

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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January 2, 2014

SECRETARY OF LABOR, MINE SAFETY	:	<b>CIVIL PENALTY PROCEEDING</b>
AND HEALTH ADMINISTRATION (MSHA),	:	
Petitioner,	:	DOCKET NO. KENT 2012-1214
	:	A.C. No. 15-18854-291171
	:	
v.	:	
	:	
LIGGETT MINING, LLC,	:	Mine: Liggett #3
Respondent.	:	

**DECISION**

Appearances: Paige I. Bernick, Esq., Office of the Solicitor, U.S. Department of Labor,  
Nashville, Tennessee, for the Petitioner

James F. Bowman, Midway, West Virginia, for the Respondent

Before: Judge Moran

**Introduction**

On May 24, 2011, Respondent’s Liggett No. 3 mine experienced a significant roof fall at the intersection of a crosscut and an entry. The roof fall dimensions were approximately 25 feet by 25 feet, with a depth, or thickness, of some 8 feet. Following an investigation by MSHA, Liggett was cited, on May 25, 2011, for an alleged violation of 30 CFR § 75.202(a), the safety standard requiring, as pertinent here, that where persons work or travel, roof must be supported or otherwise controlled to protect persons from hazards related to such roof falls. The Citation in issue, No. 8350111, also asserted that the violation was significant and substantial (“S&S”) and the result of moderate negligence. Liggett challenged the violation itself, the attendant gravity and negligence claims and the penalty sought by MSHA. For the reasons which follow, the Court affirms the citation and the associated special findings, and imposes a \$10,000.00 (ten thousand dollar) civil penalty.

## Findings of Fact

### Testimony of Inspector Hensley

MSHA Inspector Jerry Hensley has over 30 years of mining experience, as well as six years' experience as a coal inspector with MSHA. Tr. 12, 18-20. On May 24, 2011, around 1:30 p.m., Respondent Liggett Mining called in a roof fall accident. Tr. 23. The fall occurred in the intersection of the mine's No. 5 entry with the No. 4 right crosscut. Tr. 21-22. Inspector Hensley arrived at the mine at around 4:30 p.m. that day to conduct an E08 accident inspection at the location of the roof fall, which was in the mine's active 003 mechanized mining unit (MMU) section. Tr. 23-24. Argus Brock, the Inspector's acting supervisor, and trainee Tommy Wright accompanied Inspector Hensley on this investigation. Tr. 23-24.

Upon arriving at the mine, Inspector Hensley went to the mine office, where he spoke with Dayshift Superintendent Jack Calloway and Safety Director Gene Fisher. Tr. 24. Following their conversation, he entered the mine and went directly to the 003 section where the roof fall had occurred. Tr. 24-25. Mr. Hensley recalled that Gene Fisher and John Simpson accompanied him into the mine. Tr. 25. Once they arrived at the 003 MMU, the Inspector conducted an imminent danger run and found no dangers present. Tr. 25. He then went to the rock fall area itself, which had occurred "in the intersection where the No. 4 right crosscut had been cut into the No. 5 heading." Tr. 26. Due to the potential dangers in the area, the Inspector was not able to get an exact measurement of the rock fall, but he recorded his estimates of its size both in his notes and in the citation he later issued. At the hearing he recalled those estimates, stating that the fall "appeared to be about 25-feet long and 25-feet wide and it may have been about 8-feet high the best that we could tell." *Id.*<sup>1</sup>; *See also* Ex. P-1; Ex. P-2, p. 4.

The area around the roof fall was dangered off by the time Inspector Hensley reached the area as he approached through the No. 4 right crosscut. Tr. 34.<sup>2</sup> He noted the presence of draw rock which he would later learn from Liggett roof bolter Joey Brock had fallen prior to the roof fall and was next to the spot of the roof fall at the intersection in the No. 4 crosscut. Tr. 35, 91. He also noticed two 8-foot rope bolts in the same area where cribbing was installed. Tr. 35. Inspector Hensley could not determine whether the rope bolts were installed before or after the roof fall. Tr. 36. To the Inspector's knowledge, the mine's roof control plan did not require the installation of these rope bolts at the time of the fall. *Id.*

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<sup>1</sup> Due to some ambiguity as to what the 8 feet *high* measurement was describing, at the Court's urging, and without objection from the Respondent, the Secretary obtained a post-hearing affidavit from Inspector Hensley, further explaining the measurement. In that affidavit Inspector Hensley stated that he was describing that "the thickness of the rock that fell out was approximately 8 feet." Therefore, the "8-feet high" reference did not describe the distance from the floor to the roof after the fall. Roof bolter Joey Brock estimated the *height of the roof* in this area prior to the fall was between 6 and 7 feet from the ground. Tr. 145. Roof bolter Brock's testimony, as it referred to the roof *height* does not conflict with the Inspector's testimony about the thickness of the material which fell. The Court, upon consideration of the testimony, finds that the thickness of the roof fall material was approximately 8 feet.

<sup>2</sup> The only two means of accessing the roof fall area were to travel in from the No. 4 right crosscut or from the No. 5 entry. Tr. 47-48.

After checking the roof fall area, the Inspector checked “the roof and really all over the section for about five crosscuts outby the section, from the section face outby the section about five crosscuts,” finding that, except for the area of the roof fall, the roof and ribs otherwise “were in good shape.” Tr. 26. Upon reaching the surface, Inspector Hensley called aside roof bolter Joey Brock,<sup>3</sup> for a private conversation. Brock had bolted the intersection and No. 4 crosscut in the days before the roof fall. Tr. 27. As it unfolded at the hearing, what was discussed during their conversation is in dispute, with Mr. Brock and Inspector Hensley offering different accounts. Inspector Hensley recalled: “[Joey Brock] informed me that when they had taken the roof bolt machine into the 4 right crosscut that from 18 to 24-inches of draw rock had fell in that crosscut, and that they actually had to push the draw rock over into the No. 5 heading so that they could bolt that, cut a culvert, cut into that No. 5 heading.” *Id.*; *See also* Tr. 91.

According to the Inspector, in addition to encountering this draw rock prior to the fall and needing to push it aside,<sup>4</sup> Joey Brock also told him that while he was bolting the roof in the days prior to the roof fall “they encountered cracks in the roof up to 8-feet.” Tr. 27. Inspector Hensley recorded this account in his notes from May 24 concerning his interview with Joey Brock about the roof fall. Ex. P-2 [5/24/2011], at p.6. The contents of Inspector Hensley’s conversation with roof bolter Brock, as reflected in his notes from May 25<sup>th</sup> record:

Roof bolter, Joey Brock, stated that 18 inches to 2 feet of draw rock had fallen from the roof when the 4 right crosscut was cut into the No. 5 entry before the cut was bolted. Mr. Brock stated the rock had been pushed through the unbolted cut into the No. 5 entry, so that it could be bolted. He said, during the bolting process, he encountered cracks in the roof at least 8 feet in the roof. Ex. P-2 [5/25/2011], p. 3.

Inspector Hensley was sure about the accuracy of his conversation with Joey Brock: “I had the conversation with him the evening of the 24<sup>th</sup>, and I wrote these notes on the morning of the 25<sup>th</sup>. I had an accurate recollection of what was said...What is in my notes is exactly what occurred.” Tr. 75.

The Inspector explained that the presence of draw rock prior to the May 24 roof fall was significant, as it indicated that “there’s something going on in that top, especially when you’ve got 18 to 24-inches. A lot of times you’ll just have a small scale; but in this instance Mr. Brock said they had 18 to 24-inches, so that’s going to signify that you do have a problem in that roof in that area.” Tr. 29. The cracks Joey Brock located in the roof signified that the layers of rock had separated, which was “going to weaken that roof in that entire intersection.” *Id.*

The Inspector acknowledged that the mine had followed its MSHA-approved roof control plan, but he believed that they should have done more to prevent the roof fall:

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<sup>3</sup> To avoid any potential confusion for the reader, the Court notes that, as it happens, there were two “Brocks” referenced in the transcript. Only one, Joey Brock, a roof bolter for Liggett, testified at the proceeding. Roof Bolter Brock, as noted above, was the miner who bolted the area where the roof fall occurred. The other Brock referenced in the transcript is MSHA supervisor Argus Brock, who was present at Liggett No. 3 the day following the May 24<sup>th</sup> roof fall, but did not testify. The testimony does not disclose if the Brocks are related.

<sup>4</sup> Draw rock is loose rock that occurs in a mine’s immediate roof and is either subject to fall, or, as in this case according to Inspector Hensley’s testimony, has already fallen. Tr. 55.

They took no precautions to prevent that roof fall other than their normal bolting. They did install two rope bolts to the approach from the 4 right crosscut and two roof bolts to the approach in No. 5 heading, but they did nothing in that intersection, which is an area where you would have had the greatest present danger, you've got the most exposure because it's a more wide open space. Tr. 50.

The Inspector explained that the 20 by 20 foot intersection is an area that requires particular attention because it is the greatest area that is not supported by coal and therefore the best support is needed. Tr. 50-51. In the Inspector's opinion, the 18 to 24-inches of draw rock,<sup>5</sup> which Joey Brock saw fall while he was roof bolting in the No. 4 right crosscut on or around May 23,<sup>6</sup> should have alerted the mine that there was a problem with the roof in this area. Tr. 51-52. Brock was the only person with whom Inspector Hensley spoke who mentioned the 8-foot crack in the immediate roof. Tr. 58.

After his conversation with Joey Brock around 6:30 or 7:00 p.m. on May 24, Inspector Hensley spoke with Jack Calloway before exiting the property.<sup>7</sup> He notified Mr. Calloway that "we would probably be issuing some citations on that fall." Tr. 61. The following morning, after consulting with his supervisor, Argus Brock, he issued Citation No. 8350111 for the mine's failure to properly support the roof under 30 CFR § 75.202(a). Tr. 63, 103. The Inspector marked the negligence as "Moderate" and, under the "Gravity" section of the citation, the likelihood of an injury was listed as "reasonably likely," with such an injury, were it to occur, marked as fatal. The gravity section also identified the violation as "Significant and Substantial."

Inspector Hensley offered examples of the additional steps Liggett should have taken to avoid this violation:

When they encountered the draw rock and pushed it through that cut and then [Joey Brock] started to bolt that cut and he also encountered the cracks in the roof of up to 8-feet—remember at this time they are just installing 5-foot grouted bolts—you immediately have got to go to either longer bolts, rope bolts is what most people go to; or you may install jacks and cribs or collars or something like that. Tr. 56.<sup>8</sup>

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<sup>5</sup> While the 18 to 24-inch measurement referred to the thickness of the draw rock, Joey Brock did not specify the length or width of this rock when he spoke with Inspector Hensley. Tr. 55. Inspector Hensley explained that "[Joey Brock] didn't give me any measurements on [the length and width], but it was big enough to where they couldn't get the roof bolting machine into place. They had to have another machine come in and push that draw rock over into the No. 5 heading so they could get their roof bolter in the unbolted cut, so that they could bolt that cut." *Id.*

<sup>6</sup> Inspector Hensley estimated that, given the amount of progress miners had made in other entries, Joey Brock would have discovered the fallen draw rock around May 23, about one day prior to the roof fall. Tr. 52-53. While he was not sure that the progress made in the Nos. 1, 2, 3, and 4 entries had been made after Mr. Brock encountered the draw rock, he explained that "normally you try to keep all entries pretty much even across normally." Tr. 54.

<sup>7</sup> At this time, the 103(j) order that Argus Brock issued around 3:30 p.m. was still in effect. Tr. 60. Inspector Hensley modified this to a 103(k) order after conducting his accident assessment. *Id.*

<sup>8</sup> A roof bolter will know whether he has hit a crack in the roof while roof bolting if the steel bolt jumps slightly or hangs in the crack. Tr. 57. Mine examiners will take a tape measure and insert it in the crack to determine the size of the crack. *Id.*

Despite these options for additional roof support, Inspector Hensley noted that instead “the only thing that I could see that they had done, which didn’t actually [a]ffect the fall early itself, is they had put two rope bolts in that No. 4 right entry and two rope bolts in the No. 5 heading.” Tr. 58. He found these efforts to support the roof to be insufficient because “in that greater potential danger area, there was actually nothing done except the normal bolting.” Tr. 59.<sup>9</sup> Aside from those four rope bolts, Inspector Hensley could not establish that the roof in the area of the fall had been supported by cribbing or any other supplemental support. Tr. 63. He added that the rope bolts were “incorrectly placed to actually [a]ffect that intersection where the fall was.” *Id.*

Regarding the S&S designation, for Inspector Hensley in his view the condition created a roof fall hazard that could result in serious injury to the people traveling through the area. Tr. 64. The Inspector referenced both the high volume of miners and the frequency of their travel through this intersection as contributing to the hazard:

[Y]ou have people traveling and working through there all the time during the day. That’s where the majority of your activity in your mines is [] on the section, itself, and that’s normally where most of your people are at. So you’ve got the people going in and out of there all the time, and you’re subject to crushing injuries from the roof fall especially of that magnitude. *Id.*

The amount of mining activity, the number of people who would normally travel through that area as part of that activity, and the inadequate roof support informed the Inspector’s opinion that a roof fall that would crush or even kill people was reasonably likely to occur. Tr. 64-65. He stated that “this amount of rock is probably almost always going to be fatal.” Tr. 67.<sup>10</sup> The Inspector added that, given the exposure, “it was reasonably likely that that accident was going to involve an injury; and it was reasonably likely to me that...the injury expected would be of a serious nature . . .” *Id.* The Inspector opined that when Joey Brock encountered the draw rock and 8-foot cracks while roof bolting, those conditions brought about a reasonable likelihood that the roof would fall. Tr. 68-69. He further believed that the condition had existed for at least one day “[b]ecause of the extent of mining that had taken place and . . . [the time] when...the actual call came in.” Tr. 69. He agreed that the condition was obvious because the bolters would have had to move the draw rock in order to bolt the crosscut. *Id.*

The Inspector marked that, due to the extent of the rock fall, two people would be affected by this condition. Ex. P-1; Tr. 67.<sup>11</sup> His notes indicated that, based on the number of

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<sup>9</sup> Inspector Hensley opined that those rope bolts “probably...would have been done before they cut the 4 right crosscut into that 5 heading.” Tr. 59.

<sup>10</sup> The Inspector also recalled that, while working as a mine foreman, a “small piece” of draw rock “probably about 4-foot thick and a couple feet wide, maybe 2 of 3-feet in length” fell and hit his coworker on the ankle, to the point where he could not walk correctly or work after that incident. Tr. 62. Compared to this, the Inspector concluded that the injuries that could be expected from the May 24 rock fall were such that “if you get this much rock on you, you’re probably and almost definitely not going to survive it.” Tr. 62-63.

<sup>11</sup> At hearing, Inspector Hensley drew a sketch detailing the location of the roof fall and the placement of the cribs and timbers, which were erected next to the roof fall along both the No. 4 right crosscut and then along the No. 5 heading. Ex. P-4; Tr. 33.<sup>11</sup> He stressed that the location of the roof fall was in an area where miners were actively

miners working in the area, 10 persons could be affected by traveling through the area. Ex. P-2 [10/25/2011], p.6; Tr. 108. He elaborated that “most of the time when you’re mining coal, you’re going to have at least two people at the miner, maybe three, maybe four. And when you’ve got roof bolters in that area, you’re going to have at least two.” Tr. 67. In this area of the mine, miners would be traveling through both on foot and on machinery. Tr. 65. During the mining process, both the miner operator and the shuttle car operators would be in the area. *Id.* After the mining process had finished, roof bolters would work in the area, two of whom would operate the double head roof bolter machine. *Id.* Given the noise that roof bolting machines produce while running, Inspector Hensley noted that miners might not be alerted to any warning sounds from the roof before it falls. Tr. 65-66. Pre- and on-shift examiners would also be exposed to this hazard. Tr. 66.

Regarding the moderate negligence designation, the Inspector believed that the draw rock and cracks indicated problems with the roof that should have alerted the operator to take more steps to prevent the accident from occurring. Tr. 69-70. When Joey Brock encountered the draw rock, Inspector Hensley noted that he would have had to bring another machine into the area “to push that draw rock through this intersection so it can be bolted.” Tr. 63-64. The Inspector concluded that under such circumstances “there’s no way the foreman could not have known that that rock was in the intersection. It had to be moved.” Tr. 64. The Court agrees with this observation. Inspector Hensley further expressed that, from his own mining experience, if a roof bolter encounters cracks in the roof, he informs his foreman. *Id.*<sup>12</sup> Inspector Hensley therefore could not envision a situation in which the foreman would have been unaware of the bad roof conditions in the area. *Id.* Since the cracks were present before the cut was bolted, the operator should have taken further steps to examine the roof more closely and then added more support to the area. Tr. 70. Aside from complying with its MSHA-approved roof control plan, the only other mitigating circumstance Inspector Hensley could recall was that two rope bolts were installed on each approach to the area. Tr. 72. He was unsure, however, whether these additional rope bolts were installed before or after the roof fall. Tr. 72-73.

On cross-examination, Inspector Hensley conceded that he found no violations of the mine’s approved roof control plan when he conducted his nonfatal roof fall accident investigation on May 24, 2011. Tr. 76. When he arrived at the location of the roof fall, the cribs and timbers were in place, although it was his belief that both had been set after the fall. Tr. 79-80. No one told Inspector Hensley during his pre-inspection meeting before entering the mine that the rock fall had been timbered, cribbed, and dangered off<sup>13</sup> prior to the rock fall. Tr. 88.

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mining at the time of the fall. Tr. 37. During the normal mining process, miners would be in the entry doing dusting, clean-up, and conducting examinations. Tr. 38. In addition, if miners decided to cut the No. 5 heading, there would also be people cutting the coal, hauling the coal, and hanging the curtains, and if a cut was removed, then roof bolters would also be in that area. *Id.* Management would also travel through this area. Tr. 50. Given the number of people who would be passing through or working in this section, Inspector Hensley felt that this condition created a significant potential exposure to miners. *Id.*

<sup>12</sup> The Inspector did not believe Respondent conducted an adequate examination of the area. Tr. 71. He explained, “I don’t believe that they would have left that top like that and exposed those people to that type of danger without taking some sort of steps to prevent it.” *Id.* He did not issue a citation for a failure to conduct an adequate examination, however, because he did not think he could substantiate it. *Id.*

<sup>13</sup> To danger off or crib off an area does not necessarily prevent a roof fall, as these measures are only used to prevent people from going into the area. Tr. 120. Furthermore, a roof control plan is a minimum requirement; if an operator encounters adverse roof conditions that require additional support, the operator “is required to put additional support in those areas to prevent accidents from happening.” Tr. 120-121.

The Inspector concluded that the cribbing had been installed after the roof fall and based this conclusion on his experience that normally when cribbing is installed before a roof fall, this “would have been the first thing you would have been informing the inspector.” Tr. 120.

### **Testimony of Dayshift Superintendent Jack Calloway**

Jack Calloway has worked at Liggett Mine No. 3 for about 12 years, where he has held the position of dayshift superintendent for the past 6 to 7 years. Tr. 124. Testifying about this matter, he stated that at around 6:30 a.m. on May 24, 2011, underground foreman Lonnie Couch contacted him about “some roof working or inadequate roof in the No. 5 entry, [which] he wanted [Calloway] to come look at it. [Calloway] told him to danger it off until [he] got there to look at it.” Tr. 125. While checking test holes, Couch had located a shift in the test hole that prevented him from running a tapeline into the hole. Tr. 126, 134.

Thereafter, at around 8:00 a.m., a state inspector arrived at the mine and Calloway went with the state inspector to check the roof. Tr. 127. Around 8:30 a.m., Calloway directed that the area be dangered off and timbers were set on both ends of the intersection, on the No. 4 right side and No. 5 entry side. *Id.* At this time, the roof was “dribbling” pieces of rock from a quarter to a half-dollar size. Tr. 128. The state inspector was satisfied with the mine’s actions and he did not issue any citations. Tr. 128, 169.

When the roof fall then occurred, at around 11 a.m., Mr. Calloway noted that the area had been tagged off, coal production had halted, and “[e]veryone was aware of what was going on.” Tr. 129. Because of those actions, he did not believe there was any likelihood of a miner being injured from the conditions he observed during that shift because all miners were warned to stay out of the area. *Id.* He stated that the intersection of the No. 5 entry was supported by 5-foot blue bolts fully grouted and 10-foot rope bolts. *Id.*<sup>14</sup> He further recalled that the No. 5 intersection had been roof bolted three to four shifts prior to the fall. Tr. 130. Contrary to Inspector Hensley’s testimony that Mr. Calloway was present at the pre-inspection conference, Mr. Calloway contended that as he had been in the midst of a shift change he had no opportunity to inform the Inspector about what had occurred in the section. Tr. 131. Accordingly, Mr. Calloway testified that he was unaware of any problem with the roof in the No. 5 entry until the morning of the fall. Tr. 131, 135. He also noted that nothing in the pre-shift or on-shift examination reports indicated any problem with this area of the roof. Tr. 131. Thus, it was his view that this condition could not have caused an injury to any miner because they located the problem and addressed it before anything could happen. *Id.*

Mr. Calloway acknowledged that he did not take notes on May 24 or May 25, 2011. Tr. 134. When asked if there were any more measures he could have taken prior to the roof fall, he responded that they could have “cribbed the center of it all the way through the break and up the heading” in order to preserve the airway. Tr. 132. Aside from those measures, Mr. Calloway could think of no other safe and prudent measures he could have taken prior to the roof fall on May 24. Tr. 135-136.

### **Testimony of Roof Bolter Joey Brock**

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<sup>14</sup> While confident in his notes reflection that the rope bolts measured 8 feet, Inspector Hensley also acknowledged that he could be mistaken and they could have in fact measured 10 feet. Tr. 102.

Mr. Joey Brock has 12 years of mining experience and has worked as a roof bolter for Liggett Mining for the past four years. Tr. 138. He testified that, on May 22, 2011, he bolted the No. 5 entry on the No. 3 MMU in the face area where the No. 4 right crosscut intersects to the No. 5 entry but noticed no problems with the roof at that time. Tr. 143, 149.<sup>15</sup> The following day, May 23, he bolted the No. 4 crosscut leading into the intersection and again saw no cracking or other adverse problems with the roof in this area while drilling on that day. Tr. 141-143, 149-151. He did not observe any cribbing installed in this area of the mine prior to the roof fall. Tr. 151.

Although he recalled talking to inspectors after the roof fall on the evening of May 24, there is a direct conflict in the testimony between Mr. Brock's recounting of the conversation and that provided by Inspector Hensley. Mr. Brock denied discussing roof problems with the Inspector. Tr. 152. When asked about how he responded to questions about whether he noticed adverse roof conditions or cracking prior to the roof fall, Mr. Brock stated that he "told them, no, while [he] was bolting the punch through and the intersection that [he] had not observed any roof conditions." Tr. 144. In addition, Brock stated that he "told [Inspector Hensley] that while [he] was bolting the place where the fall was, that [he] observed no cracks, no problem with it at all. [He] had all of [his] bolts anchored, and [he] didn't see no problems with it." Tr. 152.

On cross-examination, Mr. Brock agreed that he installed cable bolts<sup>16</sup> in the intersection and in the entire No. 5 entryway. When asked whether the installation of these bolts was part of the mine's roof control plan, Mr. Brock responded that he was "told by my supervisor that we were going through a place that had low—not a lot of coverage over the top of us, so we were just taking extra precaution[s] ..." Tr. 146. He did not take notes concerning bolting either the intersection or the crosscuts prior to the roof fall, nor did he take notes from his conversation with Inspector Hensley on May 24. Tr. 147. Thus, his testimony was based on his recollections of the events.

### **Testimony of Safety Director Gene Fisher**

With 25 years' experience in the mining industry, Gene Fisher has worked as a safety director for 12 of these years. Tr. 155-156. He has been employed by Liggett Mining and its parent company, Southern Coal Corporation, for over three years. Tr. 155. Fisher was present at the Liggett Mine on the evening of May 24, following Inspector Hensley's investigation. Tr. 157. Contrary to Inspector Hensley's testimony, Mr. Fisher stated that he did not speak with Inspector Hensley before the accident investigation, but he did converse with MSHA supervisor Argus Brock. *Id.* It was his testimony that he traveled with Argus Brock down to the area of the

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<sup>15</sup> When drilling the mine roof, roof bolter Brock explained that he will check for cracks and loose rock. Tr. 139. Similar to Inspector Hensley's testimony, Brock also stated that the steel drill will jump or one will otherwise feel a crack in the roof when encountered while drilling. *Id.* When installing 5-foot fully grouted resin bolts, Mr. Brock will drill a 7-foot test hole; when installing 8-foot cable bolts, he drills 10-foot test holes. *Id.* During May 2011, Mr. Brock asserted that he only used 10-foot cable bolts, which he also used prior to the May 24 roof fall. Tr. 140. Safety Director Gene Fisher also asserted that 10-foot cable bolts were the shortest bolts present on the mine site. Tr. 162.

<sup>16</sup> Roof bolter Brock also referred to cable bolts as rope bolts. Tr. 146. The witnesses used these two terms interchangeably throughout the transcript.



fall, and that he told Brock that the area was timbered off prior to the fall, but that the cribs were set after the fall. Tr. 157-158. Aside from the roof fall, Fisher did not find any adverse roof or rib conditions in the area. Tr. 158.<sup>17</sup>

At the time of the roof fall, the Liggett Mine had been in operation for between 6 to 7 years and 9.2 miles of mining had been performed. Tr. 160. The roof fall on May 24, 2011 was the only roof fall occurrence Mr. Fisher could recall in his three years at Liggett. *Id.* In the two years preceding the roof fall, MSHA had issued five roof control citations at the mine, two of which were S&S. Tr. 168. Aside from section foreman Lonnie Couch's reports of adverse roof conditions on the morning of the fall, Mr. Fisher received no prior notifications from the pre- or on-shift records of problems with the roof. Tr. 161, 166. Fisher stated that the purpose of an approved roof control plan is to control adverse roof conditions and otherwise provide safe mining operations. Tr. 156. However, he noted that roof control plans cannot prevent roof falls, and adverse roof conditions can occur even when a mine exceeds its roof control plan. *Id.*

Contrary to his testimony at the hearing, Mr. Fisher also sent a signed letter to FMSHRC,<sup>18</sup> dated August 23, 2012, regarding the May 24, 2011 roof fall, which stated that "[t]he roof was discovered to be deteriorating approximately 18 hours prior to the fall. At that time this area was timbered off and danger ribbon hung." Ex. P-6, p.3; Tr. 191. Mr. Fisher agreed that he wrote and signed the letter, but at the hearing took the position that his notes were wrong: "I'm assuming my notes are incorrect. If I wrote this at a later date or the first date, this could be incorrect versus this (indicating), but now I'm not sure. I can't say either one of them are correct now." Tr. 192.

### **The Secretary's Arguments**

The Secretary asserted at hearing that not only did Respondent encounter faulty roof conditions and not take proper steps to address the area, but also contended that, had the roof fall not occurred, Respondent would have continued mining in these areas despite encountering hazards in the roof. Tr. 45. The Secretary contends that the Respondent violated Section 75.202(a) when it failed to address the roof conditions encountered, by failing to meet the requirements of the "reasonably prudent person" test, as articulated in *Canon Coal*, 9 FMSHRC 667, 668 (April 1987). Sec Br. 6. Although roof bolter Brock denied encountering adverse roof conditions in or near the intersection prior to the May 24 roof fall, he did testify that he bolted in that area around May 22 and again on May 23. *Id.*; Tr. 148-51. The Secretary urges the Court to credit Inspector Hensley's testimony over that of roof bolter Brock. In this regard it points to the Inspector's conversation with roof bolter Brock in which he learned that Brock had encountered draw rock and cracking in the roof in the days before the fall. Sec. Br. 6-7.

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<sup>17</sup> Mr. Fisher provided typed, undated notes that articulated his objections to this Citation and Respondent's representative repeated those same objections during the hearing. Ex. RX-1; Tr. 166. He first drafted the notes in handwritten form. Ex. RX-7; Tr. 179. He testified that he wrote out these notes on or about May 25, 2011, and then cleaned them up and typed them out before submitting them to MSHA. Tr. 180-81.

<sup>18</sup> At the hearing, the Secretary referenced the letter that Gene Fisher wrote to MSHA. Tr. 191. Exhibit P-6, however, indicates that this letter was in fact addressed to the Federal Mine Safety and Health Review Commission. While this discrepancy in the intended recipient does not alter the substance of Mr. Fisher's letter, the Court notes that it was addressed to the Commission.

In addition to this admission, the Secretary also asserts that the intersection's proximity to the outcrop line notified the mine of weakening roof conditions. The Secretary presented this as an additional basis for employing close scrutiny to those conditions, noting that roof bolter Brock testified that his supervisor advised him of the need for extra precautions to be taken in the area. *Id.*; Tr. 146. Given the geological factors that the roof bolters encountered, a reasonably prudent miner would have installed additional roof support, such as cribbing, jacks with beams across the entry, and/or longer bolts in the area. Sec. Br. 9. The Court does not adopt this second basis advanced by the Secretary because the testimony of Inspector Hensley does not support it.

Regarding the Inspector's evaluation of the violation, per his citation, the Secretary urges upholding Inspector Hensley's S&S determination, maintaining that there was a reasonable likelihood that the hazard contributed to -- a roof fall -- would result in a serious injury to at least two miners. Sec. Br. 14. The mine's use of insufficient roof support in the areas where draw rock and cracks were observed increased the likelihood of a roof fall, while the proximity of this area to the working face posed a significant risk to workers there. *Id.*

Finally, the Secretary contends that Inspector Hensley's moderate negligence designation is proper as the mine should have known that more support was needed in the right crosscut connecting to the No. 5 entry, given the conditions encountered. Sec. Br. 15. It is reasonable to presume that the foreman would have been alerted to the draw rock that had fallen in the intersection. *Id.* As noted, as a separate argument, the Secretary also maintains that the Respondent should have been on notice that the roof needed more support as the mining was reaching the outcrop area. *Id.* In this regard, it notes that roof bolter Brock testified that his supervisor instructed him to take extra precautions in the area. *Id.* As also noted, the Court finds that the evidence of record does not support the claim that the proximity to the outcrop area was a factor.

### **Respondent's Arguments**

Respondent argues that Liggett's compliance with its approved roof control plan evidences its ability to control the hazard. Liggett not only followed, but exceeded its roof control plan by installing one extra roof bolt in each row of roof bolts. Resp. Br. 3, 10; Tr. 84. It maintains that the roof was adequately supported in the No. 5 entry from May 22, when the area was first roof bolted, and remained so, through May 24 at 7:00 a.m. when the roof began to show signs of deterioration. Resp. Br. 10. Regarding the gravity of the violation, Respondent argues that the area was dangered off, timbered, and cribbed to prevent exposure to miners. Resp. Br. 8. The examiner discovered the hazardous roof conditions prior to the shift, and this early discovery meant that miners were not exposed to the hazard. Resp. Br. at 11. Respondent notes that anomalies in the roof can be unexpected and even uncontrollable, but the mine's compliance with its roof control plan, its discovery of the adverse condition prior to a mining shift, and its protection of miners by warning them of the danger and dangering off and setting timbers and cribbing in the area, effectively controlled the hazard. Resp. Br. at 11.

### **Discussion**

The Court finds that the Secretary established a violation of Section 75.202(a), and also upholds Inspector Hensley's gravity determinations regarding the injury being reasonably likely to occur, that the evidence supports the significant and substantial characterization, and that the

negligence involved was moderate. However, upon applying the six statutory criteria set forth in Section 110(i) of the Mine Act, for the reasons set forth herein, the Court has reduced the civil penalty to \$10,000.00.

### **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), by employing 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)).<sup>19</sup>

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. L.L.C.*, 27 FMSHRC 435, 439 (May 2005) (quoting *U.S. Steel Corp.*, 5 FMSHRC 3, 4-5 (1983)). 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)).

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<sup>19</sup> 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.”

Inspector Hensley recorded in his investigation detailed and timely-made notes of the events that transpired after the roof fall on May 24, 2011. His May 24 notes relate that he spoke privately with Liggett roof bolter Joey Brock, who had bolted the intersection and surrounding area in the days preceding the fall. Ex. P-2 [5/24/2011], p.6. Inspector Hensley's notes made the next morning, May 25, elaborate upon Brock's statements to the Inspector the day before. These notes disclose that Brock saw cracking in the roof and that 18 to 24 inches of draw rock had fallen from the roof in the No. 4 crosscut. The draw rock was of an amount that it first had to be pushed aside before additional cutting could occur in the No. 5 heading. Ex. P-2 [5/25/11] p. 3; Tr. 27. Inspector Hensley recorded the substance of his conversation with roof bolter Brock while the events were still fresh in his mind. In contrast, neither Joey Brock nor Jack Calloway took notes in the aftermath of the roof fall; rather, in their testimony at the hearing, they relied solely on their memories to recall events that occurred two years earlier. Tr. 147; Tr. 134. Under the circumstances, and considering the Inspector's notes about his conversation with roof bolter Brock taken very near to the time at which he spoke with the roof bolter about the roof support issues, Brock's denial of the conversation is not viewed to be as credible as Inspector Hensley's recounting.

Although Safety Director Gene Fisher took notes after the roof fall, these notes were not dated and they do not provide a substantive counterpoint to the information Inspector Hensley gathered. *See* Ex. RX-1, RX-7. Furthermore, Mr. Fisher wrote in his letter addressed to FMSHRC on August 23, 2012 that the roof conditions began to deteriorate approximately *18 hours prior* to the fall. Ex. P-6; Tr. 191. As that 18-hour time frame, establishing Liggett's awareness of the deteriorating conditions, supports Inspector Hensley's investigatory conclusions, Fisher was left in an awkward position, having to deny the accuracy of his own notes. Tr. 192. Mr. Fisher's letter thus presents a major problem for the Respondent's contentions about the time the adverse conditions were first discovered in the mine. *See* Sec. Br. 11. Given the sequence of events, the Court cannot credit Mr. Fisher's subsequent testimony regarding the moment that management first became aware of the roof problem nor accept his effort to divorce himself from his notes.

Based upon the Inspector's more reliable testimony, the Court agrees with the Inspector's opinion and Secretary's position that the mine should have taken additional measures to support the roof prior to the fall. When a miner is confronted with cracking and draw rock, such as roof bolter Brock encountered around May 22, Inspector Hensley stressed that "you immediately have got to go to either longer bolts, rope bolts is what most people go to; or you may install jacks and cribs or collars or something like that." Tr. 56. He elaborated upon the additional precautions that Liggett could have taken to prevent a roof fall: "They should have installed either the cribbing. They could have installed jacks with beams across the entry. They could have put in longer bolts. Normally that would be rope bolts, and they did none of those things." Tr. 58. Instead of taking any of these extra precautions, the only thing the Inspector noticed was that they had placed two rope bolts in the No. 4 right entry and two rope bolts in the No. 5 heading. *Id.* He noted that these efforts were insufficient because the placement of these bolts was not in the intersection itself, and "in that greater potential danger area, there was actually nothing done except the normal bolting." Tr. 58-59.

The Respondent has pointed out that the mine installed an additional roof bolt to each row of bolts, and also installed four 10-foot cable roof bolts, and that neither of these actions were required by the roof control plan. With those actions, Liggett maintains that the roof was

adequately supported until May 24<sup>th</sup> when, at 7:00 a.m., the roof first showed signs of deterioration. While acknowledging that the roof fell four hours later, at 11:00 a.m., Liggett asserts that its additional bolting, as described above, and its recognition of the roof hazard and the endangering off of the area, translates into compliance with standard. Resp. Br. 10-11. However, as set forth in this decision, the Court does not agree with Liggett's contention about the time frame of the discovery of the problem, nor that it had done all it could to address it.

The Court further concludes that both the cribbing and the timbers were installed after the roof fall. The witnesses each tended to agree that the cribbing was set after the roof fall. Tr. 63, 120 (Inspector Hensley); Tr. 132, 135 (Jack Calloway acknowledged that they could have installed additional cribbing in the intersection "all the way through the break and up the heading"); Tr. 150-151 (Joey Brock did not observe any cribbing installed in that area at any time prior to the fall); Tr. 158 (Gene Fisher told MSHA Supervisor Argus Brock that the cribs were set *after* the fall). There is, however, a dispute as to when the timbers were set in the area. Inspector Hensley opined that the timbers were set after the fall, while Safety Director Fisher asserted that they were set prior to the fall. Tr. 79-80 (Hensley); Tr. 157-58 (Fisher). Jack Calloway testified that they timbered the area and then endangered it off prior to the fall, around 8 a.m., after the state inspector arrived. Tr. 127. The Court credits Inspector Hensley's determination, which is also supplemented by the state inspector's notes that the cribs *and* timbers were both set after the fall: "During inspection on 5-24[,] roof fall occurred in 5 heading intersection last open cross cut area was checked *then* cribbed and timbered out by fall and endangered off." Ex. RX-2, p. 3 (emphasis added).<sup>20</sup>

Accordingly, for the foregoing reasons, the Court credits Inspector Hensley's testimony regarding the events of May 24, 2011. Given the weight of this testimony, the Court holds that the Secretary has met its burden in establishing Respondent's violation of Section 75.202(a) per the requirements of the reasonably prudent person test.

In its brief, Respondent proposes a test for determining whether a violation occurred that does not fully coincide with Commission precedent. As noted, for violations of roof control standards, the Commission applies the reasonably prudent person test, as articulated in *Canon Coal*. However, the Respondent argues that the test in this case "should be was the approved roof control plan followed [;] if so were there any adverse roof conditions that indicated additional supplemental roof supports were needed when the initial roof supports were installed [; and finally], how effective has the approved roof control plan been in protecting miners?" Resp. Br. 12. Respondent's interpretation would alter the *Canon Coal* test to coincide with its own argument that the mine followed its approved roof control plan and is therefore shielded from liability. The applicable test, however, does not hinge upon whether an MSHA-approved plan was adequately followed, but whether a reasonably prudent person familiar with the mining industry would have taken additional measures beyond those in the plan. Roof control plans are minimum requirements; a mine's compliance with its approved roof control plan does not

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<sup>20</sup> The size of the cable bolts installed in the area was also disputed. Inspector Hensley recorded that the mine used 8-foot cable bolts, while the Respondent's witnesses each asserted that the mine uses 10-foot bolts, thereby indicating additional roof support. Tr. 139-40. The Court views this dispute between the claim that 8-foot cable bolts were installed versus 10-foot bolts to be a distraction which is not critical to resolving whether the standard was violated. The outcrop issue is another distraction, because the impact of this geological location is merely speculative. The mine was not mining in the no-mining zone, nor did this event occur in the no-mining zone. This decision is focused on the conditions encountered prior to the fall and must be limited to that area.

necessarily insulate it from liability in the event of a hazardous roof condition or roof fall. Additional steps must be employed where, as here, the evidence of the roof conditions so demonstrated their need. The hazardous conditions, as identified by Inspector Hensley, and as conceded to him as having been present, as per his interview of the roof bolter who had firsthand knowledge of those conditions, were encountered. Given those encounters, Respondent failed to take the efforts that a reasonably prudent person familiar with the mining industry would have taken when faced with such circumstances.

As Inspector Hensley was the more credible of the witnesses, the Court finds that Respondent violated Section 75.202(a). The draw rock preceding the fall was significant and the mine therefore should have reacted sooner than it did. The activity in the roof presented a very hazardous condition and a reasonably prudent person familiar with the mining industry would have taken additional measures to control this problem prior to the fall.

### **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). The absence of an injury-producing event when a cited practice has occurred does not preclude the determination of S&S. *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)).

The Court sustains Inspector Hensley’s S&S finding. The first two elements under *Mathies* were plainly established. For the reasons discussed above, the roof fall that occurred in the Liggett No. 3 Mine on May 24, 2011 constituted a violation of Section 75.202(a), a mandatory safety standard. Second, the discrete safety hazard is a roof fall, which, in this instance, occurred.

Respondent’s primary challenge to the S&S determination involves whether the Secretary established the third prong of the *Mathies* test. Although it was fortunate that no injury resulted from this roof fall, such a sequence of events does not prevent the Court from upholding Inspector Hensley’s S&S designation. Given the intersection’s proximity to active mining, coupled with the ongoing miner presence in the area, it was reasonably likely that the inadequately supported roof would result in an injury. The enormity of the fall, which measured

about 25 feet by 25 feet by 8 feet high in debris, is another significant factor. The roof area in this intersection, which showed signs of deterioration prior to the time the area was dangered off, could have injured individuals such as the roof bolters, miner operators, or shuttle car operators. Tr. 65. That no one was in fact injured speaks more to a matter of good fortune, not to the assessment of the reasonable likelihood of its occurrence.

As noted, Respondent has contended that Jack Calloway dangered off the area shortly after section foreman Lonnie Couch noticed problems with the roof on the morning of May 24 and therefore no Liggett miners were at risk of injury from this hazardous condition. These efforts, however, do not negate the credible testimony which establishes that this hazardous condition existed prior to the morning of May 24. Miners such as Joey Brock were exposed to the reasonable likelihood of a roof fall that could have resulted in a very serious injury at a time before the area was dangered off and while active mining was still in process.

Finally, given the significant amount of rock that fell from the roof, which Inspector Hensley estimated at 25 feet by 25 feet by 8 feet high, it was reasonably likely that any injury sustained from the roof fall clearly would have been of a reasonably serious nature. As Inspector Hensley remarked, it would be unlikely that a miner caught in a roof fall of this size would survive such an event. Tr. 63. Accordingly the Court sustains the Inspector's S&S finding.

## **Negligence**

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." *Id.* (emphasis added).

The Court subscribes to the Secretary's contention that moderate negligence was present, based upon the draw rock and the imputation that the foreman would have known about that condition once it was discovered by the roof bolters. Sec. Br. 5. As the Secretary points out, the roof bolter would have followed standard protocol upon locating draw rock and would have reported the condition to the foreman. Sec. Br. 15. Inspector Hensley drew from his experience as a foreman when he concluded that a foreman would have been alerted about the draw rock which was in the intersection because it needed to be removed. Tr. 64. Here, the roof bolters had to remove the draw rock in order to continue mining, and Inspector Hensley noted that Joey Brock informed him that they moved the rock over into the No. 5 heading so they could continue to cut coal. Tr. 27. Even if Joey Brock, who was not a part of management, did not inform management of the draw rock issue, his supervisor's instructions to install additional cable bolts as extra precautionary measures demonstrate management's awareness of this adverse roof condition. Tr. 146. Furthermore, Gene Fisher's letter noting that "The roof was discovered to be deteriorating *approximately 18 hours prior to the fall*" supports the Court's conclusion that the mine either knew or should have known about this condition. Ex. P-6; Tr. 191 (emphasis added).

Also noteworthy is that, despite Joey Brock's denial of any prior knowledge about this roof condition, Respondent did not dispute the Secretary's contention that the draw rock was pushed aside. If anything, in its brief, Respondent concedes the presence of the draw rock: "The draw rock had already fallen in the unsupported area of the crosscut and was not a hazard ... The theory that anytime you have draw rock a major roof fall is imminent is inconsistent with MSHA's approved roof control plans and overall scheme of supporting the roof." Resp. Br. 12. Although Respondent attempts to diminish the draw rock issue as an incidental event, the Court considers the draw rock and its extent, along with the cracking, as twin-warnings, demonstrating that they had come against a hazardous roof condition which needed to be addressed. The Court concludes that Respondent either knew or should have known of this hazardous roof condition prior to the fall. As such, the Court sustains Inspector Hensley's moderate negligence designation.

### **Penalty Assessment**<sup>21</sup>

Section 110(i) of the Mine Act confers upon the Commission the authority to assess civil penalties provided in this Act. The Court has considered the six penalty criteria set forth in Section 110(i), and concludes that a civil penalty of \$10,000.00 is appropriate upon application of those criteria. 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 finds mitigating factors were present in this case. The Liggett Mine employed an MSHA-approved roof control plan at the time of the roof fall. Inspector Hensley recalled that the mine had installed 5-foot resin grouted bolts, as well as two 8-foot rope bolts in the intersection close to the area where cribs were built. Tr. 30. He also recalled that two additional

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<sup>21</sup> Although a special assessment was proposed, the penalty in this decision is based strictly upon the evidence presented at hearing. The findings of fact derived from this evidence are then applied to the statutory penalty factors. Respondent's attempt to litigate the propriety of MSHA's decision to issue a special assessment is not cognizable in the hearing setting. Therefore, Respondent's contentions regarding MSHA's alleged motive for issuing its special assessment are not material to this proceeding. *See* Tr. 111-112.



roof bolts were installed in the No. 5 heading near the cribbed area. *Id.* Inspector Hensley did not dispute that the Liggett Mine took efforts to secure the roof in that area, which efforts exceeded its approved roof control plan. Tr. 36. For example, the rope bolts that were installed near the cribbing were not required under the mine's roof control plan. Tr. 35-36. The mine also employed an additional bolt in each row of roof bolts. Tr. 84. Furthermore, no other roof control violations were discovered in the 420-foot area around the intersection where Inspector Hensley conducted his accident investigation. Tr. 81.

After investigating the fall area, Inspector Hensley and Argus Brock examined the working section for five crosscuts outby the working section, which covered a distance of about 420-feet. Tr. 80. They found that the roof was adequately supported with no adverse roof conditions for that 420-foot span in the five entries. Tr. 81. As just noted, Inspector Hensley acknowledged that the mine exceeded its minimum roof control plan by placing five roof bolts in a row rather than the four bolts required by the plan, at least in the section he observed. Tr. 84.

The Liggett Mine's history of previous violations and its good faith efforts to achieve rapid compliance after notification of the violation also afford grounds to support a penalty reduction. The roof fall on May 24, 2011 was the only roof fall Gene Fisher could recall occurring in his three years at Liggett. Tr. 160. MSHA had issued five roof control citations at the mine, two of which were marked S&S, in the two years preceding the roof fall. Tr. 168. Inspector Hensley noted that its history of violations is about average for a mine of Liggett's size. Tr. 117. This record indicates the Respondent's history of compliance with roof control safety measures. Furthermore, the mine ultimately made good faith efforts on the morning of May 24, 2011 to control the hazardous condition, albeit those efforts should have been initiated sooner. The area was dangered off so that no miners came into contact with the intersection in the hours leading up to the roof fall. Additionally, although this condition itself was quite serious, it was isolated. Inspector Hensley did not locate pervasive roof control issues during his accident inspection; in fact, he found that the roof was adequately supported with no adverse roof conditions for the 420-foot span in the five entries outby the working section. Tr. 80-81. Given Liggett's history of compliance with roof control standards and its good faith efforts to control the hazard, as described above, a reduction in penalty is justified and the Court therefore imposes the \$10,000.00 civil penalty.

Within 40 days of this decision, Liggett Mining is **ORDERED** to pay a civil penalty in the total amount of \$10,000.00 for the violation identified above. Upon payment of the civil penalty imposed, this proceeding is **DISMISSED**.

**SO ORDERED.**

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

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