

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

December 18, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

WEBSTER COUNTY COAL, LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2013-652  
A.C. No. 15-02132-316453

Mine: Dotiki Mine

**DECISION AND ORDER**

Appearances: Latasha T. Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner  
  
Tyler Fields, Esq., Alliance Coal, LLC, Lexington, Kentucky, for Respondent

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (2012). At issue is whether the Respondent, Webster County Coal, LLC,<sup>1</sup> violated § 75.223(a)(1). That standard, titled, “Evaluation and revision of roof control plan,” provides, in relevant part, “Revisions of the roof control plan shall be proposed by the operator (1) When conditions indicate that the plan is not suitable for controlling the roof, face, ribs, or coal or rock bursts.” On January 22, 2013, the Secretary issued a section 104(a) citation, alleging that “[r]evisions to the Approved Roof Control [plan] were not proposed by the Dotiki Mine Operator when conditions indicated that the plan was not suitable for controlling the roof.” For the reasons which follow, because the Secretary did not meet his burden of proof, the citation is DISMISSED.

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<sup>1</sup> Respondent is also referred to as “Webster” and “Dotiki” in this decision.

## Findings of Fact<sup>2</sup>

Testimony began with the Secretary's roof control specialist, MSHA Inspector Ronnie Rich, who issued the citation at issue. Tr. 32. Rich completed his MSHA Inspector training in April 2010.<sup>3</sup> The inspector informed that the first roof fall comprising the Secretary's case, the fall of November 2, 2012, was attributable to material above the anchorage.<sup>4</sup> The fall's location was inby the tail piece, a particular concern because there is more miner exposure in such an area. Its dimensions were about 25 feet by 10 to 11 feet in depth. The original entry was 19 feet across. The inspector noted the roof support that Respondent, Webster County Coal, had installed at that location. At the end of his investigation, the inspector concluded that water infiltration, which posed an anchorage problem, was the cause of the fall.<sup>5</sup> Tr. 44.

The inspector then spoke about the second fall, which was also on the number two unit. That fall occurred on December 17, 2012. The mine then ceased production in the main southeast panel. After the inspector concluded his investigation, he determined that again the cause was water infiltration of the roof, the same reason for the first fall. Following the first roof fall, per a revision to the roof control plan, longer roof bolts had been installed at that location, but they still did not hold. Tr. 45. The plan revision involved more than using longer bolts — it also included the installation of T3 channel, as part of the mine's roof control approach if they encountered water inby the tailpiece. Tr. 46. The inspector opined that the revision to the plan following the first roof fall was not effective, given that a second fall occurred. Tr. 46.

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<sup>2</sup> The Parties submitted a joint stipulation, which consisted of the following: 1. Webster County Coal, LLC is subject to the Federal Mine Safety and Health Act of 1977. 2. Webster County Coal, LLC has an effect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977. 3. Webster County Coal, LLC is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge has the authority to hear this case and issue a decision. 4. Webster County Coal operates the Dotiki Mine, I.D. No. 15-02132. 5. The Dotiki Mine produced 3,363,050 tons of coal in 2012, and had 1,014,498 hours worked in 2012. 6. A reasonable penalty will not affect Webster County Coal LLC's ability to remain in business. 7. Without the Respondent stipulating to the truth of the matters asserted therein, a true copy of the citations and order at issue were served on the Respondent as required by law. Ex. 1; Tr. 13.

<sup>3</sup> This training however was only as a coal mine inspector, not as a roof control specialist. The inspector's experience *as a roof control specialist* began about four months prior to the November 2, 2012, roof fall which is a subject of this citation, and his formal training as such a specialist was not completed until after that date. Training before November 2nd was limited to his regular coal mine inspector annual re-training. Tr. 65.

<sup>4</sup> Inspector Rich marked on Petitioner's Exhibit 10 ("Exhibit P-10"), which is a map of the Dotiki mine, the cited roof fall locations, beginning with the November 2, 2012, fall. Tr. 37.

<sup>5</sup> At the location of the fall, roof support was present. This consisted of eight foot bolts, screen wire and cribs. Tr. 43.

The third fall, which occurred on January 16, 2013, was on a different unit, the number three unit in the mains. Rich's investigation of that fall revealed that several factors were involved. Roof water was again part of the problem. However, Rich couldn't figure out what else was at work and he sought assistance, calling MSHA's Technical Support division to help solve the roof control issues. Following Tech Support's visit to the mine, and its assessment and input, there was another revision to the roof control plan. Tr. 47.

Testimony then turned to the fourth roof fall. This fall was on the number four unit on January 19, 2013, and thus it occurred in yet a different area of the mine than the other three falls.<sup>6</sup> Tr. 48. The fall was in by the second dumping point, as were all the falls. In terms of exposure, 16 to 17 miners were working in the area of the fall, on both production shifts mining and loading coal. Tr. 51. In this instance, the inspector traced a continuous slip<sup>7</sup> line in the immediate roof, which followed a definite angle, going across the unit until it disappeared. Tr. 49. The inspector attributed the cause of the fourth fall to the slip, stating, "This fourth fall with the visible slip line that we saw in the immediate roof, it had a hidden slip at the top of the fall." Tr. 50. However, the inspector continued, "This visible slip line . . . [y]ou can see the roof above the top of the fall. It has a slip in it that would have been hidden until the fall." *Id.*

This comment prompted the Court to inquire: "So, by definition, the mine operator can't see a hidden slip?" The inspector agreed,

No. He cannot, but he can trace the actual slip -- and *I understand the burden of proof is on us*, but this fall was on the ground. *I know not* if it had a visible [slip] in it or not. I know it has a visible slip leading to it and out of it.

*Id.* (emphasis added). Unlike the other falls, the inspector did not attribute the fourth fall's occurrence to be due to water, admitting, "This fall threw [sic] us for a curve as far as lack of roof water." Tr. 51.

As noted, the focus of this hearing pertains to Citation 8510632, a 104(a) citation, issued January 22, 2013, citing 30 C.F.R. § 75.223(a)(1). The inspector stated that he issued the citation because Dotiki had not proposed adequate addendums to the roof control plan when the conditions indicated that it was not suitable for controlling the roof. Inspector Rich's test for determining if the addendums were adequate was that a roof fall occurred: "If they had been adequate, it probably wouldn't have fallen."<sup>8</sup> Tr. 53. The violation, which involved the fourth

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<sup>6</sup> Examining the mine map, Exhibit P-10, and its scale of 1 inch equaling 500 feet, the fourth fall was about three-quarters of a mile from the third fall.

<sup>7</sup> A "slip" refers to two joints of rock that meet. It has a definite appearance with one side being a slip and slide; it was also described as a broken rock with two joints coming together. Tr. 49.

<sup>8</sup> The inspector evaluated the violation as "reasonably likely" because of "a culmination of the other evaluations . . . due to the exposure, the amount of exposure, the results, if these revisions had not been -- been provided and approved and the unit started back running without these changes to the plan." Tr. 53-54 (emphasis added). The inspector marked the violation as

roof fall, was abated by Webster Coal making a roof control plan revision proposal, which was then accepted by MSHA.<sup>9</sup> Tr. 56.

The inspector then disclosed that after the fourth fall, and as of the hearing date in this matter, two additional falls had occurred in by the feeder. These falls occurred some eight or nine months after the fourth roof fall. As the inspector described these, “they were both dealt with. There were reasons that they fell that this couldn’t help and we obtained [further] revisions in the [roof control] plan to satisfy them.” Tr. 58-59. However, Rich was not involved in the investigation of those subsequent falls. Tr. 60.

The inspector confirmed that MSHA’s Technical Support became involved after the third roof fall and that it made recommendations concerning that fall, which were then adopted by Dotiki. Tr. 60. Approximately one day after implementing the Tech Support recommendations, the mine experienced the fourth fall, which is the subject of this litigation. Tech support did not come back to the mine following the fourth fall. As noted, the fourth fall did not involve water issues. The inspector acknowledged that the fourth fall did not involve water. Instead there was the discovery of the slip line. Tr. 61. The inspector believed that the line was visible to the mine operator. Tr. 62. Given that, the inspector was asked whether Webster Coal should have submitted a revision to their roof control plan based on the slip line, which he asserted was visible. He responded: “They could have if they wanted to . . . *I cannot say that they should have.*” Tr. 62. (emphasis added).

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permanently disabling, though at the hearing he remarked that fatal would have been a more appropriate assessment. His reasoning was that the mine employs string wire that “pings” before a fall occurs, but because the tail piece is an inherently noisy area, miners might not hear the ping, and therefore not have the audible warning of an imminent roof fall. Tr. 54. He also marked the alleged violation as S&S, but his offered reasoning simply recited the *Mathies* formula: “[I]t was a violation of the mandatory standard of the health or safety regulation and there was exposure to too many miners. It would likely or reasonably likely result in a serious injury if the anticipated event occurred.” Tr. 55. The number of persons affected was marked as one. For negligence, the inspector marked that as “moderate” based on “[t]he past falls. We had received them -- we had gotten changes to the roof control plan, revisions.” Tr. 56.

<sup>9</sup> Exhibit P-9 is Dotoki’s proposal to abate the violation; it was accepted by MSHA. The inspector stated that

the way I understand it, water infiltration, roof conditions, the whole nine yards, we’re backing up and redoing -- and redoing -- we want to redo our primary roof control. We want to go from a grade 60 bolt to a grade 75 bolt. And then it lists all the reasons in this report. It lists the load bearing capacity of each. It’s all contained in this. They allude in here that we think this may have been the leading reason for all the falls we’ve experienced.

Tr. 56.

On cross-examination, with regard to the first fall, the inspector stated that there was no supplemental support installed that he could find and he was told that there were only 8 foot bolts for the primary support. Tr. 66. However, the inspector agreed that, at that time, the absence of supplemental support was not a violation of the roof control plan, and he agreed that he did not find a violation of the roof control plan on that day. Tr. 66-67. The supplemental support that was then installed was longer roof bolts. Tr. 67. Asked whether the longer bolts actually made matters worse, in terms of causing more problems with water, the inspector would only admit, "I've had some of them cause problems . . ." Pressed, he then admitted when asked if the use of longer bolts were causing more water, "They [the bolts] were penetrating water. . . . It seemed more water came out of them." When asked if more water came out of where longer bolts were installed, he responded, "Uh- huh," which he then clarified as a "yes" to the question. Tr. 67-68.

As to the second fall, that of December 17th, which was also on unit two, the inspector agreed that the mine had moved into a different panel, dividing the two at that time. The inspector then admitted that, after that second fall, there was a meeting between Webster County Coal officials and the MSHA officials and that the two sides discussed potential roof control plan and modifications to resolve that second fall. Further, the inspector conceded that the modifications to the roof control plan that ensued were the result of collaboration between MSHA and Webster County Coal and that those efforts were designed to address the cause of the December 17 roof fall. The inspector stated that both falls pertained to water in the mine roof. Tr. 69-71.

For the third fall, that of January 16th, the inspector admitted that he could not determine the cause of the fall initially. The fall in that instance was on a different unit, the number three in the mains, and thus it was in a different area than unit two. Tr. 71-72. This was the fall for which Tech Support was called. Jim Vadimal was the MSHA Tech Support person who came to the mine. Indirectly, the inspector conceded that by having a Tech Support mining engineer come to the mine, that action would offer a level of expertise which would help address the roof problem. Tr. 73. At the conclusion of the Tech Support engineer's visit, Vadimal met with Dotiki management and offered recommendations to them. Those recommendations were then adopted, being included in the plan addendum that Dotiki submitted *and MSHA approved* on January 18th. Tr. 74.

In terms of MSHA's enforcement in connection with the four roof falls, the November 2, 2012, roof fall resulted in a 104(a) citation being issued for an alleged violation of 30 C.F.R. § 75.223(a)(1), but no roof control violation was issued then. For the December 17th roof fall, no citation was issued. As to the January 16th roof fall, which the inspector inspected the following day, no citation was issued then either. Tr. 76-77. The only citation issued for the January 19th incident was two days later for the alleged violation of § 75.223(a)(1). Tr. 77. Shown his notes, dated January 18, 2013, which stemmed from his investigation of the January 16th roof fall at the Number 3 unit, the inspector agreed those notes related to the same time of the MSHA Tech Support inspection. Those notes reflect that the inspector's (k) order was modified "to allow operator to support roof ribs per approved plan," and the inspector confirmed that his reference to the "approved plan" referred to the plan addendum, meaning the plan addendum that was approved on January 18th. Tr. 79. The notes also stated that once supported, the unit may

resume production per the addendum/plan until MSHA conducts an evaluation of the area and determines the unit is through the area. Tr.79. The inspector explained the Tech Support evaluation as follows:

Technical support and [Webster Coal's] people and [the local MSHA office] people that were with him, the meeting we had after we came outside when Mr. Vadimal made his recommendations, you-all [i.e., Webster Coal] opted to follow them. We wanted -- everyone involved wanted to make sure that this new support plan would work and that it would be completely out of this geological abnormal zone before we went back or altered the roof bolting pattern and the extra support.

Tr. 81. The Tech Support evaluation pertained only to the area of the third roof fall.

Moving to the fourth roof fall (again, the fall on January 19th), on unit four, the inspector agreed that Dotiki submitted a rehab plan for that roof fall. The inspector's (k) order included Dotiki's rehab plan in it, per his Modification-02, and he agreed that by including it in his (k) order, he was essentially accepting what Dotiki proposed for rehabilitating the fall. Resp't's Ex. 10 ("Ex. R-10"); Tr. 82-83. The rehab plan, the inspector also agreed, provided that Dotiki would be submitting a plan modification *prior* to resuming production but it had not finished the rehabilitation of the area by January 22nd, and no approval of a roof control plan had been approved by that date. Tr. 83-84. This is significant because such an approval would need to be issued before they could start production again. Tr. 84.

Turning to the cause of the January 19th fall, the inspector reaffirmed that he attributed the cause to the presence of the slip. He also referred to a "hidden" slip, "in the middle of a fall." Tr. 84. Asked if that slip could not have been visible to the mine before the fall occurred, the inspector initially attempted to evade a direct answer. Tr. 84-85. After the Court intervened, the inspector relented, answering the question when repeated: "The hidden slip, you testified under oath that that could not have been seen by the mine personnel until the fall occurred; is that correct?" The inspector responded: "That is correct." Tr. 85.

When asked about his remark that there was a visible slip that the inspector and Mr. Quisenberry<sup>10</sup> were able to trace, he affirmed that was true, adding that it was a "slip line." Tr. 85. The inspector agreed that he could not tell if the slip line was present in the area of the fall, but that one end of the slip exited the fall on both sides. Tr. 86. The inspector made no determination of when the slip line developed. He believed that it was not immediately before the roof fell out because there was rock dust covering it. Tr. 87. Though he conceded that rock dust will kick up when roof falls, he added that does not happen all the time and that in this instance it had been applied.<sup>11</sup> However, he made no mention of this in his notes. Tr. 88-89. He

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<sup>10</sup> Mr. Quisenberry's affiliation was not identified by the parties.

<sup>11</sup> As explained further herein, given that the claimed presence of rock dust was an important observation, yet not included in his notes, the Court does not find the inspector's claim about its presence to be credible. As noted below, the inspector admitted that he was thrown by occurrence of the fourth fall and that he was instructed by his supervisor to issue the citation.

also conceded that he said in his testimony on direct that “the fall threw *us* for [a] curve,” (emphasis added) but then adding that in using “us,” he was referring to himself. Tr. 89-90. His explanation for the remark was that the fall occurred in the absence of roof water, making it distinct from the previous three falls. Tr. 90.

Conflicting with the text of his own citation, the inspector stated that when he wrote the citation for the fourth fall, it was based on that event alone. His noting the three previous falls, he maintained, was included as “history.” Tr. 90. When asked, if the three previous falls had not occurred, whether he would have issued a citation for the fourth fall, alleging a violation of § 75.223(a)(1), he responded that he did not know. Tr. 91. Noting that his investigation was on January 20th but that he did not issue a citation until the 22nd, the inspector admitted that he was instructed to issue the citation by his immediate supervisor, Tim Gardner. Tr. 93. The inspector did not know if Gardner examined the January 19th roof fall, nor did he know if Gardner examined any of the four falls. Tr. 93. As Gardner later testified, he did not examine any of the falls.

Revisiting the fall of January 16th, the inspector agreed that the January 18th changes to the roof control plan were designed to address areas of abnormal geological zones. Tr. 94. Given that, when asked if the fourth fall was in such an abnormal geological zone, the inspector stated that it did not meet all of the criteria described in the plan for an abnormal zone. *Id.*

The four falls were all in the 13 seam and that seam was a fairly new development for Dotiki. Tr. 96. And, Rich conceded that, as part of the development of the coal seam, there is a learning process when mining a new seam. Tr. 96. The point is that the roof control plan is developing as the mine learns of the seam conditions. However, the inspector maintained that the plan was deficient in that it did not address the slip formation that he and Quisenberry found. Directed to his notes and his drawing of the map with a slip line identified on it, the inspector again agreed that *he did not know when the slip line developed* and that the mine *had not had falls developing from slips in the 13 seam* as far as he knew. In this connection, he agreed that the fourth fall represented the first fall resulting from a slip where there was no water infiltration. Tr. 98.<sup>12</sup>

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<sup>12</sup> On redirect, referring to the inspector’s notes, P-2 at 15, the inspector described the slip line in his drawing, noting numbers on the left side, number 38 and the black circle, which reflects the fall and that it encompassed the intersection. The dashes in the drawing reflect the slip line, as determined by the inspector and Mr. Quisenberry. The line up from 37 at about a 45 degree angle reflects the visual slip line. A hash mark on the upper corner of the left side of the black dot goes down at a 45 degree angle, depicts the visual slip. He stated that the start of the slip line was visible to the operator and the point was made that one need not wait for a roof fall to occur in order to make a revision to a roof control plan. Tr. 101-02.

The Court asked that the inspector, regarding Exhibit P-2, to mark the slip he described that he believed existed prior to the roof fall, although he was uncertain about its presence. Tr. 102-103. This newly created exhibit was marked as P-2A. Tr. 103.<sup>13</sup> The inspector then marked the exhibit with a red pen, and stated that they depicted the slip lines he saw when he came upon the site of the roof fall. Tr. 106. He described it as a “proposed slip line” because the slip line entered into areas that had not yet been mined. The Court then asked for further clarification, asking, “You can still see the slip line?” The inspector responded, “No, sir. No.” Tr. 107. He added, “That’s why I called it a visual proposed slip line.” Tr. 108. Therefore, he admitted that he was making, as framed by the Court, “a guess that the slip line continue[d] into an area that you can’t see,” stating in response, “That would be correct.” Tr. 108.

The Court then asked,

[W]hen you talk about the area that you could not see, is it equally possible that the slip line did not continue into that area? You’re saying that you -- none of us can see, right? We don’t have x-ray vision, for the use of a less articulate term, so you can’t see it; that means no one can see it. So my question is: Is it equally possible that that slip line did not continue into the area that you could not see?

Tr. 110. Although Counsel for the Secretary attempted to overcome the evidentiary dilemma by offering that the inspector was trying to draw the portions that could be seen and those that could not, the Court did not consider that a solution because “if you can’t see it, then it seems to me logically that you can’t know that, in fact, they were there; is that true?” The witness then responded, “That is true,” and his Counsel then admitted, “Right.” Finishing up this area of questioning, the Court stated: “So if you can’t know that it’s there, then it’s equally possible that it is not there; isn’t that true?” The inspector replied, “That is true.” Tr. 111. On cross-examination, Respondent’s Counsel asked if it is true that a slip is not one solid line that extends through the entire coal seam. The inspector affirmed, based on the slips he has seen, that is true, that is to say, a slip will start and stop. Tr. 112.

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<sup>13</sup> The black squares on the map reflect the pillars and therefore show the areas that had been mined out at that time. Tr. 109. The inspector marked in red the visual area of the slip line that could be seen (i.e., when he was present at the mine) and used a blue pen to mark the area that was *not* visible. Tr. 109. The areas marked in red were all the areas in the crosscuts of the entry and represented areas that had been mined and the inspector confirmed that he walked those entries and crosscuts and saw slips. Tr. 112. Regarding the pillar block between crosscut 38 and 39, one of the inspector’s markings was in error and he marked that out and initialed the mistaken area. Tr. 114.



Significantly, in the Court's view, *the inspector agreed that the mine was in compliance with the provision of the roof control plan addressing how to support slips*. Further, the inspector agreed that *Dotiki had never experienced a roof fall because of slips prior to the citation in issue*.<sup>14</sup>

Regarding the point made by the Secretary's Counsel that one doesn't have to wait for a roof fall to make a roof control plan revision, the inspector stated that he was not aware that Dotiki made other plan submissions independent of roof falls in that November 2 to January 19 period. Tr. 117.

The Court asked the inspector about the fourth roof fall and in so doing expressed its understanding of the basis for the inspector's issuance of the citation as follows:

[T]he sole reason why you issued this citation is that you believe that the mine operator should have seen this slip which you refer to as a slip line, and that . . . upon seeing that slip line prior to the fall, they should have made revisions to their roof control plan based solely upon seeing that slip line.

Tr. 104. As the inspector did not agree with the Court's summary, it then asked the inspector to "explain the basis for your determining that Webster County Coal came up short prior to the roof fall -- what conditions they should have observed which should have caused them to react to amend their roof control plan." Tr. 104. The inspector responded:

The slip line, as I called it, played a very important role in it. The direction of the slip line is what they should have recognized and it would -- if they had been in a future -- I don't know how -- some of the coal hadn't been mined yet right close to this slip and as on the map, I called it a proposed slip line, and I'm denoting the actual slips that we saw, the direction of them should have alerted Dotiki management that they were getting ready to go into a different kind of zone because of the lack of low roof water.

Tr. 105.

When the Court inquired if the sole reason that Webster should have reacted was the presence of the direction of a slip line, the inspector affirmed that was accurate. Tr. 105-06. Following up on that response the Court asked: "And it should have told them to take action based solely on that because there w[ere] no other elements such as water being a problem?" Tr. 106. The inspector responded that was his interpretation but conceded that he did not know with any certainty when the slip line first appeared. Tr. 106.

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<sup>14</sup> Amending his remark, the inspector stated that he said they had never experienced a fall without the presence of roof water. Tr. 115. Amending further still, he stated that as to those falls that he investigated, such prior slips were hidden, visible only *after* a fall. Tr. 116.

The Court also asked whether, when the inspector arrived at the scene of the roof fall and he saw the slip line, it was an essential part of his finding that there was a violation, that the slip line continued into the areas that he could not see. The inspector responded: "It played a great part in it, Your Honor. I would have to say yes." Tr. 119. To be sure that it understood his position, the Court asked whether it was fair to state "that if [he] had not made the conclusion that this slip line continued and [he] only saw the slip line that [he] could see, . . . that [he] would not have issued this citation?" Tr. 120. The Court, noting that the question was a hypothetical, emphasized that the inspector was to block out from his analysis that which he could not see and that he was to consider only the slip line that he was able to visualize. With that in mind, it asked whether the inspector still would have issued the citation. The inspector responded, "No. Because -- no." To be sure of the answer he just gave, the Court asked again, "You would not have issued this citation?" The inspector responded again, simply, "No." *Id.*

Timothy Gardner also testified for the Secretary. Gardner is an MSHA roof control supervisor. Regarding the subject of this hearing, Gardner first spoke to how a roof control plan is developed. He advised,

For a new -- a new plan -- a new mines going in, we look at other mines that was mining the same seam in that area. We try to review their last roof control plans. We try to talk to different people that had worked at them mines, try to gather as much information as we can about the mines, and in doing so, hopefully, we can make a good judgment on what the operator submits for that mine.

Tr. 123-24. He added that the onus in developing a roof control plan is on the mine operator, resulting in the submission of a plan "that should be adequate in supporting the roof and . . . any of the geological conditions that they might encounter in that area or region." Tr. 124.

The Secretary's Counsel directed Gardner's attention to Webster County Coal's Dotiki Mine and the type of geological conditions he was aware of there, and he responded that "water infiltration, water coming through the mine roof, there's slips, there's sandstone that comes down close to the --the number 13 seam, their overall immediate shell is considered to be weak." Tr. 124.

Gardner was aware of the revisions for the control plan at the Dotiki Mine pertaining to the four roof falls from November to January and he reviewed the progression of those revisions. For the first fall, he thought, they issued a citation for section 75.223(a)(1), for the roof not being adequately supported and he believed that water was the issue for that one, though he admitted "not [being] real -- sure on that." Tr. 126. He noted that the mine submitted, and MSHA approved, an addendum for additional support. He acknowledged that MSHA plays a role in plans too, in that it sends out a specialist who investigates a roof fall and tries to determine the cause. Then the mine will meet with MSHA before an addendum is provided and there is communication between the two. In arriving at a remedy, MSHA listens and tries to be reasonable. That is, he expressed that MSHA tries "to be reasonable and come to somewhere in the middle to where we feel, you know, like we're making an adequate adjustment in the roof control plan to prevent future roof falls." Tr. 127. Gardner admitted that it's not easy to figure out how to prevent future falls: "Of course, you know, if I could adequately say this is what it's

going to take, I probably wouldn't be sitting here today. I'd be somewhere else [getting rich from such prescience]." Tr. 127. Continuing with his theme that it is a collaborative effort to figure out an effective roof control plan, Gardner stated: "It's a -- it's a guess. It's a guess off history, experience or knowledge in roof control that we try to come to -- come together and we listen to the operator as well as we listen to our roof control specialist in trying to come up with a plan. And that was on the first fall." Tr. 127.

Speaking to the second fall, Gardner stated he believed they came "in to a geological conditions of, if I recall, the sandstone was dipping these areas within a certain feet of the 13 seam." Tr. 127. The operator believed that this dipping created more water infiltration and so they came up with a plan and increased their roof control plan a little bit. However, he was unable to remember exactly what steps Webster took, though he thought they increased their pillar size. In Gardner's view the mine's use of an isopach map<sup>15</sup> gave them a pretty accurate view of where the sandstone was dipping down. Tr. 128. The upshot was that MSHA did not issue a citation for the second fall. Tr. 129.

Moving then in his testimony to the third fall, Gardner described water as the chief culprit. This was the third fall on a working section and it happened only a short period of time following the second fall. That heightened MSHA's attention, prompting it to seek some help from the MSHA technical support group to come down and do an evaluation of the 13 mine seam. As noted, that group did make a visit and an evaluation. Gardner however wasn't part of that, as he was dealing with a medical issue. *Working together*, the mine and tech support concluded that an increase in the supplemental support was needed. To that end, a truss system was installed in between the rows of permanent support, and the plan involved having the support installed quicker, too. Though unsure, he thought the roof bolt length might have been increased as well. The bottom line was that together, *MSHA and the mine came up with a plan* and MSHA did not issue a citation for the third fall. Tr. 128. Gardner confirmed that the parties work together on arriving at a plan.

For the fourth fall, which, it bears repeating, is the only fall genuinely in issue, Gardner stated that MSHA did not issue a citation right away. Because roof falls are considered to be accidents, MSHA usually waits to review its specialist's investigation report. Tr. 129. Understandably, MSHA was worried that, eventually, a miner was going to be under one of these roof falls and therefore a handle had to be achieved to control these events. *He added that the mine shared the same concern*. In that regard, Webster advised MSHA that they had their corporate geologist speaking with roof bolt manufacturers as they tried to come up with a solution to stop the falls. Tr. 130. Gardner identified Exhibit P-9 as the report that Webster developed and presented to MSHA a few days after the fourth fall. This amendment to the mine's roof control plan, as characterized by Gardner, asserted that the mine was using the

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<sup>15</sup> Not expressly explained by the parties, an isopach map indicates, "usually by means of contour lines, the varying thickness of a designated stratigraphic unit," or sedimentary rock layer. Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 288, 543 (2d ed. 1997). Webster's defines an isopach as "an isoline that connects points of equal thickness of a geological stratum formation or group of formations." "Isopach," Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/isopach> (last visited Dec. 17, 2015).

wrong support system. The new plan was to use a stronger roof bolt and to increase some of the cable bolts and install them more rapidly. Tr. 131.

Gardner, speaking to the proposal's approach to the primary roof control following the fourth fall, noted that Webster would be employing grade 60 bolts (eight foot bolts) as their primary system at Dotiki Mines. Tr. 132. However, Gardner then expressed that Webster

should have come up with this when we had the third fall. Tech support was come in. That was the time we was [sic] trying to really get a handle on these falls and come up with something that would work. That was our objective when we called tech support. We're trying to come up with something to work, and we always encourage the operators to do their utmost in helping us come up with an addendum that's going to support the roof at their mines.

Tr. 134.

Regarding Exhibit P-9, Gardner acknowledged that MSHA and Webster agreed that supplemental support of the intersections be extended to the entire sections, including entries and crosscuts and that all sides agreed to continue this support through the zone of influence and then to reevaluate after conditions improve. Tr. 137-38. Gardner admitted that the changes in the roof control plan were approved on January 18th, and that the fourth fall occurred the next day. Yet, Gardner maintained that Webster could have and should have been doing a reevaluation after the first fall occurred to prevent subsequent falls. Reluctantly, Gardner agreed that the reevaluation had not occurred before the fourth fall on the 19th. Further, Gardner conceded that he never personally examined any of the four roof falls discussed during the hearing and that his knowledge was limited conversations with Inspector Rich and review of the inspector's notes. This was done as MSHA and Webster "were trying to come up with addendums" to the roof control plan. Tr. 143-44. Yet, ultimately, Gardner admitted that he instructed Rich to issue the citation in issue in this proceeding. Tr. 144.

Gardner later backed away from a claim that Webster should have gone to the grade 75 bolts after the third roof fall, instead stating that

I think I said, you know, when we had this third roof fall, we pulled out our big gun tech support and I think my reference was, you know, we were hoping Dotiki would pull out every obstacle to and let's come together and let's – let's prevent these roof falls on the working section.

Tr. 144. He conceded both that tech support recommended supplemental support and that it be installed quicker. He also admitted that tech support would have been aware of the grade 75 bolts at the time it made its recommendations. He also was aware of the grade 75 bolts at that time. Yet, neither tech support nor Gardner himself made a recommendation that Webster start using them. While the operator has the responsibility to propose such plans, it is MSHA which must approve them. Gardner admitted that MSHA would not approve a plan if it believed it was inadequate. Tr. 145.

The Court inquired further about Gardner's involvement with these falls. He conceded that, while he never went underground to view any of them, he was engaged with the amendment to the roof control plan after the first fall in that he was involved with developing the addendum to the plan and, further, that he believed that the changes then made were sufficient to deal with the problem presented with that first fall. Tr. 146. However, as to the second fall, he qualified his answer regarding whether he was satisfied with the roof control changes presented:

With the information I had, yes. And you -- when we're reviewing these, of course, we could jump out and say steel supports everywhere, but we have to be reasonable and take information given to us by our specialists and also consider what my management is telling us also. I mean, yeah, we could probably come up with a tool to stop them, but then again, *that's not being reasonable*.

Tr. 147 (emphasis added).

Nor, Gardner admitted, was his review based on a blind acceptance of what Webster Coal was telling MSHA; he had Inspector Rich and other people advising him. Accordingly, he agreed that he had firsthand knowledge through the people that worked in his office and those MSHA personnel had input into the review of the proposed changes to the plan. Tr. 147. In fact, Gardner agreed with the characterization that it was *a collaborative effort*. Tr. 148.

Gardner then added: "these falls was [sic] in four different areas. Conditions change when you move from one area to another area, so, you know, the . . . characteristics of one fall is going to be different than in another fall."<sup>16</sup> Tr. 148. Gardner attempted to rebut his own observation, adding "[b]ut this last submittal that we come [sic] together with, changing the primary support, we have had two roof falls since that time on working sections." Tr. 149. To this, the point was made again that the falls were in different areas and that MSHA had its "big gun," Tech Support, out of Triadelphia, West Virginia, come down to the mine to assess the roof control. Effectively, Gardner's response was that MSHA is limited in what it can do vis-à-vis such roof control problems: "you know, we can't -- when we're trying to negotiate these plans, we can't come up with every avenue to make sure we get it adequately supported." Tr. 149. To this defense, or excuse, depending on how one wishes to characterize it, the Court stated that it understood, but it also observed that Gardner wasn't "sitting there sitting on [his] hands so to speak." Gardner answered, "Correct." Tr. 149. Gardner then responded that, as with the prior two falls, he "was involved" with the third fall and that the remedy also had his approval. The same was true for the fourth fall. Tr. 149-50.

The government having rested, Respondent called Chris Gunn, safety director with Webster County Coal's Dotiki Mine. Tr. 153. Gunn held this position during the times involved with the roof falls discussed in this decision. Addressing the first of those falls, that of November 2, 2012, in the 13 seam, Exhibit R-1, reflects the roof control plan then in effect. Tr. 156. He explained that fall as follows: "Number two unit, we had roof water. It was coming in

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<sup>16</sup> The Court observed with regard to Gardner's point that the falls occurred in four different areas and that conditions change: "I agree. I don't know if that helps your case or hurts your case, though." Tr. 148. Gardner agreed that the locations were not next to one another. *Id.*

and, of course, when the roof water came in, it caused an intersection to give way and -- and it fell.” Tr. 156. The fall was reported to MSHA. Tr. 157. The results of the MSHA investigation were that the mine would have to submit an addendum addressing roof water in by the tail piece and how it would handle roof water from that point on. Tr. 157. Exhibit R-2 reflects that addendum.<sup>17</sup>

Exhibit R-6 is an addendum to the roof control plan of December 18th and it pertains to the December 17th roof fall. Tr. 163. That plan revision addressed sandstone dipping to less than 30 feet of the roof. The mine realized that there was a greater issue than just roof water in by the tail piece and their geologist and engineers appreciated that when the sandstone in that area would dip below 30 feet, it would cause the roof to almost turn into gravel in certain areas when the roof water would start coming in. Tr. 164. The steps taken by the mine were in

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<sup>17</sup> Gunn noted that Exhibit R-2 reflects that Webster went to a seven foot minimum bolt length. Gunn stated that it was his understanding that the mine was already installing a seven foot bolt at that time, but that it was then formally expressed in the plan. Gunn noted that the plan also spoke to the precautions to be taken when roof water was encountered, in that it addressed additional measures that would have to be seen by the section foreman or the examiner, meaning that they would have to have test holes drilled, and then examine the test holes to make sure that water was not coming in. In addition, the mine would drill test holes in adjacent intersections to make sure that water was not carrying over to an adjacent entry. Beyond that, the mine would do an additional on-shift to look this area over, checking the area, to make sure that it was not getting worse. Further, Webster would narrow the entries in these areas where it had roof water, and thereby increase the pillar size. Tr. 158. Other steps were taken as well, as Gunn described:

[W]e put a 10 foot minimum cable length bolt in here for our supplemental support option and then the crib block size, we increased that from 30 inches to 48, and the crib block size, it wasn't actually applicable to the addendum for the roof -- roof water, however, after we'd been in the 13 seam -- we started in January of 2011, you know, initially, so we realized at the end of 2012 that 30-inch crib block was too small. [This occurred] in discussion with me and Mr. Gardner, so we increased those to 48-inch length as to fit the mine height. The mine height in 13 seam's approximately 10 foot of mine height, so the 30-inch crib block were [sic] actually too small by the time you stacked them up to form a crib.

Tr. 160. These changes were not related to the November 2nd fall. Instead they were included in the addendum as additional roof control measures. Tr. 160. Exhibit R-2 reflects the letter from MSHA approving the modification on November 5th. Tr. 161. At the time of the November 5th approval, Webster had previously submitted, on October 2nd, a modified roof control plan, which was then pending. Ex. R-4. This roof control plan would supercede the then-existing plan. Tr. 162. Gunn described it as a “cleanup” of the existing plan because the mine was no longer producing coal in the nine seam. All units had ceased production in the nine seam, and Webster was minimizing the nine seam plan to only be applicable to outby areas. That plan was not approved until November 8th. Ex. R-5. The plan that was approved on November 5th was incorporated into the plan that the mine submitted on October 2nd. Tr. 163.

reaction to the second roof fall and those proposed changes were discussed with MSHA prior to its approval. Tr. 165.

Addressing the third roof fall, that of January 16th, Gunn stated that occurred on the number three unit. Tr. 166. It was for this fall that MSHA's Tech Support became involved. Tech Support's Mr. Vadimal gave guidelines that he believed would fix the problem going forward to ensure that it wouldn't happen again. His recommendations were included in the plan addendum approved by MSHA. Tr. 167; Ex. R-8. MSHA's approval was issued on January 18, 2013.

As for the fourth fall, which occurred on the number four unit on January 19, 2013, Gunn expressed:

It was a gut-wrencher because, you know, we had exhausted, we felt, everything on the previous fall, and, you know, the 13 seam was going through a hard knock here because the previous fall that was on the number three unit was in our mains, so this was the main life of mines to allow development for the rest of Dotiki.

Tr. 168. At that time Respondent was trying to figure out what to do next. The mine believed that it had addressed the roof water and the sandstone dipping and that it had thrown "the kitchen sink" at the roof control problems. With the fourth fall, the mine concluded that it had to "kind of basically go back to the drawing board and realize okay, well, . . . what can we do now different than what we've done in the previous addendums . . . we were kind of at wit's end of -- of what to do next." Tr. 168-69.

Gunn stated that the January 19th fall did not have symptoms similar to the previous three falls. Tr. 169. The Court would note that this is undisputed. Following the January 19th event, Webster submitted a rehabilitation plan. Gunn's response placed the plan in context, as he noted that there are times when a fall occurs and the mine can stop running that entry and it can timber or crib it out or flag it out, so that no one goes in the area, but there are also times when a fall occurs and the mine needs to continue use of the entry, strategically, to load out. In such circumstances, MSHA will require submission of a rehabilitation plan to ensure that the area is safe to resume production and that is what happened. Tr. 169.

Gunn spoke about the rehabilitation plan the mine submitted following the January 19th fall. Ex. R-11.<sup>18</sup> The next day, on January 20th, the mine advised that it would be submitting an approvable addendum, noting that "[a] roof control addendum will be submitted and approved *prior to resuming production* on number four sections" and then it listed the MMU numbers, MMU037 and MMU029, in the first northwest panel, which is the section where the fall on the 19th occurred. Tr. 171 (emphasis added). However, the roof control plan addendum was not approved by January 22th, which was the date that the citation involved in this case was issued.

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<sup>18</sup> The plan provided for installing cribs at different intersections, installing support and, for rock loading, the methods for extracting the rock and support through the area and ultimately to submit a roof control addendum for MSHA's approval which would then allow production to resume in the number four section. Tr. 170.

The mine was not producing coal on the number four unit when the citation was issued. At the time of the (k) order and the citation the mine was required to follow through with its rehabilitation plan and submit an addendum. The mine did submit such an addendum (Exhibit R-12) and it was then approved by MSHA (Exhibit R-13). Tr. 171-73. The mine had also submitted other plans between November 2nd and January 19th. On November 28, 2012, a plan reflected a different Fletcher-type roof bolter per a roof control specialist's conversation with Gunn. Tr. 174. This approved change came about without any citation involved. Exs. R-14, R-15. Similarly, Exhibit R-16 is another addendum to the roof control plan, bearing a December 5th date, regarding supplemental support options involving use of T3 channel bolts. These had been used at another mine, and Webster wanted to employ the idea for its mine. This was approved as well and their use also came about without any citation involved. Ex. R-17. Yet another addendum occurred on December 20, 2012, with that one involving changing the roof bolt plate size. This, too, was at the mine's initiative, not under the issuance of a citation. MSHA approved that change on January 4, 2013. Tr. 176-77; Ex. R-19.

In its post-hearing brief, Respondent fairly summed up the above information regarding Webster's voluntary efforts as follows:

In addition to the modifications to the roof control plan required by MSHA to terminate 103(k) orders resulting from the above-referenced roof falls, WCC took the initiative to submit additional roof control plan changes for MSHA's approval between November 2, 2012 and January 19, 2013. A complete roof control plan was submitted to MSHA for approval on October 2, 2012, and approved November 8, 2012. Tr. 162. R-4. That plan removed the roof control provisions for coal production in the #9 seam, but also incorporated the roof control plan addendum submitted by WCC as a result of the November 2, 2012 roof fall. Tr. 162-163. R-4. Additionally, the mine submitted proposed roof control plan addendums on November 28, 2012, December 5, 2012, and December 20, 2012, all of which were not required to terminate any manner of enforcement action by MSHA.

Resp't's Br. 6.

The Secretary's cross-examination emphasized that the burden for proposing changes and for dealing with roof control is on the mine operator. Tr. 180. However, per Ex. R-12, and the approved addendum, dated January 18, 2013, the mine stated that the falls on the number two and three sections were all related to "an abnormal geological zone." Tr. 182. That addendum stated that it would address any other abnormal geological zones projected or encountered. In response to a question posed by the Secretary, Gunn stated that the fourth fall occurred outside of the geological zone are that the mine was aware of. In the Court's view, Gunn's response was helpful to the Respondent. Tr. 184.



## The Parties' Contentions

### The Secretary's Brief

The Secretary notes that pursuant to 30 C.F.R. §75.223(a)(1), revisions to the roof control plan shall be proposed by the operator when conditions indicate that the plan is not suitable for controlling the roof, face, ribs, or coal or rock bursts. When MSHA adopted this standard, the agency noted that "any condition which indicates the plan is not suitable for controlling the roof, face, ribs, or coal or rock bursts requires that the plan be revised." 53 Fed. Reg. 2354, 2372 (Jan. 27, 1988). The Secretary invokes the rule that in interpreting and applying broadly worded standards, "the appropriate test is . . . 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." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). Looking to an administrative law judge's decision,<sup>19</sup> the Secretary contends that to prove a violation of section 75.223(a)(1), he must show "(1) the existence of adverse roof conditions at the mine, (2) that a reasonably prudent miner would have recognized the existing roof control plan was insufficient to address those negative conditions, and (3) the mine did not amend the roof control plan." Sec'y's Br. 6 (quoting *Big Laurel Mining Corporation*, 37 FMSHRC 2001, 2020 (Sept. 2015) (ALJ)).

From this, the Secretary contends that the evidence presented at hearing established that Webster County Coal violated 30 C.F.R. § 75.223(a)(1). To make this argument, the Secretary first asserts that adverse roof conditions existed at the Dotiki mine. Specifically, the mine had experienced four roof falls over a short period of time and that, after each roof fall, Webster met with MSHA and proposed revisions to the roof control plan. Thus, the Secretary contends that the Respondent was well aware that the mine was experiencing adverse roof conditions because of the four roof falls between November 2012 and January 2013. The Secretary asserts that while those roof falls occurred in four different areas, the falls still put the mine on notice that adverse roof conditions were being encountered during the mining process. Sec'y's Br. 6.

With that premise, the Secretary declares that the four falls would have caused a reasonably prudent mine operator to have recognized that the existing roof control plan was insufficient to address the negative conditions at the mine. *Id.* It notes that, according to Inspector Rich's testimony, there was a visible slip that could be traced from one end of the fourth roof fall to the other end and that the slip should have been visible to the mine operator because it was easily traced by Inspector Rich. While a mine operator cannot see a hidden slip, the operator can easily trace the actual slip by following the visible slip line. The hidden portion of the slip, which could be traced from one visible end to the other visible end, became visible after the fall occurred. From this, the Secretary argues that the operator should have been aware that a slip line was present on the unit and apparently by that fact alone, should have recognized that the existing roof control plan was insufficient to address the negative conditions created by the slip line. *Id.* at 6-7. Attempting to establish its case by actions taken following the fourth fall, the Secretary points to revisions presented by Webster County Coal after that event and that

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<sup>19</sup> Neither the Secretary, Respondent, nor this Court could find a Commission-level decision addressing the contours of the cited provision.

those revisions were then sufficient to maintain the roof while also acknowledging that the revisions thereafter limited (but did not eliminate) the future occurrence of additional roof falls. *Id.* at 7. Finally, the Secretary believes that, because the mine had a geologist investigate the conditions at the mine that caused the roof falls only after the fourth fall this apparently demonstrates that it could have taken such action beforehand. Thus, the Secretary is critical that such proposed revisions were not included in the mine's revisions to the roof control plan following the first, second, and third falls, and that they did not submit the geologist report until after the fourth roof fall occurred.

In sum, the Secretary reasserts that Webster, well aware that conditions existed at the Dotiki Mine that indicated a plan change was needed, still failed to revise the roof control plan when the conditions indicated that the plan was not suitable. *Id.* Apparently, the asserted presence of the slip line was sufficient to require Webster to proactively submit a plan change to prevent the fourth roof fall.

### **The Respondent's Brief**

The Respondent notes that, for each fall incident, it took action. The steps it took after each event are not in dispute. Turning to the fall which provoked the citation, Webster notes that the fall occurred the day after its most recent plan had been approved by MSHA. Resp't's Br. 4. It also points out that the fourth fall was very different from the falls which preceded it. In terms of establishing the alleged violation, Webster observes that while the inspector believed that a hidden slip line was present in the mine roof and the pillars, he admitted that was simply a guess and that it was equally possible that slip line did not continue into the unmined areas. *Id.* at 5. Further, the inspector conceded that in his experience slip lines can stop and start throughout a coal seam. Nor could he state definitively when the slip line first appeared in the mine. Webster also notes that when the inspector was asked if the mine should have submitted a revision to their roof control plan based on the visible slip line, he stated that they *could* have submitted a change, but did not assert that it *should* have done so. *Id.* Webster also observes that the roof control plan in place as of the time of this fall did have a provision regarding slips, and that Rich admitted that the mine was following the plan with regard to that provision. Rich was also not aware of any prior roof falls at Dotiki in the 13 seam that were caused by visible slips, when water was not a contributing factor. Rich testified that the existence of the visible slip line was an essential part of his finding of a violation in fact. Tr. 119-20. The inspector stated that, had he not made the conclusion that the slip line continued on and instead only considered the visible areas of the slip, he would not have issued the citation. Resp't's Br. 5.

Webster states that instead of immediately submitting a plan change to terminate the 103(k) order issued following the January 19th fall, it submitted a rehabilitation plan the next day, detailing the steps they would take to make the number four unit safe for normal mining operations. Resp't's Br. 5-6. However, it included in that plan a statement that the mine would submit a plan modification prior to resuming production and in that regard it points out that as of January 22nd, the date the citation in issue was issued, it had not resumed production on the number four unit. Consistent with this assertion, the inspector confirmed that the mine would be required to have an approval on that roof control plan modification before production could resume on the affected unit. Resp't's Br. 6.

## Discussion

The Secretary has contended that on January 19, 2013, the conditions preceding the roof fall on that date indicated that the roof control plan was not suitable for controlling the roof. Part and parcel of the Secretary's case was its noting that the Dotiki Mine experienced four roof falls inby the dumping point of the producing units in four different locations of the mine beginning on November 2, 2012, and ending with the roof fall of January 19, 2013. It contends that those roof conditions at the Dotiki Mine therefore indicated that the plan was not adequate or suitable for controlling the roof. While MSHA acknowledged that Webster County Coal met several times with the Mine Safety and Health Administration regarding the roof falls, and each time, a revision was made, it argues that the revisions made were not adequate. It emphasizes that it is up to the operator to propose revisions to MSHA in order to control roof conditions of the mine.

In response, it is Respondent's contention that the Secretary must establish two elements to prevail in a claimed violation of § 75.223(a)(1): The Secretary has to establish that conditions were present that indicate that the current plan was not suitable, and that the mine failed to submit proposed modifications to that plan after the conditions manifested themselves. Respondent argues that at the time of the roof fall immediately preceding the citation there was no evidence of any conditions present which indicated that the plan in place at the time was not suitable. It notes that a roof control plan proposed by Webster County Coal with MSHA's input and approval was in place for a little over one day when the mine suffered the roof fall that led to this citation. Additionally, in the time period identified by the inspector involving the four roof falls, Respondent submitted an entirely new roof control plan as well as three additional roof control plan addendums that were not submitted as a result of any citation or other enforcement action. Accordingly, it contends that Webster was diligently and prudently monitoring its roof control plan throughout the relevant time period and proposing changes as necessary. It notes that at times those changes occurred when the mine experienced a roof fall but that changes were also proposed independent of any geological event. Returning its focus on the cited event, however, it asserts that at no point did the mine fail to submit a plan modification when conditions indicated that it should do so.

In analyzing the alleged violation, it is important to keep in mind the full text of the Secretary's Citation, Number 8510632. That citation asserts:

Revisions to the Approved Roof Control [plan] were not proposed by the Dotiki Mine Operator when conditions indicated that the plan was not suitable for controlling the roof. This operation has experienced four (4) roof falls inby the dumping point of producing units in four (4) different locations from 11/02/2012 to 01/19/2013. The Dotiki Mine Operator has not proposed adequate revisions to the approved Roof Control Plan when roof conditions at the Dotiki indicated that the plan was not adequate or suitable for controlling the roof. Standard 75.223(a)(1) was cited 1 time in two years at mine 1502132 (1 to the operator, 0 to a contractor).

Accordingly, the Citation rests upon the four cited roof falls *in the attempt to establish* the claimed violation. Yet, it has been conceded that the fourth roof fall, the fall that resulted in the citation's issuance here, was entirely different from the preceding three falls and citations were not issued for two of the four roof fall events.<sup>20</sup> At the hearing, the Court inquired and the Secretary's Counsel confirmed that it would explain where the Secretary believes Webster County Coal came up short in this process, and what they should have done on a given day or time, in light of events, but failed to do so. Tr. 16.

As noted by the Court at the hearing, the triggering mechanism for § 75.223(a)(1), the cited provision, arises when conditions in an existing plan indicate that it is not suitable for controlling the roof face, ribs, or coal or other rock bursts. Under such established conditions, revisions of the roof control plan are to be proposed by the operator to deal with that lack of suitability.<sup>21</sup> The Secretary's failure to meet its burden of proof is evident on several fronts. First, its chief witness, Inspector Rich, could not state definitively that the slip line continued beyond where it was visible. The Court has found that the inspector's late assertion that rock dust was present was not credible. Also, the inspector was unable to assert that Webster should have proposed revisions to its roof control plan. The inspector, the sole MSHA hearing witness who actually viewed the falls, admitted that he was directed by a person or persons above him to issue the citation. The Secretary did not point to any provision of the roof control plan existing at the time of the fourth fall that was deficient. For example, the plan existing before the fourth fall spoke to slips, providing, in part, that "[i]f a fault or slip is running with the entry or cross cut an 8' minimum length cable bolt will be installed on each side of the fault or slip on 4' centers." Ex. R-4 at 4. The Secretary, in addition to not establishing the extent of the slip, nor the period of time it existed, did not offer any evidence that Respondent failed to comply with the plan's provisions regarding slips nor how the plan's addressing the subject of slips was not suitable.

In the Court's view, the genesis for this citation's issuance was MSHA's understandable frustration that there had been four roof falls. However, that is an insufficient basis to establish a violation of § 75.223(a)(1). That a roof fall occurred is insufficient to establish, by that fact alone, that the standard was violated. Though the cause of the fourth fall was undisputedly not related to the causes of the preceding three falls, MSHA, both through the citation and at the hearing, attempted to tie the first three falls to the fourth. In short, the Secretary may not bootstrap its way to establishing a violation by showing that there were previous roof falls when those falls were not instructive to the cause of the fourth fall. Further, it certainly was not the case that Webster was ignoring the issue. To the contrary, it was working closely with MSHA to

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<sup>20</sup> All of the falls occurred in the 13 seam, with the mining for this new seam of coal beginning around July 2011. The mine had previously been in the nine seam. By September 2012, the mine had four units, eight MMU's, operating in the 13 seam. Tr. 178. Respondent's witness Gunn reviewed the fall locations for the Court: Falls number one and two were in the number two section, fall three in the three section, and fall four in the four section. Tr. 187.

<sup>21</sup> Respondent also argued in the alternative that, should the Court find that the standard was violated, it takes issue with the appropriateness of the proposed penalty and with related questions regarding whether the alleged violation was properly designated as S&S. As the Court vacates the citation, it does not need to address the Respondent's alternative arguments.

solve the problems each step of the way. In addition, Webster established that it made changes to its roof control plan independent of citations. It is fair to state that both sides were attempting, in good faith, to control the roof.<sup>22</sup> Revealing that both parties were without an answer, even the roof control remedies suggested by MSHA's technical support office, and fully accepted by Webster, came up short a day after they were implemented.

Accordingly, under those circumstances and also by the Secretary's failure to meet its burden of proof, the Citation is VACATED and this matter is hereby DISMISSED.

*William B. Moran*  
William B. Moran  
Administrative Law Judge

Distribution:

Latasha T. Thomas, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219

Tyler Fields, Esq., Alliance Coal, LLC, 1146 Monarch Street, Lexington, KY 40513

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<sup>22</sup> It was after the fourth fall that Webster decided that the mutually agreed upon fixes to the first three falls were not sufficient.