangers of falling roof. I have found that cut 18 was made. It is clear that the theory of pillar removal was that the roof would collapse after the cuts were made and that the collapse would be controlled by the breaker posts. Sampsel persuasively explained that once cut 18 was taken and the roof began to collapse there was nothing to prevent the fall from traveling into the belt entry and over the miners setting posts at location L (Tr. I 73, 86, 88).

Altizer's explanation that there was no danger because everyone would have been in the belt entry and crosscut or outby them is not reassuring. The fact remains that without the posts at K there was nothing to hinder the progression of a fall caused by the removal of the pillar at cut 18. Nor do I find that the previous roof bolting of the crosscut and belt entry lessened the danger of roof fall to those setting the posts at L. As Altizer himself noted, even given the presence of the roof bolts it is probable the roof would not have remained in tact (Tr. I 221-222). Indeed, the approved pillar plan contemplated that it

would fall. For these reasons, I find that a violation of section 75.202(a) has been established.

S&S and GRAVITY

I conclude also that the violations were S&S. The evidence establishes the standards were violated. Moreover, both violations presented a discrete safety hazard. Because of the violations miners setting posts as required by the pillar plan were subjected to the danger of falling roof.

Further, I conclude that it was reasonably likely such a hazard would have occurred. Sampsel's fear that the lack of breaker posts at K would have facilitated a roof fall beyond K into the belt entry where miners were installing posts at L was a real one. Altizer, who was Cross Mountain's witness, testified to the probability that with cuts 17 and 18 taken the roof would fall. Moreover, it is common knowledge that pillar removal is one of the most dangerous operations in mining, as witnessed by Cross Mountain's use on the section of remote controlled mining equipment. The remote controlled miner and bridge conveyor to extract the pillars was described by Altizer as "much safer" than a traditional extraction system and bespeaks the heightened hazards of pillar removal (Tr. I 184).

Finally, any injury that would have occurred as a result of miners being struck by falling roof while setting posts would almost certainly have been serious, if not fatal.

The violations were also serious. They presented the hazard of miners being struck by falling roof. Given the fact that cut 18 had been taken, that no posts had been set at K, and that the roof was supposed to fall, I conclude that the lack of posts at K meant that it was probable the fall would travel into area L when miners were setting posts there.

NEGLIGENCE

Sampsel testified that the section foreman oversaw pillar removal on the section and had direct control over mining of the pillars as it progressed (Tr. I 76, 81). It was the section foreman who bore overall responsibility for compliance with the plan. In fact, as Cross Mountain agreed, the section foreman usually carried on his person a copy of the plan (Tr. I 81, 83, 115). I credit Sampsel's testimony.

I further conclude that the inherently dangerous nature of pillar removal required of the section foreman a high standard of care to insure there was compliance with the plan, and I agree with Altizer that if cut 17 was mined the section foreman, who would have been present, was obligated to set the posts at K (Tr. I 213-214). Since I have found that, in fact, cut 17 was

mined and that the posts at K were not set, it follows that the section foreman did not meet the standard of care the situation demanded.

The thrust of the testimony of Cross Mountain's witnesses was that the presence of adverse mining conditions (i.e., draw rock) caused the section foreman to discontinue mining before the mining sequence was completed. It may be that the crew encountered draw rock on the section. However, because cuts 17 and 18 were mined, the record suggests that rather than abandon the mining sequence the foreman chose to mine to its end. Given the high standard of care required of the section foreman, I find that he was highly negligent in failing to insure compliance with the plan and in failing to prevent the roof conditions from exposing miners under his direction to the hazards of roof fall.

DOCKET NO. SE 93-255

SETTLED VIOLATIONS

Citation No.	Date	30 C.F.R.	Proposed Penalty	Settlement
3824922	10/21/92	50.20(a)	$300	$225

The Secretary alleges that Cross Mountain failed to report an injury within ten days as required by the standard. Counsel for the Secretary stated that, although the inspector found the violation of section 50.20(a) was the result of Cross Mountain's "high" negligence, in fact the company was moderately negligent and the Secretary had agreed to modify the citation accordingly (Tr. I 13). I accepted the settlement (Tr. I 14).

Citation No.	Date	30 C.F.R.	Proposed Penalty	Settlement
3824776	1/14/93	70.100(a)	$690	$0

The Secretary alleged that a respirable dust sample for a designated occupation indicated a miner was working in an environment containing excessive respirable dust. At the commencement of the hearing, Cross Mountain's motion to vacate the citation was pending. Cross Mountain maintained the alleged violation was based on improperly obtained respirable dust samples. Counsel for the Secretary stated that the Secretary did not oppose the motion and that MSHA agreed to vacate the citation (Tr. I 14). I dismissed the Secretary's petition with respect to the alleged violation on the understanding the citation was or would be vacated. Id.

OTHER CIVIL PENALTY CRITERIA

The history of previous violations at the No. 6 Mine indicates that in the 24 months prior to October 14, 1992

(the date of the first alleged violation found in this case), 471 violations were assessed and paid (Gov. Exh. 6). (The computer printout listing the history of previous violations was submitted post-hearing pursuant to the agreement of the parties (Tr. II 297-299).) Of these violations, four were violations of section 75.902, two were violations of section 75.202(a), and 18 were violations of section 75.220. There were no previous violations of section 75.603. I find that the overall applicable history of previous violations at the mine was large and that the history of previous violations of the roof control plan was such as to moderately increase the civil penalty that must be assessed for the violation of section 75.220(a)(1).

The parties have stipulated that the mine is large in size and that Cross Mountain's ability to continue in business will not be affected by the assessment of a "reasonable penalty" for each violation (Stipulation 5).

I find that Cross Mountain exhibited good faith in attempting to achieve rapid compliance after being cited for the violations.

CIVIL PENALTIES

The Secretary has proposed a civil penalty of $4,400 for the violation of section 75.902. The proposal was based upon a special assessment made as a result of the S&S and unwarrantable findings that accompanied the violation. In view of my findings that the Secretary has failed to establish the S&S and unwarrantable failure findings, the proposal is highly excessive.

The violation was serious and Cross Mountain was negligent in allowing the violation to exist. The highest penalty previously paid for a violation of section 75.902 was $178. Given the fact that the No. 6 Mine is large in size and has a large history of previous violations, I find a civil penalty of $300 to be appropriate.

The Secretary has proposed a civil penalty of $6,500 for the violation of section 75.603. The proposal was based upon a special assessment made as a result of the S&S and unwarrantable findings that accompanied the violation. I have upheld those findings. Further, I have found the violation was serious and was caused by Cross Mountain's more than ordinary negligence. Given these factors and the criteria previously mentioned relating to the mine size and overall history of previous violations, as well as Cross Mountain's ability to continue in business and good faith abatement, I conclude a civil penalty of $3,000 is appropriate. This is far more than Cross Mountain has paid for any previous violations and the amount is meant

to alert the company to the fact that S&S and unwarrantable violations must be deterred.

The Secretary has proposed civil penalties of $7,000 each for the violations of section 75.202(a) and section 75.220(a)(1). The proposals were based upon the violations having been issued in association with an imminent danger order. The order was not before me; however, I have found the violations were very serious and in allowing them to exist Cross Mountain was highly negligent. Given these factors, and the other factors previously mentioned, I conclude civil penalties of $4,000 appropriate for the violations. Finally, based on Cross Mountain's history of previous violations of its roof control plan, the assessment for the violation of section 75.220(a)(1) is increased by $300 to $4,300.

ORDER

DOCKET NO. SE 93-108

Within 30 days of the date of this decision, the Secretary is ORDERED to modify Citation No. 3824679 by deleting the S&S and unwarrantable findings and to indicate the citation is issued pursuant to section 104(a) of the Act. 30 U.S.C. 814(a). Cross Mountain is ORDERED to pay a civil penalty of $300 for the violation of section 75.902.

DOCKET NO. SE 93-244

The settlement of Citation Nos. 3824750 and 3824751 is APPROVED. Within 30 days of the date of this decision, the Secretary is ORDERED to modify the citations by deleting the "high" negligence findings and by substituting findings of "moderate" negligence. Cross Mountain is ORDERED to pay civil penalties of $500 for each violation. In addition, the settlement of Citation No. 3824775 is APPROVED, within 30 days of the date of this decision, the Secretary is ORDERED to vacate Citation No. 3824775, if he has not already done so.

DOCKET NO. SE 93-245

Citation No. 3824983 is AFFIRMED. Within 30 days of the date of this decision Cross Mountain is ORDERED to pay a civil penalty of $3,000 for the violation of section 75.603. In addition, Citations No. 3824998 and 3824999 are AFFIRMED and within 30 days of the date this decision Cross Mountain is ORDERED to pay a civil penalty of $4,000 for the violation of section 75.202(a) and of $4,300 for the violation of section 75.220(a)(1).

DOCKET NO. SE 93-255

The settlement of Citation No. 3824922 is APPROVED. Within 30 days of the date of this decision the Secretary is ORDERED to modify the citation by deleting the "high" negligence finding and substitute a finding of "moderate" negligence and Cross Mountain is ORDERED to pay a civil penalty of $225 for the violation of section 50.20(a) In addition, the settlement of Citation No. 3824776 is APPROVED. Within 30 days of the date of this decision the Secretary is ORDERED to vacate Citation No. 3824776, if he has not already done so.

Upon compliance with these orders these matters are DISMISSED.

David F. Barbour
Administrative Law Judge

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