

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH St., Suite 443
Denver, CO 80202
TELEPHONE: 303-844-1614 / FAX: 303-844-5268

February 13, 2014

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

v.

WEBSTER COUNTY COAL, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2012-438
A.C. No. 15-02132-275499

Mine: Dotiki Mine

DECISION AND ORDER

Appearances: Thomas Motzny, Office of the Solicitor, U.S. Department of Labor,
618 Church Street, Suite 230, Nashville, TN 37219 for Petitioner

Tyler H. Fields, Alliance Coal, LLC
771 Corporate Drive, Suite 500 Lexington, KY 40503 for Respondent

Before: Judge Simonton

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Webster County Coal, LLC pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). This docket originally involved 34 contested violations with a total proposed penalty of **\$71,623.00**. The parties settled 31 of the contested violations prior to hearing. The parties presented testimony and documentary evidence on the remaining 3 citations at hearing in Madisonville, Kentucky commencing on November 13, 2013.

I. ISSUES FOR ADJUDICATION

At hearing, the parties contested the following main issues. For Citations No. 8503536 and 7656891, did the Secretary show that automatic dump dust skirts were missing from roof bolting machines for more than one maintenance shift in violation of the mine's approved ventilation plan? If not, did the Secretary demonstrate that WCC's ventilation plan required immediate repair of completely missing automatic dump dust skirts? Did the Secretary demonstrate that the missing dust skirts were Significant and Substantial (S&S) violations of 30 CFR § 73.370(a)(1) and WCC's ventilation plan?

For Citation No. 7656922, did the Secretary demonstrate that the roof bolter hydraulic oil leak violate separate and distinct duties under the Mine Act, allowing the Secretary to cite WCC for violations of both 30 CFR § 75.400 and 30 CFR CFR § 75.1725 (a)? Was the hydraulic oil leak an S&S violation that exposed miners to a reasonable likelihood of suffering a significant injury?

II. BACKGROUND

Webster County Coal, LLC, (“WCC”) operates the Dotiki mine (the “mine”) in Hopkins County, Kentucky. The mine is an underground bituminous coal mine subject to regular quarterly inspections by the Secretary’s Mine Safety and Health Administration (“MSHA”) pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The mine is classified as a large mine by MSHA and produced 3.6 million tons of coal in 2011. The parties stipulated that Webster County Coal is the operator of the mine, that its operations affect interstate commerce, and that the mine is subject to the jurisdiction of the Mine Act. The mine utilizes the room and pillar system of mining.

The three remaining contested violations in Docket KENT 2012-438 include two citations for alleged failures to comply with the mine’s mandatory ventilation plan, and one citation for an alleged failure to maintain equipment in a safe operating condition. MSHA inspectors designated all three of these 104(a) citations as “Significant and Substantial” or S&S violations of the Mine Act.

III. CITATION Nos. 8503536 and 7656891

On May 18, 2011, MSHA Inspector Alan Frederick issued Citation No. 8503536 to WCC for a violation of Section 73.370(a)(1) of the Secretary’s regulations. The citation alleges in part that:

The approved ventilation and dust control plan was not being followed on the # 2 unit, MMU-027-0, 2nd Southeast Sub mains. The skirt for the automatic roof dust systems on the opposite operator side of the DBT roof boofbolter, CO# 6047 was missing. Page #2, item 21 of the plan states that these bolters will be equipped with skirts on the automatic dump...

Ex. 1, 1.

Inspector Frederick found that an injury was reasonably likely to occur and would result in a permanently disabling injury, that the violation was S&S, that two persons would be affected, and that the violation was the result of moderate negligence on the part of the operator. Ex. 1, 1.

On June 6, 2011, MSHA Inspector Ronnie Rich issued Citation No. 7656891 to WCC for a violation of Section 73.370(a)(1) of the Secretary’s regulations. The citation alleges that:

The approved ventilation and dust control plan was not being followed on the 1 2 unit, MMU-031-0 4th S.E. Panel. The skirts for the automatic roof dust dump system on both the operator and opposite operator sides of the DBT double boom roof bolter, Co. #6043 were missing. Page #2, item 21 of the plan states that these bolters will be equipped with skirts on the automatic dump...

Ex. 4, 1.

Inspector Rich found that an injury was reasonably likely to occur and would result in a permanently disabling injury, that the violation was S&S, that two persons would be affected, and that the violation was the result of moderate negligence on the part of the operator. Ex. 4, 1.

A. Statement of Law

1. The Regulation

30 CFR § 75.370 (a)(1) states in part that:

The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine...

30 CFR § 75.370 (a)(1).

The relevant part of the Dotiki Mine ventilation plan in effect at the time of the citation required that:

Roof bolters will be equipped with skirts on the automatic dump. If this skirt becomes damaged it will be repaired on the next maintenance shift.

Ex. 3: Part B, 2.

2. Interpretation

Mandatory site specific safety plans, including ventilation plans, are enforceable as mandatory standards. *UMWA v. Dole*, 870 F. 2d 662, 671 (D.C. Cir. 1989); *Ziegler Coal Co. v. Kleppe*, 536 F. 2d 298, 409 (D.C. Cir. 1976); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995).

Because MSHA-required site specific safety and health plan provisions are enforceable as mandatory standards,

the operator is entitled to the due process protection available in the enforcement of regulations... When a violation of a regulation

subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express. Laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly

Energy West Mining Co., 17 FMSHRC 1317-18 (internal citations omitted).

However, the Secretary is not required to provide the operator actual notice of its interpretation of a mandatory site specific safety standard, rather,

the Commission has applied an objective standard of notice, i.e., the reasonably prudent person test. The Commission has summarized this test as ‘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.’

Energy West Mining Co., 17 FMSHRC 1318 (internal citations omitted).

3. Burden of Proof

The Commission has long held, “In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation.” *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (August 1992).

The Commission has described the Secretary’s burden as:

“the burden of showing something by a ‘preponderance of the evidence,’ the most common standard in the civil law, simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence.”

RAG Cumberland Res. Corp., 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

The Secretary may establish a violation by inference in certain situations. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2153. Any such inference, however, must be inherently reasonable, and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Resources*, 6 FMSHRC 1132, 1138. (May 1984).

If the Secretary has established facts supporting the citation, the burden shifts to the respondent to rebut the Secretary’s prima facie case. *Construction Materials*, 23 FMSHRC 321, 327 (March 2001) (ALJ Feldman).

4. Significant and Substantial

A violation is 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 or illness of a reasonably serious nature.” *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In order to uphold a citation as S&S, the Commission has held that the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

B. Testimony and Party Arguments

1. The Secretary

MSHA Inspector Alan Frederick testified that he issued citation No. 8503536 approximately 4 hours into the morning production shift on May 18, 2011. Tr. 14-16. Frederick stated that he observed a missing dust dump skirt on the opposite operator side of the # 6047 DBT roofbolter while it was parked. Tr. 15-16. Based on his observations at the time of the citation, Frederick did not believe that the roof bolter had been operated during that production shift. Tr. 15. Frederick acknowledged that he did not have direct evidence for this conclusion, but stated that the dusty color of the exposed dump column indicated that the skirt had been missing for some time. Tr. 28, 57.

Frederick further testified that when he asked roof bolter operators how long the skirt had been missing, the operators replied that they didn't know. Tr. 19. Frederick stated that the shift before this day production shift had been a maintenance shift. Tr. 20.

Frederick testified that the skirt acted to control dust dumped from the automatic roof bolter stab jack after a bolt hole had been drilled. Tr. 18. Frederick described the automatic dump as located within a foot and a half of the bolter operator. Tr. 20. Frederick stated that at the Dotiki mine, the dust skirt was constructed of flexible ventilation curtain attached to the dump with a hose clamp. Tr. 19.

Frederick further explained that the opposite operator side of the roofbolter was a designated area that MSHA dust sampling inspections had previously determined to present elevated respiratory hazards. Tr. 22-23. Frederick stated that a roof bolter could drill up to 200 bolts in a standard shift. Tr. 21. Frederick testified that he had rarely observed roof bolt operators use dust masks or respirators at the Dotiki mine. Tr. 16. On cross examination, Frederick acknowledged that the DBT roofbolter was equipped with a cyclone vacuum system designed to filter smaller respirable dust into a protected dust box so that the dust dumped out of the automatic dump was “less respirable.” Tr. 29-30.

Frederick believed that the Dotiki ventilation plan required operators to replace missing skirts immediately as the plan required that roof “bolters will be equipped with a skirt or skirts on the automatic dump.” Tr. 18. Frederick stated that according to his interpretation of the Dotiki ventilation plan, WCC had until the next maintenance shift to repair present but damaged skirts, but must immediately replace completely absent skirts. Tr. 26. Frederick stated that regardless of whether a skirt was damaged or missing, the standard method of “repair” for both conditions was to install an entirely new skirt. Tr. 25-26, 65. On cross-examination, Frederick conceded that a badly damaged skirt was no more effective at controlling dust than a completely missing skirt. Tr. 34.

Frederick based his gravity designations on the close proximity of the automatic dust dump to the roof bolter operator and concern that exposure to elevated levels of respirable dust would lead to silicosis and pneumosilicosis. Tr. 21-22.

MSHA Inspector Ronnie Rich testified that he issued Citation No. 7656891 towards the end of the midnight maintenance shift on early Monday morning June 6, 2011 at approximately 4:00 am. Tr. 78. Rich stated that he observed that both the operator and opposite operator side automatic dump skirts were missing on the # 6043 DBT roofbolter. Tr. 78-79. Rich stated that as this inspection occurred during the Sunday/Monday midnight maintenance shift, WCC had worked several maintenance shifts since the last production shift on the previous Friday day production shift. Tr. 76. Rich based this conclusion on conversations with WCC maintenance supervisors, in which they told Rich that they worked every mechanic available through the weekend maintenance shifts. Tr. 76-77.

When Rich asked the mechanic in the area if he was going to fix the missing skirt, the mechanic replied, “It’s not on my list.” Tr. 82. Rich further testified that to his knowledge, standard procedure on maintenance shifts was to provide every mechanic with an identical unit wide list of necessary repairs. Tr. 84.

Rich stated that this roof bolter was an older model that ran “hot”, a condition that in his experience, led roof bolters to not wear respirators and to breathe more rapidly. Tr. 87. Rich testified that the return side of all roof bolters were designated areas, due to previous excessive respirable dust levels or high quartz content results. Tr. 89-90. Rich also noted that the Dotiki mine was the only mine he inspected that used the ventilation skirt/hose clamp configuration to provide dust skirts on the automatic dump. Tr. 125. Rich based his gravity designations for Citation No. 7656891 on the proximity of the automatic dump to the bolter operator, the high number of bolts drilled in a production shift, and the possibility of miners developing black lung from exposure to respirable dust. Tr. 87-89.

MSHA Health Specialist Hubert Wright testified regarding the hazards of respirable dust in underground coal mines. Wright described respirable dust as any dust particle 10 microns or smaller. Tr. 135. At that small size, respirable dust can be breathed deeply into the lungs to where it damages small air sacs and prevents oxygen exchange. Tr. 135. Wright explained that respirable dust is associated with both pneumoconiosis and silicosis. Pneumoconiosis is commonly referred to as black lung, and the negative effects of the disease can be halted but not cured by removing affected miners from exposure. Tr. 136. Silicosis is caused by the exposure to

silica particles, commonly referred to as quartz. Tr. 136. Silicosis results in a progressively worsening illness as hardened crystalline particles are drawn deeper and deeper into the lungs even without continued exposure. Tr. 136.

Wright stated that roof bolters generate significant amounts of respirable dust, including silica, during the drilling process. Tr. 137. On cross-examination, Wright acknowledged that dust produced by continuous miners could have previously led MSHA to designate roof bolters as designated areas. Tr. 151. However, Wright stated that if the automatic dump skirts are not present, a significant dust cloud is generated and that dust can enter the air stream of the roof bolter. Tr. 140. Wright testified that automatic dump dust contained respirable dust, as the cyclone vacuum system on roof bolters was not a 100% effective system in removing respirable dust from the automatic dump. Tr. 140. Wright primarily based this conclusion upon a National Institute of Occupational Safety and Health article that found roofbolter automatic dump dust in underground Appalachian coal mines contained respirable dust in concentrations from 5 to 35 percent. Tr. 143-144; Ex. 9, 5. Wright further stated that this article had been prepared in response to a rise in respiratory illnesses in coal miners in Appalachia. Tr. 142.

Wright acknowledged that the NIOSH article did not study mines in western Kentucky where the Dotiki mine is located.¹ Tr. 144. However, he stated that the basic geologic composition of coal seam roofs are fairly consistent, formed by layers of shale, limestone, and sandstone. Tr. 143. On cross-examination, Wright conceded the Dotiki mine was located in a different geologic region, the Illinois Basin, as compared to the Southern Appalachia region studied in the NIOSH article. Tr. 154. Wright also conceded that the article studied a different brand of roof bolter and cyclone vacuum system than used at the Dotiki mine. Tr. 157. Still, Wright did not believe that distinction diminished the relevance of the NIOSH article, as both systems used a similar design and sought to control the same hazard: dust produced by drilling into the coal seam roof. Tr. 161. Wright also stated he was not aware of the specific roof composition of either the Dotiki mine or the mines studied in the NIOSH article. Tr. 155. Nonetheless, Wright believed the NIOSH article was still “good information,” as both Dotiki and the NIOSH study area were bituminous type coal mines. Tr. 167.

In his post-hearing brief, the Secretary first asserts that the language of the ventilation plan required WCC to immediately replace missing dust skirts as the first sentence states, “Roof bolters will be equipped with skirts on the automatic dump.” Sec’y Br. 4. According to the Secretary’s interpretation, the second sentence allowing WCC until the next maintenance shift to repair “damaged” skirts only operates if at least some part of the dust skirt is physically present. Sec’y Br. 5.

The Secretary also argues that regardless of how the ventilation plan is interpreted, evidence indicates the skirts had been missing for more than a full maintenance shift in both citations. Sec’y Br. 7. The Secretary notes that although Inspector Frederick issued Citation No.

¹ The NIOSH Article included mines in MSHA Coal districts encompassing Central Kentucky, Eastern Kentucky, South Central West Virginia, and all of Tennessee, North Carolina, South Carolina, and the Commonwealth of Virginia. Immediately prior to hearing the Respondent attempted to exclude consideration of this study in this case via a Motion in Limine. On November 12, 2013 I denied Respondent’s motion for reasons detailed in both the Order and as discussed below.

8503535 only several hours into a production shift that followed a full maintenance shift, the roof bolter operator was not aware how long the skirt had been missing. Sec'y Br. 7; Tr. 19. The Secretary also points out that when Inspector Rich issued Citation No. 7656891 during a maintenance shift that followed another maintenance shift, the mechanic in the area stated that replacing the skirt was not on the shift maintenance list. Sec'y Br. 7; Tr. 83-84.

2. WCC

Shift Maintenance Foreman Bobby Nall testified about standard maintenance procedures and the operation of the roofbolter automatic dump system. Nall stated that the dust skirts were a common maintenance item that were routinely replaced during the maintenance shift. Tr. 209. Nall explained that the skirts were not recommended by the roof bolter manufacturer and had been retro-fitted per MSHA instruction. Tr. 222. Nall described that as the cyclone vacuum system switched on and off during the drilling/dump cycle, the tube the skirt was attached to contracted and expanded, loosening the hose clamp and eventually causing the skirt to fall off. Tr. 216-17. Nall explained that the maintenance department tried fabricating different attachment methods, but were unable to find a design that kept the skirt on consistently. Tr. 217. Nall did not believe there was any difference between a damaged skirt and a missing skirt, and stated he did not believe even an intact skirt did any good. Tr. 221.

Nall described the skirt replacement procedures in detail. Replacing the dust skirts safely required tramming the bolter to an intersection where the operator could swing the booms out fully. Tr. 219. Once the operator had swung the booms, the operator would de-energize the bolter to allow miners to replace the skirts without being exposed to dangerous pinch points. Tr. 220. Replacing dust skirts on a maintenance shift allowed repairs to be made without exposure to the shuttle car and scoop traffic present on production shifts. Tr. 220-21.

On cross-examination, Nall stated that he was not present during either of the citations and did not have any specific knowledge of when the skirts had gone missing. Tr. 227-28. Nall also confirmed that the mechanics on each unit worked off an identical maintenance to do list. Tr. 238. However, Nall stated that if a maintenance mechanic found a repair item not on the official list, he would either repair the issue himself or add it to the next shift's list. Tr. 239-40. Nall explained that while anyone could theoretically repair a missing skirt, many production workers focused on their normal tasks and would most likely add a missing skirt to the maintenance shift repair list. Tr. 248-49.

WCC Safety Director Gunn testified on the equipment inspection procedures in place at the Dotiki mine. Gunn stated that certified mechanics conducted detailed weekly permissibility exams while roofbolter operators conducted dust parameter checks before beginning production on each shift. Tr. 263. Gunn confirmed that a weekly permissibility exam was conducted for the # 6047 roof- bolter on May 11, 2011, seven days before Citation No. 8503536 was issued. Tr. 263; Ex. B, 1. Gunn also confirmed that a weekly permissibility exam was conducted for the # 6043 roof-bolter on June 2, 2011, four days before Citation No. 7656891. Tr. 267; Ex. C, 1. Gunn stated that for each permissibility exam, the certified mechanic affirmed that there were no hazardous dust conditions found during the permissibility exam. Tr. 268. According to Gunn, the

mechanic would have noted missing dust skirts if they had been missing at the time of the permissibility inspection. Tr. 268.

On cross-examination, Gunn conceded that the permissibility exams did not specifically require a check on the dust skirts. Tr. 293. Gunn also confirmed that multiple maintenance and production shifts had occurred between the last permissibility exam and the time citations were issued for both Citation Nos. 8503536 and 7656891. Tr. 298-299. However, Gunn stated that a dust skirt check was required as part of the dust parameter exam. Tr. 308. Gunn explained that no official record of dust parameter checks were kept, and that dust parameter exams were only tracked underground on a chalkboard at an underground maintenance shack. Tr. 265. Gunn also stated that while pre-shift and on-shift exams were officially recorded, they did not record issues with dust-skirts. Tr. 311.

Gunn stated that the automatic dust dump was located outby or behind the roofbolt operator in relation to the face of the cut. Tr. 258. Gunn also testified that the Dotiki ventilation system and roof bolter blower fans pulled air away from the roof bolter operator and made it unlikely that operators would be exposed to automatic dump dust. Tr. 273, 275.

Gunn interpreted the Dotiki ventilation plan as allowing WCC until the next maintenance shift to repair/replace damaged *or* missing skirts. Tr. 276-77. Gunn stated that prior to these citations, he had observed MSHA inspectors allow WCC until the next maintenance shift to replace missing skirts. Tr. 278-79.

In their post-hearing brief, WCC argues the Dotiki ventilation plan did not require them to replace missing skirts immediately, but allowed them until the next maintenance shift to replace missing skirts, just as they were allowed until the next maintenance shift to replace damaged skirts. Respondent's Br., 4. WCC points out that the text of the ventilation plan does not state it is necessary to replace missing skirts immediately, and contends that "missing" is commonly defined as a type of damage. Respondent's Br., 5. WCC also argues that given MSHA's past acceptance of repairing missing skirts on the next maintenance shift at the Dotiki mine, and the absence of any prior explicit instructions regarding this provision, this court should decline to give the Secretary's current interpretation any deference. Respondent's Br., 7.

WCC states that MSHA Inspectors Frederick and Rich could not establish when the dust skirts went missing from the roof-bolters. Respondent's Br. 6; Tr. 28-29; Tr. 107-108. WCC further states that no evidence supports an inference that the skirts were missing prior to the last maintenance shift before the citations were issued. Respondent's Br. 6. WCC finally asserts that it would be improper burden shifting for this court to sustain these violations on a finding that WCC did not establish that skirts were attached after the last maintenance shift prior to these citations. Respondent's Br., 6.

3. Relevance of the NIOSH Article

At hearing, the Secretary entered the NIOSH article into evidence in an attempt to demonstrate that automatic dump dust contained a respirable dust component and note a recent increase of respiratory illnesses in other underground bituminous coal mining areas. Prior to

hearing and during cross-examination, WCC contested the relevance of the NIOSH study to these proceedings. In summary, WCC argues that the article's findings are not relevant to these proceedings because Dotiki is located in a different geologic region from the article study area.

I find WCC's distinction unconvincing. The NIOSH article was conducted in underground bituminous coal mines, including mines in central Kentucky and Tennessee. Ex. 9, 3. The Dotiki Mine is an underground bituminous coal mine in western Kentucky. Thus, the study examined similar types of roof bolter machines in similar underground bituminous coal mines in areas adjacent to the western Kentucky region. Although it has presented hypothetical examples of possible variations, WCC has not presented any evidence of significant differences between the study area and the Dotiki Mine. Tr. 154-155; 167. Therefore, I find it reasonable to consider the general finding of the NIOSH article, that roofbolter automatic dump dust contains significant amounts of respirable dust, while determining the validity and gravity of these citations.

Furthermore, the connection between respirable dust and respiratory illnesses is far from a novel concept to the Commission. In 1980, a Commission ALJ explained,

Coal workers' pneumoconiosis--black lung disease--affects a high percentage of American coal miners with severe, chronic, and crippling respiratory impairment. The disease, which in its advanced form is inevitably fatal, is caused by long-term inhalation of respirable mine dust, including coal dust...

Black lung disease is an occupational disease that afflicts the lives of thousands of miners and their families. Various studies show that between 10 and 30 percent of all working bituminous coal miners have some form of the disease. Every miner lives under the threat of black lung and thousands die of it every year. ... more than 11 miners each day wheeze away their final breath as a result of black lung.

Kanawa Coal, 2 FMSHRC 1658, 1659 (June 1980) (ALJ Kennedy).

This description of the pervasive effects of black lung throughout the coal industry, particularly among bituminous coal miners, indicates that respiratory illnesses and respirable dust are not anomalous or particularly region specific hazards. While the coal-mining industry has certainly made significant strides in preventing respiratory illnesses in the decades since this ruling, the mechanisms of black lung and silicosis remain unchanged. As such, I have considered the general findings of the NIOSH article in my holdings while taking the alleged variances between the study area and the Dotiki mine into account in terms of the article's weight.

C. Findings

1. Ventilation Plan Interpretation

WCC argued at great lengths that the Dotiki ventilation plan did not explicitly require immediate replacement of missing dust skirts and contended that missing skirts could be replaced on the next maintenance shift following the damage per the plan. The Secretary argued that when read as a whole, the ventilation plan required immediate replacement of missing skirts, as the ventilation plan required automatic dump skirts to be “equipped” with dust skirts. For the reasons stated below, I find that even under its own interpretation of the dust skirt provision, WCC failed to repair the missing skirts in the next maintenance shift following the damage. Therefore, I decline to determine the proper interpretation of the ventilation plan in effect at the time of the citation, as this interpretation is not necessary to my ultimate findings.

2. Citation No. 8503536

MSHA Inspector Frederick credibly testified to the following regarding Citation No. 8503536:

- 1.) The citation was issued at 10:00 AM on Wednesday May 18, 2011. Tr. 15.
- 2.) The citation was issued approximately four hours into a production shift that immediately followed a regularly scheduled midnight maintenance shift. Tr. 20.
- 3.) An automatic dump dust skirt was missing on the #6047 DBT roof-bolter machine. Tr. 16.
- 4.) The roof bolter was parked and not running at the time of the citation. Tr. 15.
- 5.) The unit roof-bolter operators did not know how long the dust skirt had been missing. Tr. 19.
- 6.) The exposed dump column was noticeably dusty where the skirt would normally be. Tr. 57.

WCC has not disputed any of these factual descriptions. WCC has disputed Inspector Frederick’s conclusion that the roofbolter machine had not been operated during the May 18 morning production shift. WCC points out that Frederick could not recall whether or not the bolter was parked at an intersection or was located at an active face. Tr. 45-46. WCC also contends that it was possible for the exposed dust column to have taken on the dusty color during the morning production shift. Tr. 60-61.

WCC personnel testified that weekly permissibility exams, pre-production dust parameter checks, pre-shift exams and on-shift exams were all regularly conducted by WCC personnel in order to identify dust hazards including missing or damaged skirts. Tr. 263. WCC relies upon these inspections to argue that the dust skirt was most likely on the roof-bolter at the beginning of the May 18 morning production shift and somehow fell off before Inspector Rich inspected the roof-bolter. Tr. 28.

However, I find that WCC’s arguments do not effectively rebut the evidence presented by the Secretary. According to WCC personnel, of the four inspection types listed by WCC, only the dust parameter exam included a specific check for dust skirts. Tr. 293, 311. Additionally, WCC personnel stated that they did not keep an official written record of the dust parameter exam. Tr. 265. The permissibility exam entered into evidence by WCC for the #6047 roofbolter

did not indicate a specific check for dust skirts and was conducted several maintenance shifts in advance of this citation. Tr. 298-99. As such, I give the permissibility exam very little weight in determining whether or not the dust skirt was present on the roof-bolter at the beginning of the May 18 morning production shift.

While the Secretary has not produced direct evidence of when the skirt fell off, several undisputed factual descriptions support the Secretary's conclusion that the skirt was not in place at the beginning of the May, 18, 2011 morning production shift. The #6047 roofbolter was parked and not running at the time of the inspection, decreasing the likelihood that the skirt had recently been knocked off during active roof-bolting or tramming activities. Tr. 15. Similarly, the exposed dump column was noticeably dusty, indicating that the skirt had been missing for at least some amount of time. Tr. 57. Given that the roofbolter was parked and not bolting, I find Inspector Frederick's statement that it was unlikely for the column to become dusty in just a few hours to be a reasonable conclusion. Tr. 61.

The statement from the roofbolter operators that they did not know how long the dust skirt had been missing undercuts WCC's contention that dust parameter and pre-shift exams would have ensured that the dust skirt was in place at the beginning of the production shift. If the dust skirt had been on at the beginning of the production shift as required, and the roof bolter operators had conducted a thorough dust parameter exam that morning, the operators would have had some idea of when the dust skirt had fallen off. Instead, when asked by Inspector Frederick how long the skirts had been missing, the operators replied that they didn't know. Tr. 19.

The parked condition of the roof-bolter, the dusty color of the dump column, and the roof-bolter operators' inability to provide a timeframe for when the skirt fell off, all support the Secretary's assertion that the dust skirt was not on the roof bolter at the beginning of the May 18 morning production shift. As the previous shift was a regularly scheduled maintenance shift, I find that the dust skirt likely fell off during a prior production shift and WCC failed to replace the missing skirt during the intervening maintenance shift. I make this finding after determining that the Secretary produced sufficient evidence to establish a prima facie case of a violation and concluding that WCC did not present convincing evidence to the contrary.

In doing so, I am not discounting WCC personnel testimony regarding extensive maintenance and inspection efforts in general. Both Foreman Nall and Gunn testified credibly and competently regarding their efforts to ensure compliance with the dust skirt provision of the ventilation plan. Tr. 209, 263. However, the Mine Act is a strict liability statute and the operator's genuine efforts to comply with the standard do not shield it from liability if the Secretary demonstrates a dust skirt was indeed missing for more than one maintenance shift without being repaired.

As such, I hold that WCC did in fact violate 30 CFR § 75.370 (a)(1) and its ventilation plan in failing to repair a damaged dust skirt in the next maintenance shift following the damage.

I also find that Citation No. 8503536 was an S&S violation of WCC's duties under the Mine Act. As noted earlier, the ventilation plan provision operates as a mandatory safety standard and is enforceable as such. If not replaced, the missing dust skirts would expose

roofbolter operators to an increased amount of respirable dust, a discrete safety hazard. As discussed above, there is a reasonable likelihood that this over-exposure to respirable dust will result in injury as respirable dust has been consistently linked to respiratory illnesses such as black lung and silicosis. Additionally, black lung and silicosis far exceed the definition of an injury of a reasonably serious nature, as they are irreversible illnesses that result in debilitating respiratory complications and even death. For these reasons, I find that the Secretary has shown that this violation meets the four element *Mathies* test for S&S violations.

For the reasons just discussed regarding the likelihood and severity of permanently disabling respiratory illnesses, I find the likelihood of injury as “Reasonably Likely” and the severity of injury to be “Permanently Disabling.” I find that 2 miners were affected by this violation, as Inspector Frederick credibly testified that the missing dust skirts allowed roof bolter dump dust to circulate within several feet of the two operators that manned the automatic roof bolting machine. Tr. 20, 24.

While the testimony at hearing indicates that the skirts had been missing for at least one entire maintenance shift, I also note that WCC personnel credibly testified that the dust skirts were partially enclosed during operations and difficult to replace without opening up the roof bolting booms. Tr. 20, 219. For these reasons, I find that Citation No. 8503536 was the result of “Moderate” negligence on the part of WCC.

After making these findings and reviewing the six penalty criteria set forth in set forth in section 110(i) of the Act, I uphold the Secretary’s originally assessed civil monetary penalty of \$2,473.00 for Citation No. 8503536.

3. Citation No. 7657891

MSHA Inspector Ronnie Rich testified credibly to the following regarding Citation No. 7656891.

1. The citation was issued at 3:35 AM on Monday June 6, 2011. Tr. 78.
2. The citation was issued approximately six hours into a regularly scheduled midnight (3rd shift) maintenance shift. Tr. 78.
3. The last production shift before this maintenance shift had occurred on Friday evening (2nd shift) June 3, 2011. Tr. 76.
4. WCC management had worked several maintenance shifts over the June 4-5 weekend. Tr. 76-77.
5. Both the operator and the opposite operator side automatic dump dust skirts were missing on the #6043 DBT roofbolter. Tr. 78-79.
6. A unit mechanic in the area informed Inspector Rich that replacing the missing skirts was “Not on my list.” Tr. 82.

WCC has not disputed any of these factual descriptions. WCC has argued that the maintenance shifts that occurred during the weekend of June 4-5 were not regularly scheduled maintenance shifts. Tr. 97-98. WCC also contended on cross-examination that the Dotiki

ventilation plan allowed WCC the entire next maintenance shift after a production shift to repair damaged/missing skirts. Tr. 112.

WCC's reliance on these arguments is misplaced. The ventilation plan requires WCC to replace damaged skirts on the "next maintenance shift" and makes no reference or allusion to so called "regularly scheduled" maintenance shifts discussed by WCC during hearing. Inspector Rich credibly testified that WCC management informed him they had worked every available mechanic over several shifts on the weekend of June 4-5. Tr. 76-77. As such, I find that WCC had worked at least one full maintenance shift after the Friday June 3rd evening production shift before the Sunday/Monday midnight maintenance shift in question even started. Thus, the evidence presented by the Secretary indicates that WCC failed to replace missing dust skirts during the next maintenance shift following a production shift as required by their ventilation plan.

Furthermore, while it is not critical to my ultimate holding, I do not fully accept WCC's contention that MSHA could not cite WCC for failure to replace a missing dust skirt until the entire maintenance shift has elapsed and a new production shift had begun. I do agree with WCC that it would be unreasonable for MSHA to cite WCC for failure to replace a damaged skirt if only a small amount of the maintenance shift had passed and WCC demonstrated a specific plan to replace that missing skirt. However, this is not the set of circumstances I have before me in this citation.

In this case, nearly six hours of the eight hour Sunday/ Monday midnight maintenance shift had elapsed and the WCC mechanic in the area indicated he had no plans of replacing the missing skirts when he informed Inspector Rich that replacing the skirt was "Not on my list." Tr. 78, 82. As the ventilation plan allowed WCC to work up to two production shifts before repairing damaged/ missing skirts on the next maintenance shift following damage, MSHA Inspector Rich was right to evaluate the likelihood of WCC replacing the missing skirts during the maintenance shift based upon his interaction with the WCC mechanic.

As discussed for Citation No. 8503536, I am not discounting Shift Foreman Nall's and Safety Director Gunn's credible testimony regarding WCC maintenance and inspection procedures as without merit. However, the only documented inspection presented to this court regarding the # 6043 roofbolter was a permissibility exam conducted on Thursday June 2, 2011 four days prior to the inspection leading to issuance of the citation. Tr. 267; Ex. C, 1.

Even if I take this permissibility inspection as conclusive evidence that the automatic dust dumps were equipped with dust skirts on this date despite the fact the permissibility exam does not specifically require a check on the dust skirts, the obvious fact remains that dust skirts were not on the #6043 roofbolter on the early morning of the Sunday/ Morning midnight maintenance shift. As such, the dust skirts must have fallen off during the Friday production shifts, remained off through the maintenance shifts worked during June 4-5, and continued to remain off the roofbolter for six hours of the Sunday/Monday midnight maintenance shift without being noted on the unit repair list or being brought to the attention of the mechanic in the area. For these reasons, I find that a full maintenance shift had passed since the last production shift and WCC

had still not, at the time of the inspection, identified the missing skirts as a hazard requiring repair.

As such, I hold that WCC did in fact violate 30 CFR § 75.370 (a)(1) and its ventilation plan in failing to repair a damaged dust skirt in the next maintenance shift following the damage.

I also find that Citation No. 7656891 was an S&S violation of WCC's duties under the Mine Act. As noted earlier, the ventilation plan provision operates as a mandatory safety standard and is enforceable as such. If not replaced, the missing dust skirts would expose roof-bolter operators to an increased amount of respirable dust, a discrete safety hazard. As discussed above, there is a reasonable likelihood that this over-exposure to respirable dust will result in injury as respirable dust has been consistently linked to respiratory illnesses such as black lung and silicosis. Additionally, black lung and silicosis far exceed the definition of an injury of a reasonably serious nature, as they are irreversible illnesses that result in debilitating respiratory complications and even death. For these reasons, I find that the Secretary has shown that this violation meets the four element *Mathies* test for S&S violations.

For the reasons just discussed regarding the likelihood and severity of permanently disabling respiratory illnesses, I find the likelihood of injury as "Reasonably Likely" and the severity of injury to be "Permanently Disabling." I find that 2 miners were affected by this violation, as Inspector Rich credibly testified that the missing dump skirt allowed respirable dust to circulate across the two roof bolt operators. Tr. 88- 89.

While the testimony at hearing indicates that the skirts had been missing for at least one entire maintenance shift, I also note that WCC personnel credibly testified that the dust skirts were partially enclosed during operations and difficult to replace without opening up the roof bolting booms. Tr. 76-77, 219. For these reasons, I find that Citation No. 7656891 was the result of "Moderate" negligence on the part of WCC.

After making these findings and reviewing the six penalty criteria set forth in set forth in section 110(i) of the Act, I uphold the Secretary's originally assessed civil monetary penalty of \$2,473.00 for Citation No. 7656891.

IV. CITATION No. 7656922

On June 7, 2011, MSHA Inspector Michael Dillingham issued Citation No. 7676922 to WCC for a violation of 30 CFR § 75.1725(a), alleging in part that:

The Bucyrus America Inc Roof Bolter, CO # 6050, located on # 3 Unit, 030-) MMU was not being maintained in a safe operating condition in that oil had been allowed to accumulate in the operators control deck. When measured it was 32 inches in length, 24 inches width and ranged from 0-.25 inches in depth...

Ex. 6, 1.

Inspector Dillingham found that an injury was reasonably likely to occur and would result in lost workdays or restricted duty, that the violation was S&S, that 2 persons would be affected, and that the violation was the result of moderate negligence on the part of the operator. Ex 6, 1.

On the same day Inspector Dillingham issued Citation No. 7677922, he also issued Citation No. 8503660, not directly at issue in this docket, alleging that the pooled oil on the operator deck of roofbolter CO # 6050 violated 30 CFR § 75.400 and presented a hazardous accumulation of combustible materials. Tr. 177. WCC has subsequently accepted and paid Citation No. 8503660 in full. Resp. Br, 9.

A. Statement of Law

1. The Regulations

30 CFR § 75.1725 (a) requires that:

Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

30 CFR § 75.1725 (a).

In relevant part, 30 C.F.R. § 75.400 requires that :

... combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

30 C.F.R. § 75.400.

2. Interpretation

The Commission has provided the following guidelines for evaluating an alleged violation of 30 CFR § 75.1725:

Under section 75.1725(a), in deciding whether machinery or equipment is in an unsafe operating condition, the alleged violative condition is measured against the standard of whether a reasonably prudent person ... would recognize a hazard warranting corrective action...

Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (Dec. 1982).

3. Duplication

The Commission has ruled that the Secretary may properly assess multiple citations for a single condition so long as the regulatory standards cited in each violation impose separate and distinct duties upon the operator. *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993); *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (Rev. Comm. June 1997).

However, the Commission has vacated citations issued upon the same factual basis under different standards when the Secretary failed to show that the cited condition violated multiple duties. *Western Fuels Utah Inc.*, 19 FMSHRC 1005.

4. Significant and Substantial

A violation is 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 or illness of a reasonably serious nature.” *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In order to uphold a citation as S&S, the Commission has held that the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

B. Testimony and Party Arguments

1. The Secretary

At hearing, Inspector Dillingham testified that the Bucyrus roof bolter had significant oil leaks that caused oil accumulations to build up on the roof bolting machine, the operator’s control deck, and the operator himself. Tr. 179-180. Dillingham stated that the oil accumulation on the control deck and operator’s gloves could cause the operator to slip off the controls. Tr. 181. Dillingham acknowledged that he had never heard of an operator losing control of a roof bolter due to oil accumulations, and that a “deadman pedal” had to be pressed for three seconds before the operator could begin to tram the roofbolter. Tr. 200-201.

Dillingham also testified that the oil accumulations made it likely that operators entering and exiting the control deck could possibly slip, bump their elbows and head, or get cuts and bruises. Tr. 185. Dillingham testified that he had never actually heard of an injury resulting from a trip and fall from accumulated oil on a roof bolter control deck. Tr. 200. Dillingham stated that he issued two separate citations after observing the oil accumulation because the pooled oil was both a fire hazard and a slip hazard. Tr. 178, 180.

The Secretary argued in his post-hearing brief that Citation No. 7656922 is not duplicative of Citation No. 8503660 that WCC has already accepted and paid in full. Sec’y Br.,

9. The Sec'y notes that 30 CFR § 75.1725(a) requires operators to maintain equipment in safe operating order while 30 CFR § 75.400 requires operators to prevent fire risks through controlling accumulations of combustible materials. Sec'y Br., 9-10. The Secretary states that a broken tie rod will violate 75.1725(a) but not 75.400, while an accumulation of oily rags will violate 75.400 but not 75.1725. Sec'y Br., 10. The Secretary also restated Inspector Dillingham's concerns of the oil accumulations creating a slip hazard or causing an error in equipment operation. Sec'y Br., 8.

2. WCC

WCC Shift Foreman Nall and Safety Director Gunn testified for WCC on the operation of the Bucyrus roofbolter machine. Tr. 220, 279. Nall stated that the operator deck was shielded by a canopy and operators swung themselves into the cab at a 45 degree angle from a handle mounted on the canopy. Tr. 223. Gunn described the canopy handle as located three and a half feet above the mine floor while the operator's seat was just three inches above the mine floor. Tr. 281, 283. Both Nall and Gunn testified that the "deadman" pedal on the control deck had to be depressed for a full three seconds before the operator could move or "tram" the roof bolter with a separate joystick control. Tr. 225, 280.

Gunn testified that the low height of the canopy deck, the available handle, and small confines of the operator deck made it unlikely for an operator to injure himself if he were to slip on accumulated oil on the operator deck. Tr. 282-283. Gunn also stated that the deadman switch made it improbable that a slip would lead to an error in roofbolter operation. Tr. 282. Gunn testified that he had never heard of oil accumulations on a roofbolter causing either a slip and fall injury or loss of control over the roofbolter. Tr. 281, 283.

In their post-hearing brief, WCC states that Citation Nos. 8503660 and 7656922 were issued at the same time, on the basis of the same pool of accumulated oil, on the same roof bolter. Respondent's Br., 8-9. WCC describes 30 CFR § 1725(a) as a "general" regulation that cannot be used as the basis for a citation based on the same factual circumstances as a citation based on a "specific" standard. *Western Fuels Utah Inc.*, 19 FMSHRC at 1004 n. 12. WCC argues that the mine's duty with respect to the roofbolter was simply to keep it free from the accumulation of oil. Respondent's Br., 9. WCC further states that separate and distinct duties were not present in these two citations and as such Citation No. 7656922 should be vacated as duplicative.

WCC also argues that even if the oil accumulation constitutes a violation of 30 CFR § 1725(a), the Secretary has not established the necessary elements to sustain an S&S designation. Respondent's Br., 9. WCC states that the configuration of the operator deck and dead man pedal control make it clear that the oil accumulation was highly unlikely to lead to either a slip and fall injury or a potential loss of roof bolter control. Respondent's Br., 10. As such, WCC argues that the Secretary has failed to demonstrate a reasonable likelihood that the hazard contributed to by the violation will result in injury. Respondent's Br., 9. From this contention, WCC argues that Citation No. 7656922 should be modified to non-S&S. Respondent's Br. 10.

3. Findings

Inspector Dillingham testified credibly that the Bucyrus roof bolter had an oil leak that caused oil accumulations to build up on the operator deck and upon the roof bolter operator himself. Tr. 179-80. Dillingham recorded the oil accumulation on the operator deck as measuring 32 inches long, 24 inches wide and a ¼” deep. WCC has not contested these basic factual descriptions and in fact concedes that the oil accumulation constitutes a violation of a mandatory standard. Respondent’s Br., 9.

Therefore, I initially find that a prudent miner would have recognized extensive oil accumulations as a potential slip hazard and I hold that the Sec’y has established that the oil accumulation constituted a violation of 30 CFR § 75.1725(a).

However, WCC argues that the Secretary has sought to impose improper duplicative penalties by citing WCC twice for the same condition. *Id.*

WCC is incorrect. Citation Nos. 8503660 and 7656922 were indeed both based on the same oil accumulation on the Bucyrus roofbolter. Tr. 195. However, Inspector Dillingham issued the two citations under two separate standards that regulate entirely different hazards. Tr. 178, 180. 30 CFR § 75.400 prohibits accumulation of combustible materials in an effort to prevent fires and explosions. 30 CFR § 75.1725(a) broadly mandates the “safe operating condition” of equipment, seeking to prevent miners from suffering direct injuries from malfunctioning or improperly maintained equipment.

As such, WCC’s reliance on *Western Fuels* is misguided. Respondent’s Br. 8. In *Western Fuels*, the Commission vacated one of two citations when the Sec’y sought to impose penalties on an operator for both 1) failing to provide an adequate number of reservoirs on a dry chemical fire suppression system and, 2) failing to install a dry chemical powder fire suppression system to protect each belt drive. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1004. Both of these two standards clearly and exclusively regulated potential fire hazards and were based on the identical lack of proper reservoirs. Therefore, the Secretary in *Western Fuels* failed to meet the Commission’s requirement that citations based on the same factual circumstances impose separate duties upon the operator. *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 378.

However, as discussed above, the testimony presented at hearing reveals that Citation No. 7656922 is not analogous to *Western Fuels* as WCC claims. The cited standards in this case imposed separate duties upon WCC to both prevent fire hazards and maintain equipment in a safe condition for miners to access and operate. As the Commission has previously held, the fact that the oil accumulation violated both of these distinct duties does not excuse it of liability from either. *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 378.

As such, I hold that Citation No. 7656922 is not duplicative of Citation No. 8503660 and proceed to determining the gravity of the citation. Inspector Dillingham testified that he believed the oil accumulations on the operator deck and on the operator’s gloves could cause an operator to lose control of the machine during operation, or slip and fall while entering the operator’s deck. Tr. 181, 185.

MSHA Inspector Dillingham, Foreman Nall, and Safety Director Gunn all testified that it was impossible to tram the roof bolter without first depressing the deadman pedal for three seconds. Tr. 200-01, 220, 279. All three of these witnesses similarly testified that they had never heard of an operator losing control of a roofbolter due to oil accumulations. Tr. 200, 226, 283. For these reasons, I hold that it was highly unlikely for an operator to lose control of the roofbolter due to oil accumulations and thus decline to consider struck by or caught between injuries as a component of this citation.

Still, Inspector Dillingham did present credible testimony that the entire floor of the operator deck was coated with a ¼" deep layer of hydraulic oil. Thus, I find that the slick nature of hydraulic oil could cause the operator to lose his footing as he entered or exited the operator deck. Nonetheless, Foreman Nall and Safety Director Gunn testified earnestly that even if the operator slipped momentarily, the canopy handle, small dimensions of the operator deck compartment and low height of the operator seat all greatly decreased the likelihood of any resulting injury. Tr. 223, 282-83. In fact, Dillingham himself testified that he had never heard of an operator suffering an injury from a slip and fall within the operator's deck. Tr. 200.

Thus, due to the configuration of the cab and absence of any history of injuries resulting from similar conditions, I hold that the violation was not reasonably likely to contribute to an injury. For these reasons, I hold that gravity designations of Citation No. 7656922 should be modified to "Unlikely" for chance of injury, to "No Lost Workdays" for type of injury, and to Non-S&S.

However, I do find that the oil leak was an obvious condition, as it coated the entire operator deck and the operator himself. Tr. 179-80. As such, I find that the violation was the result of "Moderate" negligence on the part of WCC. Additionally, as the oil leak was spraying oil across a large portion of the roof bolter, the operator deck and one of the operator's clothing and shoes, I find that two miners were affected by this violation as both roof bolt operators working on this machine had to work on the oil coated roof bolting machine. Tr. 188.

Therefore, after reviewing the six penalty criteria set forth in section 110(i) of the Act, I reduce the civil monetary penalty for Citation No. 7657922 to \$250.00.

V. SETTLEMENT

The Secretary has filed a motion to approve settlement of 31 of the violation involved in this matter. I acknowledge and accept the explanation for the agreed upon settlement contained in the parties' settlement motion and amendments. The originally assessed amount for these 31 citations was **\$65,265.00** and the proposed partial docket settlement is for **\$44,500.00**. The parties have moved to approve the proposed settlement as follows:

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
KENT 2012-438 (Partial)			
8504120	\$540.00	\$540.00	
7656897	\$1,304.00	\$1,304.00	
7657047	\$585.00	\$585.00	
7657049	\$634.00	\$634.00	
7657050	\$585.00	\$585.00	
7657051	\$585.00	\$585.00	
7657053	\$207.00	\$207.00	
7657055	\$3,405.00	\$3,405.00	
8499894	\$392.00	\$392.00	
7657125	\$807.00	\$807.00	
7657127	\$5,503.00	\$2,500.00	Reduce Monetary Penalty
7657128	\$1,657.00	\$1,657.00	
7657282	\$2,901.00	\$2,901.00	
8502593	\$1,530.00	\$1,530.00	
8502594	\$5,503.00	\$1,857.00	Reduce Monetary Penalty
8502595	\$4,689.00	\$1,819.00	Reduce Monetary Penalty
7657184	\$1,795.00	\$1,795.00	
7657185	\$1,795.00	\$1,795.00	
8502599	\$1,304.00	\$1,304.00	
8502458	\$3,143.00	\$3,143.00	
8502602	\$2,106.00	\$2,106.00	
8502603	\$745.00	\$745.00	
8498982	\$1,412.00	\$1,412.00	
8499873	\$3,996.00	\$2,900.00	Reduce Number of Miners Affected from "10" to "8"
7657060	\$3,996.00	\$1,795.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove "Significant and Substantial" Designation
7657131	\$3,143.00	\$1,412.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove "Significant and Substantial" Designation
8499896	\$3,143.00	\$1,412.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove "Significant and Substantial" Designation
7656997	\$1,530.00	\$687.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely"

			Remove "Significant and Substantial" Designation
8502596	\$1,111.00	\$499.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely"
			Remove "Significant and Substantial" Designation
7657008	\$1,530.00	\$687.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely"
			Remove "Significant and Substantial" Designation
8502600	\$3,689.00	\$1,500.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely"
			Remove "Significant and Substantial" Designation
SubTotal	\$65,265.00	\$44,500.00	

V. ORDER

For the three citations contested at hearing, I rule as follows.


It is **ORDERED** that Citation No. 8503536 is **UPHELD** as written and assessed with a monetary penalty of \$2,473.00.

It is **ORDERED** that Citation No. 7656891 is **UPHELD** as written and assessed with a monetary penalty of \$2,473.00.

It is **ORDERED** that Citation No. 7656922 is **MODIFIED** to "Unlikely," "No Injury," "Non-S&S" and assigned a reduced monetary penalty of \$250.00.

Additionally, I have considered the submitted settlement documents and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110 (i) of the Act. The motion to approve settlement is **GRANTED** and the citations contained in this agreement are **MODIFIED** as set forth above for a partial settlement total of \$44,500.00.

Therefore, Webster County Coal, LLC is **ORDERED** to pay the Secretary of Labor a total sum of **\$49,696.00** within 30 days of this order.²



David P. Simonton
Administrative Law Judge

² 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

Distribution: (First Class U.S. Mail)

**Thomas Motzny, Office of the Solicitor, U.S. Department of Labor,
618 Church Street, Suite 230, Nashville, TN 37219**

**Tyler H. Fields, Alliance Coal, LLC
771 Corporate Drive, Suite 500 Lexington, KY 40503**