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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. THE AMERICAN COAL COMPANY, Respondent.	CIVIL PENALTY PROCEEDING: Docket No. LAKE 2011-589 A.C. No. 11-02752-250608 Mine: New Era Mine

DECISION

Appearances: Ryan L. Pardue, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, on behalf of the Petitioner;

Jason W. Hardin, Esq., Fabian & Clendenin, Salt Lake City, Utah, on behalf of the Respondent.

Before: Judge Bulluck

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor on behalf of his Mine Safety and Health Administration ("MSHA"), against The American Coal Company ("American Coal"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Act" or "Mine Act"), 30 U.S.C. § 815. The Secretary seeks civil penalties in the amount of $57,300.00 for four alleged violations of his mandatory safety standards.

A hearing was held in Henderson, Kentucky. The parties' Post-hearing Briefs are of record. For the reasons set forth below, I **AFFIRM** two citations, as issued, and two citations as amended, and assess penalties against Respondent.

I. Stipulations

The parties stipulated as follows:

1. American Coal is engaged in mining operations in the United States, and its mining operations affect interstate commerce.

2. Prior to September 24, 2010, American Coal was owner and operator of the Galatia mine, MSHA ID Number 11-02752, which encompassed multiple operations and mines: New Era, New Future, and Galatia North mines. On September 24, 2010, the New Future mine began

operating under Mine ID Number 11-03232, and the New Era mine continued operating under Mine ID Number 11-02752. American Coal remained the owner and operator of both mines.

3. American Coal is subject to the jurisdiction of the Mine Act.

4. The presiding Administrative Law Judge has jurisdiction over the proceedings pursuant to section 105 of the Mine Act, 30 U.S.C. § 815.

5. The citations at issue herein were properly served by a duly authorized representative of the Secretary of Labor upon an agent of American Coal on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein or for any other purpose other than establishing their issuance.

6. The exhibits offered by the Secretary are authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. American Coal demonstrated good faith in abating the violations.

Tr. 14-15.

II. Background

American Coal operates the New Era mine, an underground bituminous coal mine, in Saline County, Illinois. The New Era mine employs approximately 400 workers, and produced 4,963,211 tons of coal in 2011. Tr. 19; MSHA, *Mine Quarterly Production Information*, http://www.msha.gov/drs/ASP/MineAction70002.asp (last visited June 4, 2015).

During September of 2010, MSHA coal mine inspector James D. Rusher, employed by MSHA for 33 years primarily as a mine inspector, conducted an inspection of the New Era mine. Tr. 88. At the time of the hearing, Rusher was retired from MSHA. Tr. 87. At issue in these proceedings are four citations that Rusher issued under section 104(a) of the Mine Act, 30 U.S.C. § 814(a). Three citations involve allegations that areas of the mine roof were inadequately supported, and one alleges that an accumulation of coal occurred along a conveyor belt in the mine.

III. Findings of Fact and Conclusions of Law

A. Roof Control Violations

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

In three of the four citations at issue, the Secretary alleges that American Coal violated

section 75.202(a) of his regulations.[1] The citations were issued during September of 2010 by Inspector Rusher, who determined that the gravity of the violations was "significant and substantial" ("S&S"). The S&S terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious any violation that is "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 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. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding the violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). The Secretary must prove that there is a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause an injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611, 616 (7th Cir. 2014).

Inspector Rusher also found that the violations occurred as a result of American Coal's moderate negligence. The Secretary defines moderate negligence with reference to his Part 100 civil penalty criteria, which state that a mine operator is moderately negligent when it "knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d).

American Coal's geologist, Gary Vancil, testified as to the geologic roof composition in the mine. Tr. 22-43. Vancil explained that the roof control citations were issued in the Number 6 coal seam, which is five to six feet thick, and that the mine floor consists of fire clay. Tr. 23-24. There are three types of roof rock in the seam: gray shale, black shale, and limestone. Tr. 28-33. According to Vancil, gray shale is the least competent roof material, i.e., most likely to fall; he stated that "most of the time you cut it out. You can't do [anything] with it." Tr. 33. Although black shale is more competent than gray shale, he explained, "humidity will cause it to flake off." Tr. 33. Vancil also testified that a limestone roof is "very competent," and described

[1] 30 C.F.R. § 75.202(a) states that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

it as "hard. I mean really hard. The best roof you can have. You don't get [any] scaling. You don't have to worry about your top panel." Tr. 28-29. According to him, and without contradiction by the Secretary, no roof falls have occurred in areas of the New Era mine where the roof consists of limestone. Tr. 33, 73.

1. Citation No. 8427425

a. Fact of Violation

On September 8, 2010, Rusher issued section 104(a) Citation No. 8427425, alleging an S&S violation of section 75.202(a) that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by American Coal's "moderate" negligence. The "Condition or Practice" is described as follows:

> The roof where persons normally work or travel was no longer adequately supported to protect persons from the hazards associated with the fall of the roof. The roof between the air locks in the Main East Return air course had numerous bearing plates that have deteriorated and are no longer capable of supporting the roof. The area is approximately 50 ft. in length and 20 ft. wide. The ribs are rashed out into the entry.

Ex. P-1. The Citation was terminated after the roof was adequately supported by installation of steel sand props.

Rusher explained that bearing plates are used "to help support the immediate roof to keep it from delaminating." Tr. 93. He testified that eight such plates "in the center part of the entry" of the cited area "had been there for so long that they had rusted to paper thin, and some of them fell to the floor." Tr. 91, 95-96. In fact, without conceding the fact of violation, American Coal stipulated that several bearing plates in the cited area were rusted. Tr. 65-66.

The operator argues that although several bearing plates were damaged, the integrity of the roof control had not been compromised because of the stability of the limestone roof. Resp't Br. at 11-15. Vancil testified that the limestone in this area is 24 to 28 inches thick, characterizing it as "good limestone," and opined that a roof fall was "not likely." Tr. 50-51. Even Rusher acknowledged that "the roof, itself, was solid limestone." Tr. 92.

Section 75.202(a), however, broadly requires mine operators to "protect persons from hazards related to falls of the roof." Rusher testified that "some of the area had . . . fragments of loose roof . . . . It could fall on a person, maybe cut you or scratch you, possibly break a collarbone . . . ." Tr. 100-01. Vancil also testified credibly that installing roof bolts in solid limestone can actually weaken the rock surrounding the bolts. Tr. 30. In this regard, notwithstanding the fact that the roof in the cited area is solid limestone, I credit Rusher's evaluation that the effectiveness of the roof control was compromised by deteriorated bearing plates, posing a hazard to persons traveling through the area. Therefore, I conclude that American Coal violated section 75.202(a).

b. Significant and Substantial

The fact of violation has been established. Applying the remaining *Mathies* criteria to this violative condition, I find that the compromised bearing plates contributed to fragments of roof or the bearing plates, themselves, falling, and that a roof fall of this nature would be reasonably likely to result in serious injuries such as lacerations and musculo-skeletal injuries such as broken bones and contusions. Therefore, I find that the Secretary has established that the violation was S&S.

c. Negligence

Rusher concluded that American Coal was moderately negligent in allowing the bearing plates to deteriorate. Tr. 106. He noted, in particular, that the conditions were obvious and had taken years to develop. Tr. 104. Again, noting American Coal's concession that the bearing plates were rusted, it is reasonable to conclude that the operator knew or should have known from visual inspection alone that the bearing plates had deteriorated over time. However, insofar as the roof consisted of very competent limestone and a catastrophic failure was unlikely, American Coal's reliance on the inherent stability of the roof somewhat mitigates its negligence. Therefore, I conclude that American Coal was moderately negligent in violating the standard.

2. Citation No. 8427427

a. Fact of Violation

On September 8, 2010, Rusher issued Citation No. 8427427, alleging an S&S violation of section 75.202(a) that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by American Coal's "moderate" negligence. The "Condition or Practice" is described as follows:

> The roof where persons normally work or travel was not adequately supported to protect persons from the hazards associated [with] falls of the roof. Three pattern roof bolts were loose from the deterioration of the roof, leaving the bearing plates and roof bolt shanks protruding from three to six inches from the mine roof. The area of unsupported roof was measured at 10 ft. by 10 ft. The surrounding roof was in good condition and no cracks were found. This condition was located at cross cut #50 of the #4 entry, just off of the Main North #2 Travelway.

Ex. P-2. The Citation was terminated after the roof was adequately supported by installation of steel sand props.

Rusher testified that the roof "had taken weight, apparently, and broken up and fractured and fell away," which, "le[ft] about two to three inches or more of the shank of the roof bolt hanging loose." Tr. 163. The two-to-three inch measurement, rather than the three-to-six inches noted in the Citation, was corroborated by his inspection notes. Tr. 182. He added that the

affected area was one crosscut off the main travelway, a crosscut where "[l]ots of times they'll store pallets, loads of rock dust and roof bolts in there, and I think that was . . . the reason I was in there looking that area over." Tr. 172. Rusher noted that this crosscut was also used by vehicles as a pull-over to avoid passing vehicles. Tr. 179.

Rusher initially testified that the roof consisted of coal and shale, and that "over time the coal deteriorated from around these roof bolts and the shale came down." Tr. 161. However, he later acknowledged that the roof was, in fact, composed of solid limestone, and that his notes did not reflect that the roof was coal or shale. Tr. 184. Likewise, Vancil opined that the roof was "really good, thick limestone," and that any shale had been cut down during mining. Tr. 58-59.

I find that the dislodged bearing plates and roof bolts demonstrated that the roof was inadequately supported and posed a hazard to miners; it is worth reiterating here that installing roof bolts in solid limestone can weaken the rock and increase the likelihood of the roof falling. Therefore, I conclude that American Coal violated section 75.202(a).

b. Significant and Substantial

The fact of violation has been established, and partially dislodged bearing plates and roof bolts contributed to the hazard of roof falls. Rusher testified that miners in the crosscut would be exposed to injuries such as facial lacerations, and that such injuries had occurred, in fact, at least two times in the past, once in a location similar to the cited area. Tr. 163-64. In this case, the likelihood of injury was even greater, in Rusher's opinion, because the type of vehicles used in the mine are "like golf carts essentially . . . [and] do not have a canopy or any type of top on them. So there's nothing that would prevent falling material from striking a miner." Tr. 164.

I find that when miners accessed the crosscut, a reasonably serious injury, such as lacerations and musculo-skeletal injuries such as broken bones and contusions, would be reasonably likely to occur were pieces of limestone to fall from around the dislodged plates and bolts. Therefore, I find that the violation was S&S.

c. Negligence

Rusher ascribed this violation to American Coal's moderate negligence, testifying that the cited area was "not the main travel road." Tr. 194. He explained further:

> I really feel like this particular situation hadn't been there all that long. How long, I cannot fix a time. And so mine management maybe didn't know about it, but people pulling in those crosscuts not only include the miners . . . it also includes mine managers and other supervisors that needed to pull off to let somebody by. . . . So I think that somebody should have maybe seen it if it existed before we got in there.

Tr. 194-95. He also testified to the obviousness of the dislodged plates and bolts by stating that "[w]hen we pulled up in there with our ride, the headlights . . . shined right on it before we even

got to it. And it lit up very well." Tr. 194.

I find that the condition was obvious and that management knew or should have known of its existence. However, I also find that considerable mitigating circumstances existed. The extensiveness of the condition was limited to three units of bearing plates with roof bolts protruding just two to three inches from the roof. The Secretary did not introduce any evidence that the affected area had been accessed recently; indeed, Rusher noted no tire tracks. Tr. 166, 185. Furthermore, the area was not required to be examined in a pre-shift, on-shift, or weekly examination, but only in the event that work was scheduled. Tr. 180. In light of this evidence, combined with the general competence of the limestone, I find that the violation occurred as a result of American Coal's low, rather than moderate, negligence.

3. Citation No. 8427431

a. Fact of Violation

On September 14, 2010, Rusher issued Citation No. 8427431, alleging an S&S violation of section 75.202(a) that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by American Coal's "moderate" negligence. The "Condition or Practice" is described as follows:

> There is an area of unsupported roof between No. 48 and 49 cross cuts of the Main North travel way. Approximately five pattern installed roof bolts had been knocked loose and another one had been sheared off by being struck by mobile equipment passing through this area. Nothing would prevent a person from being injured from hazards related to falls of the roof.

Ex. P-6. The Citation was terminated after additional roof bolts were installed.

Rusher testified that although the bearing plates were still attached to the damaged roof bolts, "they were not firm against the roof at all because the bolt[s] had been damaged and twisted." Tr. 201. He also stated that the "condition appeared fresh," and that he had not seen it the day before when he went through the area. Tr. 214-15. American Coal stipulated to the damaged bolts, without conceding the fact of violation. Tr. 65. Pointing to the inherent stability of the immediate roof, the operator argued that no violation of section 75.202(a) occurred because, although some bolts were damaged, the roof "nonetheless remained supported and controlled by the natural strength, competency and beam effect of the massive limestone." Resp't Br. at 25.

The affected area is a main travelway for mobile equipment. In light of the uncontroverted evidence that the bolts had been severely damaged, for the same reasons articulated respecting the rusted bearing plates and protruding bolts in the previously discussed citations, I conclude that American Coal violated section 75.202(a).

b. Significant and Substantial

The fact of violation has been established, and partially dislodged, mangled, and sheared-off roof bolts contributed to the hazard of roof falls. Rusher testified credibly that miners often traveled through the cited area in mobile equipment without the overhead protection of canopies. Tr. 205. In the event of material falling as a result of compromised roof bolts, Rusher opined that miners would be exposed to lacerations, broken bones, and crushing injuries. Tr. 205. Based on the record, including the fact that installing bolts can weaken an otherwise competent limestone roof, I find that miners traveling between the crosscuts were in danger of sustaining reasonably serious injuries as a result of limestone fragments breaking away from the roof. Therefore, I find that the violation was S&S.

c. Negligence

American Coal is not challenging the Secretary's moderate negligence allegation. Resp't Br. at 28 n.15. Therefore, considering evidence that miners frequented the area in uncovered mobile equipment, but the probability that the condition had existed for less than a day, I find that American Coal was moderately negligent in violating the standard.

B. Coal Accumulation Violation

1. Citation No. 8427430

a. Fact of Violation

On September 12, 2010, Rusher issued Citation No. 8427430, alleging an S&S violation of section 75.400 that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by American Coal's "moderate" negligence.[2] In a subsequent action, Rusher's finding was modified to "high" negligence. The "Condition or Practice" is described as follows:

> There is an accumulation of combustible material in the form of dry spilled loose coal and coal dust under the back side of the No. 1 North belt at the tail piece area. This spillage begins at the outby end of the belt tail roller and extends outby for a distance of about 80 feet. The spillage was about 1 inch to 14 inches deep and was coming in contact with the bottom side of the conveyor belt. No miners were observed anywhere cleaning this material up from the mine floor. The belt was in motion at the time of the citation.

Ex. P-4. The Citation was terminated after the combustible material had been cleaned up and removed from the mine, and the area had been heavily rock dusted.

Rusher testified as to all the allegations set forth in the Citation. Tr. 220-36. He stated that the feeder at the tail piece was being overwhelmed by coal being loaded from coal haulage

[2] 30 C.F.R. § 75.400 states that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

vehicles. Tr. 224-25. After reviewing his notes, however, he conceded that the cited accumulation was not near the working section, but approximately three miles outby the working section at a ninety-degree belt-to-belt transfer point between the Main North No. 1 belt and the Main East No. 1 belt. Tr. 245-48, 283-86; Ex. P-5 at 5. Although he explained that he "was thinking about another situation," he did have a clear recollection of the accumulation. Tr. 259, 286. He opined that overloading the section belts ultimately overloaded the main belts, and caused coal spillage at the cited transfer point between the main beltways. Tr. 281-85, 293-94, 311-12. Rusher believed that the accumulation, which he described as "very obvious," amounted to more than normal spillage because "of the depth of it and the length of it, and continually being added to by material falling off the belt in the form of additional loose coal and coal dust and coal fines." Tr. 338-39.

Rusher opined, from his visual observation, that the accumulation was 95 percent coal. Tr. 322-25. He also described the accumulation as dry, stating that he "didn't see any wet [conditions], but it was dry where the belt was contacting it and compacting it under where that belt would slide over the accumulations . . . creating friction." Tr. 321. Rusher identified the belt, which was running at 600 feet per minute, as a potential ignition source, and opined that although "there was no smoke or heat being generated," "most likely left unattended, [the accumulation could] create a fire hazard there and then spread . . . and increase to a large fire, and then spread out to the other adjacent entries." Tr. 227-29, 326, 330.

At the time that Rusher discovered the accumulation, American Coal's safety director, Matt Mortis, was accompanying him, and no other miners were present in the area. Tr. 286. According to Rusher, only mine examiners and miners performing such tasks as belt maintenance, shoveling, or rock dusting would have been in the area and, had miners been cleaning up the accumulation, he would not have issued the citation. Tr. 286-87, 338. As to how long the accumulation had existed, Rusher testified as follows:

> I can't specify or nail down an exact time, but I don't believe it had been there like a whole shift or even a half a shift, which is about four hours maximum. Matter of fact, in my honest opinion, you have mine examiners that check those belts [each shift], and since it wasn't written up on the books that he . . . might have found something, I believe it was not there. And then it had to have spilled, in my opinion, after the examiner had walked through that area. So that's a couple of hours or so before they're into their shift.

Tr. 335-36. He further stated that the accumulation looked fresh, and that an examiner would have had no trouble seeing it because "[y]ou could . . . easily see it from the walk side." Tr. 313, 339. It is reasonable to infer, therefore, that Rusher and Mortis may well have been the first individuals to have discovered the accumulation.

A violation of section 75.400 occurs "where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it could cause a fire or explosion if an ignition source were present." *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct.

1980) ("Old Ben II") (footnote omitted). This judgment is viewed through the objective standard of whether a "reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the hazardous condition that the regulation seeks to prevent." *Utah Power & Light, Mining Div.*, 12 FMSHRC 965, 968 (May 1990), *aff'd*, 951 F.2d 292 (10th Cir. 1991) ("UP&L"). While the Commission has held that a violation of section 75.400 occurs when an accumulation of combustible materials exists, it has recognized that "some spillage of combustible materials may be inevitable in mining operations" and that "[w]hether a spillage constitutes an accumulation under the standard is a question, at least in part, of size and amount." *Old Ben Coal Co.*, 1 FMSHRC 1954, 1958 (Dec. 1979) ("Old Ben I"). In addition to being combustible, the material cited must be of a sufficient quantity to cause or propagate a fire or explosion. *UP&L*, 12 FMSHRC at 968 (quoting *Old Ben II*, 2 FMSHRC at 2808). Although spills can occur quickly, accumulations of combustible material substantial enough to cause or propagate a fire are prohibited, even if recent. *See Black Beauty Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 703 F.3d 553, 558–59 & n.6 (D.C. Cir. 2012) (rejecting operator's argument regarding recentness of a spill); *Prabhu Deshetty*, 16 FMSHRC 1046, 1049 (May 1994) (rejecting a defense based on recentness of a spill).

American Coal argues that Rusher's testimony was at odds with the description of the violative condition on the face of the Citation and, therefore, should be disregarded. Resp't Br. at 29. However, despite the inaccuracy in the citation and Rusher's initial confusion when he testified as to location, he was clear as to the other particulars of the accumulation and its cause. Moreover, the fact that Mortis observed the accumulation along with Rusher, despite his inability to recall anything about it when he testified, is a clear indication that American Coal was on notice of its location and the charges against the company. Tr. 352. Overall, I determined Rusher's testimony to be quite credible and supported by his notes. Therefore, having considered the evidence in its entirety, I conclude that American Coal violated section 75.400.

b. Significant and Substantial

The fact of violation has been established, and the accumulation of combustible coal contacting the belt contributed to the hazard of a mine fire. The focus here is the reasonable likelihood of injury and whether the injury would be serious. The evidence establishes that the belt was running through the accumulation at a very high speed that had dried out the coal and created friction, and smoke or fire propagation was reasonably likely to occur, leading to respiratory complications or burns of a very serious nature. Respecting the combustibility of the material on the belt coming out of the mine that day, referencing the Daily Mine Performance Report for September 12, 2010, Mortis testified that over 50 percent was rock and rejected coal, a significant departure from Rusher's opinion that 95 percent coal was being transported. Tr. 342-47; Ex. R-32. The Commission, however, has not only observed that damp coal remains combustible, but that excluding coal mixtures, including coal mixed with fireclay, would defeat Congress' intent to remove fuel sources from mines and prohibit potentially dangerous conditions. *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120–21 (Aug. 1985). Therefore, given the hazards associated with smoke innundation and fire in underground coal mines, I conclude that the violation was S&S.

c. Negligence

Approximately seven hours after issuing Citation No. 8247430, Rusher modified the negligence designation from "moderate" to "high." Tr. 237-38; Ex. P-4. The modification states the following:

> In that with the increasing 75.400 type citations and that Mine Management has previously been counseled [a]bout this issue on several [occasions], this citation is being elevated from moderate to high negligence.

Ex. P-4. Rusher testified that his contemporaneous notes on this Citation were heavily soiled and that when he returned to the field office, his supervisor, Mike Rennie, transcribed them. Tr. 248-54. However, the transcribed notes differ from Rusher's originals in that the negligence designation is raised from moderate to high. Tr. 261-63. Rusher was unable to explain the heightened charge, testifying that he could not remember the circumstances related to the modification:

> JUDGE: His original notes would have said moderate. The transcription of them says high and reflects the modification. And the inspector doesn't know whether that's a mistake because he knows . . . when he wrote that citation that he wrote it according to his notes. And his citation says moderate. So either the inspector had a change of heart or his supervisor told him he wanted him to raise the negligence. But from what I understand, Inspector, you don't remember?
>
> RUSHER: I don't.

Tr. 272. Upon further questioning, Rusher testified that he believed the moderate negligence designation to be more appropriate:

> JUDGE: Today as you sit here and you've gone through your testimony and whatever recollection you have for the condition, do you believe today that this was more reasonably moderate negligence or high?
>
> RUSHER: Your Honor, I believe it was more moderate.
>
> JUDGE: Okay. Can you tell me why?
>
> RUSHER: Based on my findings of my notes, and these kind of stirred up my recollection somewhat. It's been a couple and a half years. The area . . . here, the Main East belt and the Main North Number 1 belt was well rock dusted. It was the only spillage that I had seen, and it did look fresh. But it did exist. That's why I'm

leaning more toward the moderate to be accurate.

Tr. 313. Indeed, Rusher's notes on conferencing the Citation state that "the cited area was well rock dusted and this condition looked like it had not been there all that long." Ex. P-5 at 7; Tr. 289.

Pointing to this testimony, the short duration of the accumulation, and the lack of knowledge on the operator's part that it existed, American Coal argues that the Citation should be modified to "no" or, at most, "low" negligence. Resp't Br. at 31-32. I find this argument unpersuasive because, as Rusher pointed out, the accumulation was still growing at the time that it was discovered. Tr. 289, 338-39. The evidence establishes that this accumulation occurred because too much coal was being dumped onto belts at various locations in the mine.[3] The operator has an obligation to regulate production so as to avoid overloading the mine's belt system. I find, therefore, in light of the short duration that the accumulation had existed, and the fact that it was not discovered until Rusher and Mortis happened upon it, that American Coal's negligence was moderate, rather than high, in violating the standard.

IV. Penalty

A. Special Assessments

The Secretary proposed penalties for the four citations at issue pursuant to the Secretary's Part 100 Regulations, which state in relevant part that "MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment." 30 C.F.R. § 100.5(a). Although the Secretary has wide discretion in proposing penalties under Part 100, I am not bound by the Secretary's proposed assessment. *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 678-679 (Apr. 1987). When the Secretary departs from the penalty tables of Part 100 and proposes significantly enhanced penalties, he must justify such departures. The U.S. Court of Appeals for the District of Columbia Circuit has held that:

> The special assessment . . . is designed for particularly serious or egregious violations. MSHA "may elect" to apply the special assessment in a number of situations, including violations involving fatalities or serious injuries, an imminent danger, or an operator's "[u]nwarrantable failure to comply with mandatory health and safety standards."

Coal Employment Project v. Dole, 889 F.2d 1127, 1129-30 (D.C. Cir. 1989) (quoting the version of 30 C.F.R. § 100.5 then in effect). Although the Secretary's Regulation pertaining to special assessments was revised in 2007 to remove any reference to particular circumstances that would trigger special assessment reviews, the Commission remains bound by the D.C. Circuit's holding that special assessments are reserved for "particularly serious or egregious violations." *Id.* at 1129.

[3] On the day of inspection, three sections were producing coal: the Six West Longwall, and the Seventh and Eighth Headgate continuous miner sections. Ex. R-32; Tr. 343-44.

American Coal argues that the special assessments proposed by the Secretary are "arbitrary, excessive and deserve no deference," and that the trial "[t]o a large degree . . . resulted from, and concern[ed] the propriety of the Secretary's four proposed special assessments."[4] Resp't Br. at 1. The operator further contends that, although "the Secretary must prove the reasoning or justification behind the proposed special assessment(s) . . . . [he] has been and remains extremely guarded about why and how he proposes special assessments." Resp't Br. at 3.

Rusher testified as to why he recommended that the penalties be proposed under the Secretary's special assessment formula. Respecting Citation No. 8427425, he noted an increase in the number of roof control violations, and the length of time that the condition had existed. Tr. 131-32. As to Citation No. 8427427, he stated that "more emphasis must be put on this company to stop the increasing number of [75.]202(a) citations and subjecting miners to hazards created by instances just like this." Tr. 193. As to Citation No. 8427431, he stated that he did not "see any real improvements in the two or three days between those dates [when Citation Nos. 8427425 and 8427427 were issued] by mine management being more proactive than what they are to reduce the number of [75.]202(a)s for the number of people you specified earlier, 400 men in that mine." Tr. 217. Finally, respecting Citation No. 8427430, he expressed his belief that the coal accumulation "would most likely, [if] left unattended, create a fire hazard there and then spread possibly to a larger fire . . . and then spread out to the other adjacent entries. And then based on the number of [75.]400 citations in the mine that started to increase the past three months before I got there, I felt like more attention needed to be given." Tr. 330.

All four violations are serious and had the potential, if left unabated, to lead to serious injuries. However, the Secretary's referencing of prior violations falls short in explaining the reasons why these violations are particularly serious or egregious. Therefore, I find that the Secretary has not adequately justified his enhanced penalty proposals.

B. Section 110(i) Criteria

While the Secretary has proposed a total civil penalty of $57,300.00 for the violations, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (March 1993), *aff'd*, 763 F.2d 1147 (7th Cir. 1984). These criteria are the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator in achieving rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

Applying the penalty criteria, I find that American Coal is a large operator. Tr. 19. In

[4] The operator compared the special assessments to what regular assessments would be under Part 100: Citation Nos. 8427425 and 8427427 from $7,700.00 to $2,282.00; Citation No. 8427431 from $9,100.00 to $2,473.00; and Citation No. 8427430 from $32,800.00 to $9,635.00. Resp't Br. at 1; Ex. R-9.

reviewing American Coal's Assessed Violation History Report for the fifteen-month period preceding the subject inspection, 76 violations of section 75.202(a), and 153 violations of section 75.400 had become final orders of the Commission. Ex. P-8. The Secretary's contention, that roof control and coal accumulation violations had been on the rise in the New Era mine, was unchallenged, and is supported by the data. Ex. R-36. Therefore, I find American Coal's violations history to be an aggravating factor in assessing appropriate penalties. In the absence of a showing by American Coal that the proposed penalties will have a negative financial impact on the company, I find that the total proposed penalty will not affect its ability to continue in business. As stipulated by the parties, the operator demonstrated good faith in achieving rapid compliance after notice of the violations. Stip. 7. The remaining criteria involve consideration of the gravity of the violations and American Coal's negligence in committing them. These factors have been discussed fully respecting each violation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

C. Assessment

1. Citation No. 8427425

It has been established that this S&S violation of 30 C.F.R. § 75.202(a) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that American Coal was moderately negligent, and that it was timely abated. The Secretary has proposed a penalty of $7,700.00. In consideration of my finding that a special assessment was unwarranted, I find that a penalty of $4,000.00 is appropriate.

2. Citation No. 8427427

It has been established that this S&S violation of 30 C.F.R. § 75.202(a) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that American Coal's negligence was low, rather than moderate, and that it was timely abated. The Secretary has proposed a penalty of $7,700.00. In consideration of my findings of low negligence and that a special assessment was unwarranted, I find that a penalty of $2,500.00 is appropriate.

3. Citation No. 8427431

It has been established that this S&S violation of 30 C.F.R. § 75.202(a) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that American Coal was moderately negligent, and that it was timely abated. The Secretary has proposed a penalty of $9,100.00. In consideration of my finding that a special assessment was unwarranted, I find that a penalty of $4,000.00 is appropriate.

4. Citation No. 8427430

It has been established that this S&S violation of 30 C.F.R. § 75.400 was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that American Coal was moderately, rather than highly, negligent, and that it was timely

abated. The Secretary has proposed a penalty of $32,800.00. In consideration of my findings of moderate negligence and that a special assessment was unwarranted, I find that a penalty of $8,000.00 is appropriate.

ORDER

WHEREFORE, it is **ORDERED** that Citation Nos. 8427425 and 8427431 are **AFFIRMED,** as issued; that the Secretary **MODIFY** Citation No. 8427427 to reduce the degree of negligence to "low," and Citation No. 8427430 to reduce the degree of negligence to "moderate;" and that The American Coal Company **PAY** a civil penalty of $18,500.00 within 30 days of the date of this Decision.[5]

Jacqueline R. Bulluck
Administrative Law Judge

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[5] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.