FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDING
	:	DOCKET NO. KENT 2011-1579
Petitioner,	:	
v.	:	
	:	A.C. NO. 15-02132-264085-01
WEBSTER COUNTY COAL, LLC,	:	
	:	Mine: Dotiki Mine
Respondent.	:	

DECISION

Appearances: C. Renita Hollins, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner

Gary D. McCollum, Esq., Alliance Coal, LLC, Lexington, Kentucky, for the Respondent

Before: Judge Moran

In this challenge to a Section 104(a) citation, issued to Webster County Coal's Dotiki Mine during an inspection, it is undisputed that a section of loose roof approximately 10 feet long, by 4 feet wide, and 0 to 4 inches thick was observed by the MSHA Inspector. Webster disputes that the cited standard, 30 C.F.R. § 75.202(a), was violated. The standard requires that areas of roof where persons travel be supported or otherwise controlled to protect such persons from roof falls. Webster also challenges the citation's "high negligence" and "significant and substantial" designations and the assertion that lost work days or restricted duty would result if a miner were struck by the loose roof. For the reasons which follow, the Court sustains the violation and the special findings.

Findings of Fact

Citation No. 8499036

On January 10, 2011, MSHA Inspector Abel De Leon[1] issued Citation No. 8499036 under Section 104(a) of the Mine Act, after spotting a hanging rock, suspended from the mine's immediate roof. Tr. 86.[2] The Citation, citing 30 C.F.R. § 75.202(a),[3] stated:

> A section of loose roof was observed above the 9008 substation for # 3 Unit. The section of loose roof was approximately 10 feet long, by 4 feet wide, by 0 to 4 inches thick. This area was where miners worked and examined the power box. The 6329 continuous miner cathead and breaker was just below the loose roof. Location: MMU 033/036. Standard 75.202(a) was cited 38 times in two years at mine 1502132 (38 to the operator, 0 to a contractor). Ex. P-8.

Prior to finding the condition, upon arrival at the Respondent's Dotiki Mine that day, Inspector De Leon first examined pre-shift books for Units 1, 3, and 5 and gave a safety talk to 75 miners before proceeding underground with Webster's Assistant Safety Director Jimmy Ray. Tr. 87-88. At around 9:30 a.m., the Inspector was walking with Mr. Ray toward the area MMU 033-036, which had three possible entries into the working area: the supply road entry, the belt entry, and the power entry. Tr. 88. The Inspector entered through the power center entry, where the unit substation was located, whereupon he immediately noted a "huge piece of rock…right over the unit . . . [which was in between a rectifier and a substation] …the rock was hanging over where they were both separated." Tr. 88-89. The Inspector stated that he instantly recognized the loose roof, adding that the draw rock was hanging from the immediate roof and over the walkway area that separated the rectifier and the substation, and that miners could pass through the area. *Id.*[4] Assistant Safety Director Jimmy Ray, the mine management representative who accompanied the Inspector during his examination, did not object to De Leon's issuing the citation; rather, Mr. Ray was in agreement that they needed to remove the hanging rock. Tr. 93.

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[1] Inspector De Leon is a field office supervisor at MSHA's office in Madisonville, KY. Tr. 80. He has worked for MSHA for 14 years, and had 11 years' mining experience prior to his employment with MSHA. Tr. 80-81. In his private mining employment, he worked for three different mine operators, was trained to operate all pieces of mining machinery, and received his mine foreman certificate. Tr. 81. He also has specific experience with mine roofs and ribs through his work on a mine rescue team in mines with adverse roof conditions. *Id.* The Inspector spells his last name as "De Leon," not "DeLeon." Tr. 80.

[2] At hearing, the Secretary elected to vacate Citation No. 8499578, which citation was originally part of this docket. It had been issued for an alleged violation of 30 C.F.R. § 75.403, which pertains to the required incombustible content of coal dust, rock dust and other dust. Ex. P-1.

[3] 30 C.F.R. § 75.202(a), provides: "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."

[4] Inspector De Leon testified that his immediate reaction to seeing the condition was, "I'm going to issue a citation and we need to get this piece of rock down." Tr. 92.

As noted above, the hanging rock was approximately 10 feet long by 4 feet wide and 0 to 4 inches thick, and it had separated from the main roof. Tr. 104. The significant weight of the rock and its position in a high traffic area of the mine were additional causes of concern for the Inspector when he issued the citation. Tr. 90. Among the people who traveled through this area were mechanics assigned to check the power box, on-shift miners, the electrical examiners who would check the electric boxes, and the pre-shift examiner. Tr. 90, 96-97. The face boss of the unit was also supposed to do an on-shift examination of the area. Tr. 91. In addition, the area served as a passage for miners heading to lunch. Tr. 96-97. The Inspector asserted that, even if he had seen this condition in a more remote area of the mine, he still would have issued the citation. The significant number of miners walking through the cited area increased the gravity. Tr. 90.

Inspector De Leon stayed in the area as the miners took down the loose rock. He recorded in his notes that they used two 4 inch by 4 inch timbers to bring down the rock "because [the rock] was so big that they were afraid it was going to damage the power boxes…the buttons and breaker buttons, and…there was a cat head directly underneath it that supplied power…" Tr. 93-94; Ex. P-9, p. 7. Rather than setting the timbers underneath the rock, the miners set two timbers "long ways from the unit substation to the rectifier to break the fall of the rock. Not necessarily to support the rock." Tr. 94. Despite the placement of the two timbers laid horizontally across the unit, the Inspector recalled that pieces of rock hit the emergency stop button that supplied power to the entire unit on their way down, and it took five minutes to restore the power to the unit. *Id.* [5]; Ex. P-9, at p.7. On cross-examination,[6] although the Inspector stated that the timbers did not break under the weight of the falling rock, the rock's fall did damage equipment and knocked out the power on the substation. Tr. 147. Thus, the Court would note that this was a significant piece of rock that came down and that no one contends otherwise.

The Inspector did not believe that the condition had developed during the previous shift, but rather had existed for two or three shifts. Tr. 98-99. The appearance of the loose rock and the lack of certain "telltale signs" led him to this conclusion. Tr. 99. He explained that a fresh break or crack "will be solid black or charcoal gray, whatever the rock color is, and…[t]he pillars will take weight and you will hear stuff pop and crack and see sloughage and see cutters and other things." *Id*. Unlike a fresh crack, here "there was dust back in…where [the rock] fractured from the mine roof. So it had enough time for dust to collect. So in my opinion it had been there for a little while. I think I put [in] my notes 2 to 3 shifts." *Id.* The fact that there was no coal sloughage off the ribs, nor popping and cracking sounds emanating from the hanging rock, also informed De Leon's opinion and his conclusion that the condition was older than one shift. Tr.

[5] The emergency stop button is used to kill power in the event that methane levels get too high in the unit and the equipment needs to be de-energized. Tr. 94.

[6] When asked why he did not issue an imminent danger order for this condition, Inspector De Leon acknowledged that, while he could have issued such an order, the condition was taken care of immediately and therefore did not require such action. Tr. 96. He recalled that they had flagged off the area and "we weren't going to let anybody, you know, the face boss, the safety rep, nobody was going to get underneath it because we were standing right there. And, also, it was isolated." Tr. 95.

99-100. The Inspector also attributed his ability to distinguish newer from older conditions to his years of mine experience. Tr. 103.

De Leon marked the citation as significant and substantial ("S&S") and believed a miner could sustain injuries such as broken bones, lacerations, bruises, and even a concussion, depending on how the rock might land if it fell. Tr. 104, 112. In his experience, he has seen thinner rocks kill a man. Tr. 104. He noted that he had probably marked the citation "on the light side" and, although he could have marked the citation as "permanently disabling," he thought lost workdays "was fair." *Id.*

The Inspector also referenced the notes he recorded from the inspection. In particular, his notes included an overhead-view sketch diagram of the power center entry, denoting the draw rock he observed by hash marks between the substation and a rectifier. Ex. P-9, p. 8. He added that the dotted lines he used to signify the hanging rock "probably extended further out" over the miner walkway. Tr. 105. Next to the rock in the sketch, he labeled the miner cable to indicate a power cable that reached through the unit, which was energized and running at the time the citation was written. *Id.* De Leon described the sketch as an "outline of the rock and where it was located" and later noted of his sketch that it was not a "Rembrandt – but [that] there's part of the roof that's protruding out into the walkway by the rectifier – by the substations." Tr. 106, 152.

De Leon stated that the draw rock was located in the area around the power entry of the No. 3 Unit, which holds the unit power box, where the rectifier is located. Tr. 107. He discussed the various kinds of electrical equipment that were situated in the area underneath the fractured rock, which included a "cat head," or male plug, that was plugged into the substation. *Id.* The substation functioned as a receptacle with an energized plug that powered the continuous miner, which was actively cutting coal at the time of the citation. *Id.* The emergency stop button was also located underneath the rock area, along with breakers, amp setting dials, and different electrical components to both boxes. Tr. 108.

The Inspector considered it reasonably likely that the rock would fall, expressing that when the miners pulled down the rock, it "came right down…just with little effort. In other words, it was just barely hanging there." Tr. 108. The miners used a coal bar to pull down the rock, which is a heavy gauge metal tool kept on roof bolters and continuous miners that is used to scale coal ribs or roofs. Tr. 108-109. The size of the rock, however, rather than the speed with which the rock detached and fell, led De Leon to his reasonably likely determination. Tr. 109. De Leon calculated that, based on the regulatory formula for determining the weight of slate rock, the fallen rock in its totality weighed between 2,500 and 2,600 lbs. Tr. 112, 156. The timbers broke up the rock as it fell, resulting in the rock falling to the ground in multiple pieces.[7]

[7] Once the rock fell, Inspector De Leon noted that the miners did not have to add additional support to the roof. Tr. 111.

Inspector De Leon also designated any injury which could ensue as reasonably to be expected to result in lost workdays and restricted duty. He believed that the location of the rock combined with its substantial size and weight meant that someone could have received injuries that could keep the person out of work for several days. Tr. 111. The Inspector informed Mr. Ray that this citation would be specially assessed, which he based on the Dotiki Mine's recent history of citations for violations of the same standard. Tr. 113-114; P-9, p. 9.[8] The mine had been cited 38 times in the two years preceding the examination, and cited 28 times by 10 different inspectors within one year of the examination for the same safety standard. Tr. 114. Notably, one month prior to his January 10 inspection, De Leon accompanied MSHA Inspector Mike Dillingham on an E02 inspection in the same power entry area of the Dotiki Mine. *Id.* During that prior matter, De Leon observed the same condition of loose rock hanging over a high traffic area. *Id.* Inspectors Dillingham and De Leon spoke with the operators at that time and offered suggestions about setting timbers for roof control. *Id.*[9]

Inspector De Leon marked the subject citation as high negligence because the operator had been put on notice on several occasions prior to the examination, and, as just noted, ten different inspectors had issued 28 citations involving Section 75.202(a) violations in the past year. Tr. 116. Two roof fatalities in April 2009 also informed the Inspector's high negligence determination. Tr. 116-117.[10] Despite marking the condition as high negligence, De Leon did not find it to be an unwarrantable failure. While he acknowledged that he could have marked the Citation as an unwarrantable failure, he chose to "be fair and mark the boxes that I did." Tr. 120. However, he believed that an on-shift face boss, pre-shift examiner, or the unit mechanic should have known about this condition because they were responsible for examining and correcting or reporting any hazards in that area.[11] Tr. 120. Before mine production started, a pre-shift examination of the area was also required three hours prior to running the coal.

[8] As noted, Inspector De Leon was familiar with the Dotiki Mine. At the time of his examination, he informed, it was one of the largest non-longwall mines. It then spanned three counties, with its two different coal seams and about 30 miles of belt that pushed several hundred miles of air courses, and five working sections with ten mechanized mining units. Tr. 121.

[9] De Leon explained: "And we even talked to the operator about pulling this rock prior to putting the power boxes in it or setting timbers or just whatever they had to do to control the roof before they put the power boxes in these areas. I mean, we gave suggestions." Tr. 114.

[10] Respondent objected to the Inspector's reference to the April 2009 fatalities, as they were the result of a catastrophic failure of the upper mine roof, and were not related to the skin control problem at issue in this case. Tr. 116-117. The Court admitted this testimony for the limited purpose of assessing how the Inspector's consideration of the mine roof history factored into his high negligence determination. Tr. 117. These fatalities are not determinative of the fact of violation, nor the S&S, nor the degree of negligence determinations made here.

[11] With regard to the mine's roof control plan, the Court notes that the Inspector did not see any indications of compliance problems with the mine's plan at that time, nor did he observe any improperly installed or spaced roof bolts. Tr. 131.

On cross-examination, De Leon agreed that the immediate roof can take pressure off the main mine roof, which can result in the immediate roof developing cracks. Tr. 131-132. He also agreed that changes in air temperature, heat from the substation in the entry, and changes in air moisture all can cause deterioration in the immediate roof. Tr. 132. It is also the case, he agreed, that draw rock, or the pieces that hang down from the immediate roof, can form over various amounts of time, sometimes developing very quickly and other times over an extended period. Tr. 132-133.

In the face of the Respondent's contentions during cross-examination that the substation fell *outside* of the working area that would be subject to on-shift examinations, the Inspector maintained that the substation was a part of the working area that would be subject to on-shift examinations. Tr. 137-138. The tailpiece was the loading point for the working section, and the substation was located one crosscut outby the working section. Tr. 138. For the Respondent, this meant that the area at issue did not have to be on-shifted, per the definition of "working section" in 30 C.F.R. § 75.2. Tr. 138-140. The on-shift duty issue aside, the Respondent agreed that the area was subject to pre-shift examinations. Tr. 140. De Leon admitted that he did not know exactly what time the pre-shift examination had taken place on the morning of January 10, 2011, nor did he speak to the third shift lead man who had performed the pre-shift exam or ask anyone what the condition looked like during the pre-shift exam. Tr. 142.[12] The Inspector also did not speak with the section foreman in the unit about the appearance of the condition the day prior to the examination. *Id*. As he was not present at that time, Inspector De Leon agreed that he did not know *exactly* what the condition looked like one shift before the examination. Tr. 146-147.

Inspector De Leon also agreed that miners did not eat their lunches in the area between the rectifier and the substation, nor would they crawl over the lines between the rectifier and the substation to get to the dinner hole. Tr. 149-150. However, the cited rock did protrude out into the walkway between the rectifier and substation, which area miners would pass through to reach that lunch area. Tr. 152. He further asserted that he was confident in the accuracy of his notes from the inspection, including his note that the miner cable was located between the rectifier and the substation. Tr. 150.

De Leon also clarified that he did not only see rock dust gathered in the rock, but also mining dust. It clearly was not "freshly solid white rock dust that…had just been applied." Based on his experience, "it looked like that rock had been fractured for a little while." Tr. 153. In that regard, he noted that if the rock dust had been applied on the third shift, it "would have been a little bit brighter white in color…[but] it wasn't a bright white." *Id.*

As noted, Webster's Jimmy Ray accompanied Inspector De Leon during the inspection. Mr. Ray has 35 years of coal mining experience, 27 of which have been with Webster County Coal at the Dotiki Mine. Tr. 159-60. Prior to becoming an assistant safety director at the Dotiki Mine in 2006, he worked as a section mine foreman for about 14 years along the No. 9 Kentucky

[12] The Inspector agreed that the pre-shift examination would have occurred at some time between 4:00 a.m. and 7:00 a.m., up to 5.5 hours prior to his inspection of the area. Tr. 142.

coal seam, where Dotiki is located. Tr. 162-63. He was working as an assistant safety director on January 10, 2011, the date of the inspection.

Mr. Ray disputed the Inspector's identification of the location of the loose rock. Tr. 164. Unlike the Inspector, who recorded that the roof condition was suspended in the No. 3 Unit between the substation and the rectifier and was protruding over the miner walkway, Mr. Ray recalled that the roof condition occurred in the No. 6 Unit crosscut between the substation and the rib in the power center entry. Tr. 165. He marked his own recollection of the condition's locale on the Inspector's sketch, maintaining that it was situated further away from the passageway where miners would travel. Tr. 166; Ex. P-9, p.8.[13] However, on cross-examination, Mr. Ray acknowledged that Inspector De Leon's designation of the condition's location in his notes was probably correct, as he had no reason to think this was incorrect. Tr. 175.[14] Mr. Ray could not recall whether he noticed the loose rock on his own or whether it was pointed out to him. Tr. 174. As he did not take notes during the January 10 inspection, he was relying strictly on memory to recall the location and appearance of the separated draw rock. *Id.*[15]

In order to abate the citation, Mr. Ray retrieved timbers from the belt entry and "laid them at an angle from the sub down to the floor and then pulled the rock down." Tr. 167. He testified that he did not lay the timbers flat; rather, he placed the timbers at an angle from the substation to the floor towards the rib. *Id.* He did not remember the power going off once the rock was pulled down with a coal bar, but said that it could have. Tr. 168. He also mentioned that there are "whisker switches" that stick out from underneath the lids of substation tops and will automatically disconnect the power whenever they are knocked. *Id.*

Mr. Ray stated that the area was pre-shifted between 4:00 and 7:00 a.m., up to 5.5 hours before Inspector De Leon's examination around 9:30 a.m. Tr. 169. He asserted that that condition could have developed "within seconds" because "it [doesn't] take long for that roof just to pop." Tr. 169. Ray added that the No. 9 coal seam roof could pop very quickly because "[i]t's kind of in layers, and it's slate. It's kind of like you take a board and put some weight down on it and the bottom will splinter out. That's kind of what happened." Tr. 170. He had not paid attention to the rock dust in the cracks prior to taking down the loose rock. *Id.* Rock dusting, he informed, occurs toward the end of the third shift, during the pre-shift examination. Tr. 170-71. With respect to handling draw rock conditions, Dotiki trains its miners, to look at the ribs and roof on the way to the equipment and either pull it down, if possible, or notify the mine and/or supervisors. As he expressed it, you "let somebody know about it." Tr. 172-73.

[13] Mr. Ray's recollection of the loose rock area was marked in blue on the exhibit.

[14] Mr. Ray asserted that the substation was located one crosscut outby the working section and that this area was not flagged on the day of inspection. Tr. 176, 178.

[15] When asked whether it was hard to remember what happened a couple years ago during the inspection, Mr. Ray responded, "I'm sure it is, yes." Tr. 174.

On cross-examination, Mr. Ray clarified that his testimony supported the proposition that roof conditions *can* change within a matter of seconds, not that the loose rock at issue here *did* change within a matter of seconds. Tr. 175. When asked whether the loose roof was located at the No. 3 Unit, as Inspector De Leon recorded in his sketch, or at the No. 6 Unit, as Mr. Ray recalled on direct examination, Ray conceded that "it probably was number 3 I would say." *Id.*[16]

Mr. Ray also testified that the area he circled on the Inspector's diagram was not highly traveled, asserting that "the only reason you go up there is if you had power trouble." Tr. 175. He did acknowledge that when he saw the separation in the roof, he knew a timber would be needed to prevent the rock from knocking the cat head off and that if the cat head were disengaged, the power would be turned off. Tr. 176.

The Parties' Arguments

The Secretary's Contentions

The Secretary maintains that Webster County Coal's violation of Section 75.202(a) was significant and substantial, constituted high negligence, and that MSHA's special assessment civil penalty designation of $9,800.00 was appropriate. Both the Secretary and Respondent refer to the Commission's "reasonably prudent person" test, set forth in *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987), for analyzing alleged violations of Section 75.202(a). That test asks "what a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Id.* at 669. The Secretary asserts that the violation is supported under this test, as Inspector De Leon was able to reasonably ascertain that the condition existed prior to his inspection. Despite not knowing the exact time of the last pre-shift examination, the Inspector knew that the fractured roof had existed for several shifts, based on the absence of any sign that the immediate roof was settling during the inspection as well as the presence of coal and mine dust accumulations within the fracture. Sec. Reply Br. 3. Thus, the Inspector's conclusions were based on observable facts, and informed by his 25 years of experience in the mining industry. *Id.* (citing Tr. 80-81).

Regarding Inspector De Leon's S&S designation, the Secretary highlights the Inspector's testimony that the hanging rock was in such a precarious position that he did not feel comfortable leaving the site until the rock was scaled down, and that he could have issued an imminent danger order, but did not because the issue was being handled immediately. Sec. Br. 10; Tr. 95-96. The Secretary further asserts that not only was the rock likely to fall, but its fall was likely to

[16] Mr. Ray's full response to this line of questioning reads:

> Q: If you are not sure – if Inspector De Leon's notes show that this particular loose roof was on the number Section 3 unit, do you have any reason to disagree with that?
> A: Disagree about what?
> Q: About the loose roof being on the number 3 unit. You said you didn't know whether it was 3 or 6. If his notes say number 3, you don't have any reason to think what he said is wrong, do you?
> A: Well, it probably was number 3 I would say. Tr. 175.

injure a miner. Sec. Br 10. Inspector De Leon testified that the loose roof covered an area above the substation where the mechanic and examiners were likely to be during normal mining operations, and that it also extended over the walkway where miners would travel at their lunch break. Sec. Br. 10; Tr. 152. The Inspector believed that if the rock fell, it would cause contusions, concussions, bruises, lacerations, and broken bones, and he noted that he had seen a thinner rock kill a miner. Sec. Br. 10-11; Tr. 104. The Secretary's reply brief further illuminates its contention that there was a reasonable likelihood that this violation would result in injury by noting that persons expected to be in the area included (1) the mechanic; (2) the section foreman who conducts the on-shift examination; (3) the pre-shift examiner; and (4) when going to lunch, miners would travel on a walkway over which the fractured roof protruded. Sec. Reply Br. 4; Tr. 90-91, 120, 152; Ex. P-9, p. 8. Mr. Ray and Inspector De Leon agreed that two persons, the pre-shift examiner and a mechanic, would both likely be in the area affected by a roof fall. Sec. Reply Br. 4; Tr. 171-73. Additionally, as noted earlier, while Mr. Ray's testimony calls into question Inspector De Leon's assertion that the roof protruded over the miner walkway, the Inspector made notes and a diagram at the time of his inspection, while Mr. Ray relied solely on his memory, which he admitted was poor regarding the Citation. Sec. Reply Br. 5; Tr. 174.

The Secretary also asserts that the Citation was a result of Respondent's high negligence. Although Inspector De Leon agreed on cross-examination that changes in the immediate roof can happen over a matter of days, minutes, or seconds, and further agreed that this area of the Dotiki Mine was subject to overburden that can contribute to changes in the immediate roof, he previously explained on direct examination that if the fracture had recently formed, the area would have shown signs of settling or working under the overburden during inspection; however, the mine showed no such signs during Inspector De Leon's examination. Sec. Br. 12. The combination of rock dust and mine dust that had settled into the fracture also showed that the violation had existed for two to three shifts. *Id.* Inspector De Leon explained that a fresh break would be completely black, unless it was rock dusted right after breaking, in which case it would be the color of the rock dust. De Leon, however, did not see the rock dust in its pure form; rather, he saw dust that was a mixture of rock dust and mine dust that would have settled over time. Sec. Br. 12; Tr. 99, 101, 153. Last, the Secretary points to Respondent's history of similar violations, as the operator had been cited 38 times in the two previous years for violations of the same standard, and cited 28 times in the year immediately preceding this citation. De Leon had spoken with management approximately one month prior to the examination about the importance of monitoring roof conditions, and even provided suggestions for controlling these conditions. Sec. Br. 13; Tr. 114.

Respondent's contentions

In its challenge to the violation itself, as noted, the Respondent agrees that the test is what a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided, but it asserts that the Secretary ignores how the standard is to be applied. Resp. Reply Br. 7. In this regard it asserts that the test contemplates an objective analysis of all the circumstances and that such observer must have "knowledge of the relevant facts." This includes facts "reasonably ascertainable **prior** to the alleged violation." *Id.* (emphasis in original). By Respondent's lights, the Secretary's view is that if there is loose rock present and it needs scaling at the time it is viewed by the inspector, a violation has been

established. *Id*. It views Inspector De Leon's determinations as "conclusory, [ ] uninformed, and subjective." *Id*. at 8. The Court rejects these assertions.

Respondent then offers a litany of its perceived shortcomings with the Inspector's determination listing. These include, among other deficiencies, the Inspector's failure: to speak with others about the conditions at the time of the last examination; to speak with anyone about the conditions 24 hours earlier; to inquire about when the last rock dusting occurred and; to check the main mine roof with a stratascope. The Court's reaction to this list of asserted failings is quite simple: the Inspector didn't have to do those things because his observations of the condition, coupled with his experience and knowledge, sufficiently informed him about the condition he saw and supported his view that it was not a recent development. Thus, the Court finds the Inspector's observations and conclusions to be the well-established facts.

Continuing with its argument, Respondent does not dispute that Inspector De Leon and Mr. Ray observed a large piece of draw rock in the area around the substation. Resp. Br. 6; Tr. 88, 164-66; Ex. P-8. Nor does it dispute that immediately upon observing the draw rock, Mr. Ray took precautionary steps to try to protect any equipment located below the draw rock and immediately scaled the condition down from the mine roof. Resp. Br. 6; Tr. 92-93, Ex. P-8. Respondent does contest, however, that the mere fact that the draw rock, in need of scaling, was observed during the course of inspection does not alone establish a violation of Section 75.202(a). Resp. Br. 6. The Court agrees with this last assertion, but finds that the record is not limited to that mere fact.

In any event, it is the Respondent's position that the Secretary's case is not predicated upon objective facts, and that the Inspector failed to examine objective facts which were reasonably ascertainable. Resp. Br. 7. [17] Rather, it asserts that the Secretary's case is built upon the mistaken premise that the existence of draw rock at the time of Inspector De Leon's examination and De Leon's own assumptions, are sufficient. As noted, the Respondent has offered a litany of supposed failings on the Inspector's part that prevented him from conducting an objective inquiry before issuing the Citation. In particular, Respondent stresses that De Leon did not ask the third shift lead man who had conducted the prior pre-shift examination, nor did he ask the section foreman present during De Leon's own inspection, about what the roof conditions looked like in the power entry 24 hours earlier. Instead, De Leon made a subjective determination based upon the observation of rock dust (or mine dust) in the laminations of the loose rock. Resp. Br. 8. The Inspector never took any steps to objectively determine when the

[17] Respondent identifies what it considered to be the objective facts related to this Citation: (1) the last preshift examination of the substation occurred up to 5.5 hours prior to De Leon's issuance of the citation; (2) De Leon found no record of draw rock at the substation from the last pre-shift examination in the pre-shift books; (3) De Leon did not issue citations for inadequate pre-shift or on-shift examinations, which he was obligated by law to issue if he believed those standards had been violated; (4) De Leon's inspection of the power center entry and inby working section found WCC to be in full compliance of the mine's MSHA-approved roof control plan; (5) roof conditions within the Kentucky No. 9 Coal Seam can and do change quickly; (6) upon scaling the piece of draw rock subject to the Citation, no additional roof support was needed in the affected area; and (7) abatement of the condition took approximately 3 minutes. Resp. Br. 6-7.

power entry had last been dusted, and he admitted[18] at the hearing that the area around the 9008 substation could have been rock dusted on the third shift and since the last pre-shift examination had occurred. *Id.* (citing Tr. 143-45).

As also noted, Respondent contends that De Leon's assumption that the substation would have been examined under an additional on-shift examination for the working section was factually and legally incorrect. Resp. Br. 8. Section 75.2 defines "working section" as "[a]ll areas of the coal mine from the loading point of the section to and including the working faces." Inspector De Leon could not definitively state where the substation was in relation to the loading point, while Mr. Ray testified without hesitation that the substation was located one crosscut outby the working section and the next person required under normal mining to be in the substation area would be the *pre-shift* examiner for the following shift. Resp. Br. 8; Tr. 138-39, 171-72, 177-78.

Respondent alternatively asserts that, even if the violation is affirmed, the Secretary's version of the likelihood of injury, and the S&S and negligence determinations should be rejected. Resp. Br. 9. The Secretary failed, it contends, to support the claim that the fracture was not recently formed. In this regard, it criticizes the Inspector's failure to assess whether overburden was the cause of the loose draw rock. Further, the Inspector conceded there are a multitude of rapid creators of loose or separated draw rock, which rapid creator sources he failed to investigate. According to the Respondent, the Inspector should have evaluated "weather, air moisture, mine temperature and heat, including heat generated by the substation." *Id.* at 9-10. The Court would observe that, if an inspector were to do all of the items on the Respondent's "wish list," a single citation's issuance would take an entire day to provide sufficient information for the Respondent. This is both wildly impractical and unnecessary.

Continuing with its views, Respondent asserts that the factual record does not support the Secretary's high negligence finding. It maintains that Inspector De Leon did not reveal any active experience with the Kentucky No. 9 coal seam, yet he opined that the condition existed for two to three shifts. Resp. Br. 10; Tr. 80-82, 100-102, 145-46, 153, 157, Ex. P-9. The Inspector admitted that the power center entry could have been rock dusted prior to the last required pre-shift examination. Tr. 137. This citation was the only one issued in the five-mile stretch Inspector De Leon spanned during his examination. Respondent stresses that it is vital to consider the size of the Dotiki Mine when evaluating its prior history with respect to the specific standard at issue. Dotiki is a huge underground mine. Resp. Br. 12; Tr. 121. For all the miles of air courses, Dotiki only had 23 finalized citations for violations of 30 C.F.R. § 75.202(a) for the fifteen-month period prior to the Citation's issuance. Ex. P-11; *see* Ex. R-17. In the one 10-foot long area where the Inspector did find an issue with the roof, De Leon never spoke to anyone about the conditions at the time of the last required examination, never determined the precise time of the prior examination, and never spoke to anyone about what the roof conditions looked like 24 hours earlier. Resp. Br. 11. Furthermore, Mr. Ray's response was more precise than the Inspector's in determining how long the condition had existed. Ray believed that the loose draw rock could have developed in a matter of seconds and he testified that there was no way of pinpointing an exact time that the condition began. Tr. 169-70, 174.

[18] As the Court notes *infra* at n. 21, Respondent inaccurately characterizes Inspector De Leon's testimony here as an "admission."

Regarding the S&S designation, Respondent asserts that the dispute in testimony over the location of the separated rock does not change the end result, which is that a miner's actual exposure to the specific area over which the draw rock was hanging would be minimal to non-existent under continued normal mining operations. Resp. Br. 14. De Leon repeatedly referred to an "area" without clarifying whether this "area" was beneath the draw rock at issue or the entry in which the 9008 substation was located. *Id*. This area is not the high traffic area that Inspector De Leon made it out to be, for miners do not eat their lunches between the rectifier and the substation, and they would not crawl over the power lines between the rectifier and the substation to reach their lunch spot. Tr. 148-150. Furthermore, mechanics are not in this area "all the time" and De Leon conceded that a mechanic only does a "once-over" around the box. Tr. 150-51. Mr. Ray described the condition as existing between the substation and the coal rib within the entry. Tr. 165-67. He explained that under normal mining conditions, the only people likely to travel to the substation would be the pre-shift examiner or a mechanic in the event of power trouble. Resp. Br. 16; Tr. 171-73.

Respondent's Reply Brief raises three areas of contention. Although the Respondent makes clear that it is not contesting the type of injury that could be expected (i.e. lost workdays or restricted duty), nor the number of persons affected (i.e. one), it does challenge the likelihood of injury (i.e. that it was reasonably likely) and the S&S designation and negligence (high) designations. Resp. Reply Br. 2.[19]

Respondent also takes issue with the Secretary's assertion that the 'lost work days' designation should be *upheld, if not increased*, as an attempt to enter a post-hearing amendment or have the Court unilaterally increase Box 10B of the Citation. Resp. Reply Br. 3 (citing Sec. Br. 11). Respondent, unsure of the intent behind the Secretary's argument, objects if the Secretary is seeking to amend the injury box from lost workdays or restricted duty to permanently disabling or fatal or to have the Court to make such a change on its own. Either way, Respondent objects to an upward designation of that aspect of the gravity. Resp. Br. 3. As to the former interpretation of the Secretary's remark, the Respondent, citing the decision of another administrative law judge, notes that judge held there that, as no formal motion to amend was filed by the Secretary, and as the issue was not tried, expressly or impliedly, and since the Respondent did not have a fair opportunity to defend against the issue, the attempt to amend the citation was rejected. Webster also cites to *Mechanicsville Concrete*, 18 FMSHRC 877, 879 (June 1996), where the Commission reversed the decision by the administrative law judge to add an S&S designation.

[19] Respondent further contends that the Secretary miscalculated the penalty assessment, without the special assessment, at $3,224.00, when the figure would have actually been $2,902.00 based on 30 C.F.R. § 100.3(f). Resp. Reply Br. 12. Such claims are no longer material, as the Court is to assess any civil penalty based upon the statutory criteria. Part 100 is not applicable once a matter goes to hearing.

Interestingly, the Court notes that in that *Mechanicsville* decision, *it was the Secretary* who was objecting to the judge's new designation. While the Commission found that the judge overstepped his authority by his *sua sponte* action to add the S&S designation, it upheld that judge's decision to increase the penalty four-fold. Penalty determinations on the Commission's part are bounded by the proper consideration of the statutory criteria and the deterrent purpose of such penalties.

The Court does not view the *Mechanicsville* decision as instructive here. The Commission pointed out in that case that the Mine Act expressly provides the Secretary with the authority to designate a violation as S&S. It noted that the Commission judges are not authorized representatives and therefore do not have authority to charge an operator with violations of Section 104. It concluded that to allow a judge such authority would be to grant that judge prosecutorial discretion, an action that would usurp the Secretary's role. 18 FMSHRC 877, 880.

However, the matter here is fundamentally different from that addressed in *Mechanicsville*. As noted, the Secretary has urged the change as a possible outcome, but beyond that, the subject of the challenge is simply whether the record supports that the type of injury could be listed as "permanently disabling" and/or "fatal." Just as the evidence of record in a given case could support a judge's finding that "no lost workdays" would be the likely injury, that the injury was "unlikely" or "highly likely" or that a matter was *not* S&S, the Court is free, assuming the record evidence supports such a finding, to find that the injury in a given case could be "permanently disabling" even though initially marked by an inspector with a lesser expected injury. Such findings do not involve usurping the Secretary at all. Indeed, though not a prerequisite, here the Secretary urges that it be considered and the Inspector in his testimony of record stated that he could well have designated the expected injury to be more serious than he marked on the citation. Webster did not object to the Inspector's testimony on this and it had a full opportunity to challenge the Inspector's revisiting of the injury to be expected. The foregoing stated, Respondent has lost sight of the fact that, ultimately, the Inspector's testimony was that although he could have marked the citation permanently disabling, he thought lost workdays "was fair." Tr. 104. Accordingly, as that was the only testimony on the extent of injury that could occur, that carries the day for that finding.

Discussion

In addition to the Court's previously expressed observations and comments, the following additional conclusions are expressed here.

Violation of 30 C.F.R. § 75.202(a)

Section 75.200, which is derived from Section 302(a) of the Mine Act, 30 U.S.C. § 862(a), and the related standards within Subpart C – Roof Support – are all part of the mandatory safety standards of central importance in the crucial regulatory area of roof control in underground coal mines. *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987). With respect to the particular requirements in section 75.202, that roof and ribs "be supported or otherwise controlled," this standard is expressed in general terms so that it is adaptable to myriad roof

condition and control situations. *Id. See, generally Kerr–McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981).

As expressed above, the Commission evaluates alleged violations of roof standards under Subpart C, Roof Support, Section 75.200 *et seq*, such as the Citation at issue here under Section 75.202(a), under the "reasonably prudent person" test articulated in *Canon Coal Co.*, 9 FMSHRC at 668. In *Canon Coal*, the Commission stated that "[q]uestions of liability for alleged violations of this broad aspect of this standard are to be resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the standard seeks to prevent." *Id.* (citations omitted). "Specifically, the adequacy of particular roof support or other control *must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard*." *Id.* (emphasis added). The Commission stated that "the reasonably prudent person test contemplates an objective—not subjective—analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue." *Id.* (*citing Great Western Electric Co.*, 5 FMSHRC 840, 842–43 (May 1983); *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983)).[20]

The Commission has recognized that the various factors, bearing upon what a reasonably prudent person would know and conclude, include accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine. *BHP Minerals Int'l, Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996). The reasonably prudent person test must be based on conclusions drawn by an objective observer with knowledge of the relevant facts. *U.S. Steel Mining Co.*, 27 FMSHRC 435, 439 (May 2005) (quoting *U.S. Steel Corp.*, 5 FMSHRC 3, 4-5). It follows that the facts to be considered must be those which were reasonably ascertainable prior to the alleged violation. Moreover, the test must be applied based on the totality of the factual circumstances involved, not just those which tend to favor one party or the other. *Id.* (quoting *Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992)).

Here, the parties do not dispute that Inspector De Leon and Mr. Ray observed a large piece of draw rock suspended from the area above the substation. Respondent does contend, however, that the mere observation of draw rock, in need of scaling, during the course of an inspection does not establish a violation of 30 C.F.R. § 75.202(a). Resp. Br. 6. As noted, it is Respondent's position that the Secretary's case is not predicated upon objective facts, but rather, upon Inspector De Leon's subjective determinations.[21] It further argues that the Secretary has

[20] The Commission reiterated this interpretation in *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990), wherein it stated that "in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."

[21] Among the litany of Inspector De Leon's "subjective determinations" with which Respondent takes issue, Respondent contends that "De Leon never took any steps to objectively determine when the power entry had last been rock dusted and, at hearing, admitted the area around the 9008 substation could have been rock dusted on the third shift and since the last pre-shift examination had occurred." Resp. Br. 8

failed to rely on objective facts that were reasonably ascertainable *prior* to the alleged violation, as the Inspector failed to conduct an objective inquiry regarding the state of the roof conditions at the time of the prior pre-shift examination. Resp. Br. 7. However, it is the Court's view that the Respondent's refrain that there is a lack of "objective facts" in the Secretary's case mischaracterizes the nature of the evidence adduced and applied to the reasonably prudent person test. The Court disagrees with the Respondent's characterization of the evidence and does not find the Inspector's observations and testimony to be incompatible with the objective inquiry. To the contrary, Inspector De Leon's visual observations of the loose rock's size, weight and appearance, coupled with his 25 years of experience in the mining industry and personal familiarity with this area of the Dotiki Mine, establish this violation under Section 75.202(a).

While the Court must engage in an objective inquiry when applying the reasonably prudent person test, this does not restrict its considerations solely to undisputed facts. Inspector De Leon's failure to inquire about the state of the roof prior to the MSHA inspection does not negate the weight of his visual observations, his years of experience with mine roof conditions, or his personal history with this area of the Dotiki Mine under the reasonably prudent person test. Respondent's efforts to discredit the information upon which the Inspector acted when making his determinations do not authorize this Court to disregard this testimony from the analysis. Rather, the Court must evaluate whether the conclusions Inspector De Leon drew as an objective observer on January 10, 2011 correlated to those of a reasonable person familiar with the mining industry when presented with such conditions. An objective observer such as Inspector De Leon could make determinations based solely upon the observations and information gained through his sensory and personal experience without deviating from or undermining the reasonably prudent person standard.

When applying the reasonably prudent person standard in the roof fall context, the Commission has emphasized that the Secretary must produce evidence that objective signs existed prior to the roof fall that would have alerted a reasonably prudent person that there was a hazardous condition. *Canon Coal Co.*, 9 FMSHRC at 668. Inspector De Leon discerned, based in part on his years of specialized experience in examining mine roofs, that the break in the roof had occurred two to three shifts prior to the last pre-shift examination. Tr. 99. He substantiated this determination with his observation that rock dust had gathered in areas that would have been black if the break were fresh. *Id.* He noted that mining dust was intermixed with the rock dust

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(citing Tr. 143-45). This reference to Inspector De Leon's "admission," however, is an exaggeration of his testimony. Inspector De Leon's response regarding the possibility that the area had been rock dusted since the last pre-shift examination reads:

> Q: Rock dusting could have been performed in that belt entry after the last required pre-shift from 4:00 a.m. to 7:00 a.m. Correct?
> A: Could have happened, yes.
> Q: You just don't know one way or another.
> A: Right.

Tr. 145. Agreeing to a possible scenario, as Inspector De Leon did here, is more accurately characterized as a concession, not an admission.

such that it was not a freshly solid white color that would have indicated recent application. Tr. 153. Furthermore, the Inspector informed that if the fracture had recently formed, the area would have shown "telltale signs" such as coal sloughage off the ribs or popping and cracking sounds from the roof settling under the overburden. *Id.* Each of these observations constituted an objective visual sign that existed prior to the inspection and would have alerted a reasonably prudent miner to take additional steps to prevent an accident. In addition, the Court agrees with the Secretary that Inspector De Leon did not need to know the exact time of the last pre-shift examination prior to his inspection, because his finding that the condition had existed for at least two to three shifts was based upon his objective observations combined with his years of mining experience.

Respondent has noted that the Inspector did not issue a citation for an inadequate pre-shift examination in this area, despite finding in the Citation that the condition had existed for two to three shifts. Resp. Br. 11. The issuance of such an additional citation, however, is not a *sine qua non* precondition, the lack thereof which would preclude the Court from determining the validity of the Citation at issue here. The visual observations and years of experience that contributed to Inspector De Leon's decision to issue the Citation exist irrespective of his decisionmaking process regarding the issuance of an inadequate pre-shift examination citation. This same reasoning likewise applies to Respondent's contentions about the Inspector's failure to issue a citation for an inadequate on-shift examination.

Inspector De Leon's personal history with the Dotiki Mine is another objective factor that adds to the aspects associated with the violation of Section 75.202(a) under the reasonably prudent person standard. De Leon was familiar with the roof conditions around the No. 3 Unit power entry area of the Dotiki Mine, for he had accompanied another MSHA inspector on an E02 inspection in this same area one month earlier on December 14, 2010. Tr. 114, 154. During this December 14 inspection, he observed rock hanging similarly to the rock at issue here in the same power entry. Tr. 114. He then spoke with the operator about additional measures that need to be taken to control the roof around the power boxes. Tr. 154. Respondent argues that Inspector De Leon did not have active mining experience with the Kentucky No. 9 coal seam. However, the Inspector's experiences at Dotiki one month prior to issuing Citation No.8499036 indicate his timely familiarity not only with this coal seam, but also with the very area of Dotiki at issue in this case.

Given the credible objective signs Inspector De Leon observed, the Court credits his finding that the hazardous condition had existed for at least two to three shifts prior to the MSHA inspection. As such, Webster could have reasonably ascertained this condition prior to Inspector De Leon's examination and taken steps to support or otherwise control the roof to protect persons from hazards related to falls of roof.

It is noted that there is a dispute in the testimony regarding the location of the cited, large, loose rock. As noted, whereas Inspector De Leon marked on his sketch in his inspection notes that the rock was protruding over a miner walkway, Mr. Ray believed the loose rock's location was further away from the power sources and miner traffic. *See* Tr. 105-107 (De Leon testimony), 164-167 (Ray testimony); Ex. P-9, p.8. Respondent argues that Inspector De Leon gave a vague description of the "area" which failed to pinpoint the precise location of the loose

draw rock that he denoted in his sketch. Resp. Br. 14-15. The Court disagrees with this characterization of the Inspector's testimony as vague, for he specifically denoted that the rock was hanging between the substation and the rectifier and protruded over a miner walkway. Tr. 88-89, 152. Inspector De Leon was confident in the notes he made on the day the citation was issued, and these notes included his sketch of where the condition was located. Tr. 150. In contrast, whereas Inspector De Leon corroborated his testimony with the notes he recorded on the day of the inspection, Mr. Ray relied solely on his memory to indicate the location of the fractured rock. Tr. 174. Furthermore, Mr. Ray conceded on cross-examination that the Inspector would have no reason to inaccurately report the rock's location in his notes recorded at the time of the MSHA inspection. Tr. 175. The Court therefore credits Inspector De Leon's testimony over that of Mr. Ray, regarding the location of the separated rock between the unit substation and rectifier in his sketch and its proximity to power sources and the miner walkway.

Respondent further argues that the area between the rectifier and the substation was not "high traffic" as the Inspector asserted, for miners do not eat their lunches in that area and mechanics only do a "once-over" around the power box. Resp. Br. 15; *See* Tr. 148-151. First, it was never Inspector De Leon's testimony that miners would eat lunch under the rock; he asserted from the outset that the walkway through which miners would pass to reach their lunch spot was located under the loose rock. Tr. 97. Furthermore, to perform a "once-over" around the power box still requires a miner to enter the area, albeit for a presumably shorter period of time. Even assuming the walkway underneath the rock was not a major thoroughfare for miners, this area was not completely cut off from miner access. Respondent acknowledges that mechanics and pre-shift examiners did travel through the area between the rectifier and substation where the rock was hanging to access the power center entry. Tr. 171-173. This ongoing miner presence in the area contributes to the reasonable likelihood that the hanging rock would result in an injury.

Significant and Substantial

The S&S terminology is taken from Section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to "significant and substantial," i.e., more serious, violations. 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. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

For the reasons discussed *supra*, the separated draw rock suspended from the immediate roof constitutes a violation of Section 75.202(a), a mandatory safety standard. Furthermore, the discrete safety hazard is the risk of a roof fall. Citation No. 8499036 therefore satisfies the first two requirements of the *Mathies* test.

Despite Respondent's contentions that the Secretary has not established the third prong of the *Mathies* test, the size of the loose rock and its proximity to power sources and miner pathways has led this Court to the opposite conclusion. Inspector De Leon attributed his S&S designation to (1) the size and weight of the loose rock and (2) the rock's proximity to miner walkways and power sources. Tr. 104, 109. With an estimated area of 10 feet long by 4 feet wide and a weight of about 2,500 lbs., this separated rock was both heavy enough and large enough to fall on its own and result in an injury-producing event. The damage the rock caused to power sources as it was pulled down with the support of timbers illustrates the extent of harm that was possible had the rock fallen in an uncontrolled manner. *See* Tr. 147.

Given the size and weight of the fractured rock and its proximity to the ongoing miner presence through the area, it is reasonably likely that this rock would have fallen during the course of continuing mining operations and caused an injury-producing event to a miner either working in or passing through the area, thus satisfying the third prong of *Mathies*. Accepting, as Respondent does, that the injury would reasonably be expected to result in lost workdays or restricted duty, such an injury constitutes a reasonably serious injury, meeting the fourth prong under the *Mathies* test.

Negligence

The Court finds that Respondent either knew or should have known about this violation of Section 75.202(a) in the No. 3 Unit of the Dotiki Mine at the time of Inspector De Leon's examination and that there were not mitigating circumstances.

Negligence is defined as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d) (2011). Under the Mine Act, "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety and health of miners and to take steps necessary to correct or prevent previous hazardous conditions or practices." *Id.* Moderate negligence exists when "the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances," while high negligence is when "the operator knew or should have known of the violative condition or practice, but there are *no* mitigating factors." *Id.* (emphasis added).

As noted above, the Court credited Inspector De Leon's testimony that the separated rock had existed for at least two to three shifts prior to his examination, a finding supported by the Inspector's visual observations of the rock, the surrounding conditions, and mine dust accumulations in the immediate roof. Tr. 99. Unlike a fresh crack, here the condition was covered in rock dust, indicating that it was not a recent development. Inspector De Leon also noted that other "telltale signs" of a recent break, such as coal sloughage from the ribs or popping sounds emanating from the roof, were not occurring during his inspection. *Id.*

Furthermore, Mr. Ray's testimony that conditions in the mine roof can change within a matter seconds was a general statement about immediate roof conditions; this testimony was not an assertion that the loose rock did in fact break within minutes or seconds before De Leon's inspection. Tr. 175.

Inspector De Leon's trip to the Dotiki Mine on December 14, 2010, one month prior to issuing this citation, placed the operator on notice of the need to tend to its roof conditions in that area of the mine. Not only did Inspector De Leon participate in an E02 inspection on that day where he noticed loose rock conditions in the same power entry area, but he also spoke with the operator and offered suggestions for ways to control the roof before placing power boxes in those areas. Tr. 114. The break in the roof on January 10, 2011 therefore could not have blindsided the operator, as this same issue had arisen within the past month. The mine had also been issued a number of citations for the same standard over the past 2 years, which included twenty-three (23) finalized citations for violations of Section 75.202(a) in the fifteen (15) month period prior to the Citations issuance. Resp. Br. 12; Ex. P-11. Although that section is a broad standard, it is a relevant consideration which is applicable to the issue it covers: protection from falls of roof, face and ribs.

Civil Penalty Assessment

Section 110(i) of the Mine Act confers upon the Commission the authority to assess civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of violation.

It is well-established that the Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1288-89 (Oct. 2010) (citing *Cantera Green*, 22 FMSHRC 616, 620 (May 2000)). In determining the amount of the penalty, neither the judge nor the Commission is restricted by a penalty recommended by the Secretary. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). However, such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in Section 110(i) and the deterrent purposes of the Act. *Cantera Green*, 22 FMSHRC at 620.

The Court has considered the six penalty criteria set forth in Section 110(i), and concludes that a civil penalty to $9,800.00 is appropriate under the terms of the Act. Respondent had a documented history of violations of 30 C.F.R. § 75.202(a) prior to Inspector De Leon's issuance of Citation No. 8499036 on January 10, 2011. The Secretary offered evidence that Respondent was cited for violations of this standard thirty-eight (38) times at the Dotiki Mine in the two years prior to this Citation, twenty-eight (28) of which were during the preceding twelve months. Sec. Br. 14; Ex. P-11; Tr. 114. Respondent clarified that only twenty-three (23) violations of this standard were finalized in the fifteen months prior to the Citation's issuance. Resp. Reply Br. 13; Ex. P-11 at 2. The Court has taken that into consideration. Despite

Respondent's efforts to distill this information and place it in the context of a mine with hundreds of miles of air courses, 23 violations within a fifteen month timespan is not a negligible figure, regardless of the size of the mine. These finalized violations, coupled with Inspector De Leon's testimony that he spoke with Dotiki operators about roof control problems in the same area of the mine one month prior to the issuance of this Citation, weigh into this Court's penalty assessment analysis.

The Court additionally finds that this penalty assessment is proportionate to the size of Webster County Coal. Respondent asserted at length the large size of the mine albeit in the context of finding in the single 10-foot hazardous condition. Resp. Br. 11; Tr. 121. Prior to the hearing, Respondent stipulated that the proposed penalty of $9,800 for this Citation would not affect Webster County Coal's ability to continue in business. Sec. Br. 3.

For the reasons stated above, Citation No. 8499036 was significant and substantial, reasonably likely to contribute to an injury, and the associated negligence was high. The gravity has been discussed at length in this decision. Respondent acted in good faith in its efforts to abate the Citation, as Assistant Safety Director Jimmy Ray took immediate steps upon encountering the fractured roof to remove the hanging rock.

ORDER

Within 40 days of this decision, Webster County Coal is ORDERED to pay a civil penalty in the total amount of $9,800.00 for the violation identified above. Upon payment of the civil penalty imposed, this proceeding is DISMISSED.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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