FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 29, 2014

MARTIN COUNTY COAL CORPORATION, Contestant v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	CONTEST PROCEEDINGS Docket No. KENT 2012-615-R Citation No. 8265796; 02/01/2012 Docket No. KENT 2012-616-R Order No. 8265798; 02/01/2012 Docket No. KENT 2012-617-R Order No. 8265804; 02/01/2012 Docket No. KENT 2012-618-R Order No. 8265805; 02/01/2012
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. MARTIN COUNTY COAL CORPORATION, Respondent	CIVIL PENALTY PROCEEDINGS Docket No. KENT 2012-1321 A.C. No. 15-19193-292715 Docket No. KENT 2012-1403 A.C. No. 15-19193-294671 Mine: Voyager No. 7

DECISION

Appearances: Matt S. Shepherd, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner;
Jeffrey K. Phillips, Esq., Steptoe & Johnson PLLC, Lexington, Kentucky, on behalf of the Respondent.

Before: Judge Feldman

These consolidated contest and civil penalty proceedings are before me based upon petitions for assessment of civil penalty filed by the Secretary of Labor ("the Secretary") under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), against The Respondent, Martin County Coal Corporation ("MCC"). These matters concern the nature

and extent of cited violative roof and rib conditions observed by the issuing inspectors on February 1, 2012, which the record reflects had not materially changed during the weeks preceding the inspection. A hearing was held on October 30 and October 31, 2013, in Prestonburg, Kentucky. The parties' briefs have been considered in the disposition of these matters.

Specifically, these proceedings concern four contested citations and orders ("citations") issued on February 1, 2012, alleging violations of mandatory safety standards contained in Part 75 of the Secretary's regulations governing underground coal mines. 30 C.F.R. §§ 75 *et seq.* The Secretary alleges the subject violations are attributable to unwarrantable failures.[1] Docket No. KENT 2012-1321 includes 104(d)(1) Citation No. 8265796, for which the Secretary proposes a civil penalty of $14,000.00, and 104(d)(1) Order Nos. 8265798 and 8265804, for which the Secretary proposes civil penalties of $16,400.00 each. These citations allege adverse roof and rib conditions in Voyager No. 7 Mine's No. 4 Entry along the No. 1, 2 and 3 belt lines, respectively, in violation of section 75.202(a). Section 75.202(a) provides:

> The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

30 C.F.R. § 75.202(a).

104(d)(1) Order No. 8265805 in Docket No. KENT 2012-1403 alleges that, by failing to record and correct the cited adverse roof and rib conditions, the Respondent failed to conduct adequate on-shift examinations in violation of section 75.362(b). The Secretary proposes a civil penalty of $3,224.00 for Order No. 8265805. Section 75.362(b) provides, in pertinent part:

> During each shift that coal is produced, a certified person shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (a)(3) of this section along each belt conveyor haulageway where a belt conveyor is operated.

30 C.F.R. § 75.362(b).

Thus, the Secretary seeks to impose $50,024.00 for the four alleged unwarrantable citations at issue. In addition, the captioned civil penalty matters each contain one additional citation, for which the parties have reached an agreement. With regard to 104(a) Citation No. 8251922 in Docket No. KENT 2012-1321, the settlement terms include reducing the degree of negligence attributable to the Respondent, from moderate to low, and reducing the civil

[1] As a general matter, an unwarrantable failure occurs when a violation is attributable to aggravated conduct rather than ordinary negligence. *Emery Mining*, 9 FMSHRC 1997, 2001 (Dec. 1987).

penalty from $1,500.00 to $850.00. With regard to Order No. 8265806 in Docket No. KENT 2012-1403, the settlement terms include modifying the 104(d) order to a 104(a) citation to reflect that the violative condition was not the result of an unwarrantable failure, and reducing the civil penalty from $9,122.00 to $4,000.00. The parties' partial settlement agreement, which was approved on the record, imposes a civil penalty of $4,850.00 for the two citations addressed therein. (Tr. 8-10).

I. Statement of the Case

As discussed below, I will defer to the opinion of the issuing mine inspectors that the cited roof and rib conditions constituted violations of section 75.202(a). Given the hazardous nature of adverse roof and rib conditions, the violations were properly designated as significant and substantial ("S&S").[2] However, the unwarrantable failure designations for the three subject violations cannot be affirmed for several reasons. As an initial matter, the cited rib and roof conditions lack specificity with respect to the nature and extent of the alleged violations. As discussed below, the citations contain general allegations of cracks ranging from one to twelve inches from the edge of ribs, without specifying whether the majority of the cracks were closer to one inch or to twelve inches from the edge. Thus, the obviousness and extent of the danger posed by the cited rib conditions cannot be determined.

The Secretary relies on duration and obviousness to prove an unwarrantable failure, asserting that the alleged hazardous rib conditions existed and went unattended for at least one month. However, the alleged violative conditions cited on February 1, 2012, by issuing inspectors who were not familiar with the conditions in the Voyager No. 7 Mine, were not supported by the opinion of the regular quarterly MSHA Inspector who had observed the rib conditions in the same areas of the No. 4 Entry between January 17 and January 23, 2012.

The record also precludes a finding of aggravated conduct because MCC was prejudiced by virtue of the fact that it was not given an opportunity to accompany the inspectors. This is particularly important because the lack of MCC's participation prevented it from having the inspectors identify, in MCC's presence, the nature, extent and location of each alleged hazardous rib condition, facts that are not adequately set forth in the general language of the citations. (Gov. Ex. A, B, C); *See*, *SPC Investments, LLC*, 31 FMSHRC 821, 827-28 (Aug. 2009).

Finally, the inadequate on-shift citation shall be vacated, given the inadequate description of the hazardous conditions that are alleged to have been overlooked by MCC's on-shift examiners. Moreover, as discussed below, a determination of inadequate on-shift examinations would require a finding that several regular EO-1 MSHA inspections of the same areas that occurred shortly before February 1, 2012, were also inadequate, as they did not disclose any adverse roof or rib conditions.

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[2] Generally speaking, a violation is S&S if it is reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981).

II. Findings of Fact

The Voyager No. 7 Mine is an underground coal mine located in Martin County, Kentucky. The mine was acquired from Massey Energy Company by Alpha Natural Resources in June 2011. (Tr. 407). Though now idle, On February 1, 2012, when the relevant citations were issued, the mine had one working section. (Tr. 489, 491). The cited roof and rib conditions along the No. 1, 2 and 3 belts were located in the No. 4 Entry. The three conveyor belts totaled approximately 1½ miles in length. (Tr. 117, 126). The belts were approximately eight feet from the ribs on the walkway side, and two feet from the ribs on the off-walkway (maintenance) side. (Tr. 67-68). The ribs separating the entries and crosscuts along the belts were approximately fifty to sixty feet in length, and six feet high. (Tr. 94, 202). At the time of the February 1, 2012, inspection, there were two productions shifts at the Voyager No. 7 Mine. The day shift was from 6:00 a.m. to 3:00 p.m., and the evening shift was from 3:00 p.m. to 12:00 a.m. (Tr. 56-57, 23).

Regular quarterly inspections of MCC's Voyager No. 7 underground mine, designated by MSHA as EO-1 inspections, were conducted by MSHA Inspectors assigned to the Martin County field office. Since 2010, MSHA Martin County Inspector Robert Wise had been assigned to conduct the inspections at the Voyager No. 7 Mine. (Tr. 405-06). Wise testified that it is common for MSHA Inspectors to be on-site on a regular basis for the entire three month quarter in relatively large mines such as Voyager No. 7. (Tr. 472). Wise normally conducted his inspections during the day shift, at which time he provided an opportunity for MCC representatives to accompany him. (Gov. Ex. G).

During January 2012, the month prior to the issuance of the subject citations, Wise was on-site conducting inspections on twelve separate days. (Tr. 414). As part of his routine EO-1 inspection duties, Wise inspected the roof and rib conditions along the No. 1, 2 and 3 belts. Wise testified that his quarterly inspection was on schedule, and that he had not requested any assistance in completing his inspection assignment. (Tr. 414, 434). Consequently, he neither expected nor requested a supplemental EO-1 inspection by inspectors assigned to an MSHA office other than Martin County.

Wise inspected the No. 3 Belt line and its roof and rib conditions on January 17, 2012, at which time he was accompanied by Kenny Hunt, MCC's superintendent of Voyager No. 7. (Tr. 418, 425). Wise inspected the rib and roof conditions along the No. 2 belt line on January 18, 2012, at which time he was accompanied by Foreman Timothy Stratton. (Tr. 424-25). Wise examined the roof and rib conditions along the No. 1 Belt line on January 23, 2012, once again accompanied by Kenny Hunt. (Tr. 429). In each case, Wise failed to observe any violative roof or rib conditions along any of the belts.[3] (Tr. 421-22, 425-27, 430). Wise testified that opinions concerning whether the nature and extent of a cracked rib creates a hazard that requires remedial action are frequently subjective. (Tr. 441-42).

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[3] Wise's testimony that he did not observe any hazardous roof or rib conditions is significant, as the relevant testimony and notes of the issuing inspectors reflect that the cited roof and rib conditions existed for at least a month. (Tr. 167-173; Gov. Ex. E at 4, 5, 7).

Wise also routinely reviewed the belt examination books as part of his inspection duties. (Tr. 432). Wise testified that he did not find the on-shift examinations inadequate, as he did not find any evidence of unreported hazardous roof or rib conditions. (Tr. 433). In this regard, the on-shift record book reflected that some actions had been taken to correct adverse roof or rib conditions in the weeks preceding the February 1, 2012, inspection. (Tr. 59-61, 241-44; Gov. Ex. M at 1, 3, 6).

On January 31, 2012, MSHA received an anonymous complaint alleging inadequate ventilation at the Voyager No. 7 Mine. (Tr. 52). Section 103(g)(1) of the Act authorizes MSHA to investigate safety related complaints received from miners. 30 U.S.C. § 813(g)(1). The complaint was referred to MSHA's Pikeville, Kentucky office for investigation, designated by MSHA as an EO-3 investigation. (Tr. 65, 179). Normally an EO-3 related inspection requires two or three inspectors. (Tr. 180, 183). However, on February 1, 2012, six inspectors and a special investigator were dispatched from the Pikeville Office to the Voyager No. 7 Mine. (Tr. 180, 183).

Special Investigator Venita Branham's assignment was to take control of the surface phones when she arrived at the mine to prevent any underground communication which would have provided advance notice of the inspection. (Tr. 356-58, 364). Although Wise testified that he did not require any assistance in fulfilling his EO-1 responsibilities, at some point between departing their office and arriving at the mine site, the Pikeville personnel decided to divide into two groups, thus morphing their initial EO-3 inspection into an additional EO-1 inspection. (Tr. 64-66, 414). Inspectors Robert McIntosh, Billy Buchanan and Silas Adkins were to investigate the EO-3 ventilation complaint, while Inspectors Lester Keith Preece, Benjamin Adams, and James Reynolds[4] were to conduct a supplemental regular quarterly EO-1 inspection of the belts and surrounding areas.[5] (Tr. 51, 64, 318-19).

The inspection party arrived at the Voyager No. 7 Mine at approximately 7:30 p.m., at which time Branham took control of the Mine Office phone. (Tr. 51, 353-354). Branham informed Shannon Rowe in the Mine Office of the arrival of MSHA Inspectors, and ordered Rowe not to call underground. (Tr. 357-58). Inspectors McIntosh, Buchanan, Adkins, Preece, Adams and Reynolds proceeded underground. McIntosh, Buchanan and Adkins investigated the ventilation complaint and determined that it lacked merit. (Tr. 178).

Once underground, Preece and Adams proceeded to perform a regular EO-1 inspection by traversing the No. 4 Entry along the No. 1, 2 and 3 belts. (Tr. 66, 272). Preece noted that inspectors rarely perform regular EO-1 inspections without being accompanied by a representative of the mine operator, estimating that only one to three percent of inspections

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[4] Although Reynolds participated in the EO-1 inspection, he did not testify in this matter, or issue any of the citations that are the subjects of these proceedings. It is unclear from the record whether Reynolds walked the No. 1, 2 and 3 belts with Preece and Adams, or whether he proceeded to inspect nearby areas independently.

[5] Preece conceded that, to his knowledge, this was the first time an inspection conducted in response to a complaint and a regular quarterly inspection occurred simultaneously. (Tr. 181).

are unaccompanied. (Tr. 185-86). Preece testified that, before entering the mine, MCC was prevented from arranging for any company representatives to accompany either the EO-1 or the EO-3 inspection parties while underground. (Tr. 186). Upon arriving at the No. 1 Belt, Preece further testified that he met Brandon McKinney, foreman of the rehab crew. (Tr. 258-59). Although Preece remembered talking to McKinney underground, he could not recall what was said. (Tr. 259). However, Preece testified that he did not explicitly inquire as to whether an MCC representative wanted to accompany him during his EO-1 inspection of the belts. (Tr. 186-88). Preece speculated that McKinney would have declined to participate in the inspections, as McKinney was the only foreman supervising miners underground. (Tr. 259).

Similarly, with regard to whether an MCC representative was provided with an opportunity to participate in the inspection, Adams testified:

> Q: Did you at any time ask anyone from the Voyager Mine if they wished to accompany you?
>
> A: I did not. No.
>
> Q: Did you hear anyone offer any individual from the Voyager Mine the opportunity to travel with you?
>
> A: I didn't hear anyone. No.
>
> Q: To travel with Keith Preece?
>
> A: No.
>
> Q: To travel with James Reynolds?
>
> A: No.

(Tr. 321-22).

Preece and Adams proceeded to traverse along the No. 1, 2 and 3 belts, paying particular attention to the surrounding roof and rib conditions. Preece and Adams testified that they observed a total of approximately fifty cracks, approximately 1-1½ inches wide, in the ribs surrounding the No. 1, 2 and 3 belts. The inspectors testified that the approximately one inch wide cracks were anywhere from one to twelve inches from the pillar's edge, extending from the roof down to either the floor or center of the pillar. (Tr. 72-74, 101, 107-08, 273, 279-80, 290-91). Specifically, Preece testified that they observed approximately 26 cracks along the No. 1 Belt, 16 along the No. 2 Belt, and 7 along the No. 3 belt. (Tr. 115). They opined that the cracks they observed created the risk that slices of the pillars ranging from one to twelve inches were at risk of separating and falling. (Tr. 77, 273). Significantly, neither the testimony nor the citations, as quoted below, adequately quantify how many of the cited rib cracks posed a significant hazard, i.e., differentiating those that were approximately one inch from the edge of the rib from those that were approximately twelve inches from the edge.

In addition to his observation of rib cracks along the No. 1 belt, Preece also observed two loose roof bolts, and a wide entry where roof bolts were 54-72 inches (rather than the required 48 inches) from the rib. (Tr. 96, 78). However, Preece testified that the wide area may have been cut wide, rather than a widening as a result of a rib fall, as there was no roof material observed on the mine floor. (Tr. 78, 234). Along Belt No. 3, Preece and Adams observed fallen material in a crosscut, and noted that the bolt above was approximately 74 inches from the rib. This indicated that a crack in the rib had separated (a "rib roll") allowing 26 inches of material to break off and fall. (Tr. 106-07, 282-83).

The specifics of the citations are as follows.

Citation No. 8265796 (Belt No. 1), issued by Inspector Preece, alleges:

> The roof, face, and ribs of areas where miners work or travel is not being supported or otherwise controlled to prevent falls of the roof and ribs along the co. No. 1 belt conveyor on the off walk way side. *The ribs are broken and are hanging loose from 1 inch up to 12 inches in the following locations. Between crosscuts 4-5, 12-13, 15-16, 18-19, 20-24, 26-27, 38-42, 46-51, 53-58, 60-63.* Between crosscut 15-16 the entry is 23 feet 8 inches in width. Between crosscut 17-19 there [are] 2 permanent roof supports (roof bolts) that are hanging from the mine roof from 4 inches up to 8 inches. On-shift examinations are conducted each shift on a daily basis to recognize and correct hazardous conditions by a certified foreman. These hazardous conditions are obvious to the most casual observer. These hazards have not been recognized or recorded and no additional support has been installed in the cited areas. This is an unwarrantable failure to comply with a mandatory standard.
>
> Standard 75.202(a) was cited 19 times in two years at mine 1519193 (19 to the operator, 0 to a contractor).

(Gov. Ex. A) (emphasis added).

Order No. 8265798 (Belt No. 2), issued by Inspector Preece, alleges:

> The roof, face, and ribs of areas where miners work or travel is not being supported or otherwise controlled to prevent falls of the roof and r[i]bs along the co. No. 2 belt conveyor on the off walk way side. *The ribs are broke[n] and hanging loose from 1 inch up to 12 inches in the following locations. Between crosscut 3-4 (offside), 4-5 (walkway side), and crosscut 6-20 (offside).* On-shift examinations are conducted each shift on a daily basis to recognize and correct hazardous conditions by a certified foreman. These hazardous conditions are obvious to the most casual observer.

> These hazards have not been recognized or recorded and no additional supports ha[ve] been installed in these areas. This is an unwarrantable failure to comply with a mandatory standard.
>
> Standard 75.202(a) was cited 20 times in two years at mine 1519193 (20 to the operator, 0 to a contractor).

(Gov. Ex. B) (emphasis added).

Order No. 8265804 (Belt No. 3), issued by Inspector Adams, alleges:

> The roof, face and ribs of areas where miners work or travel are not being supported or otherwise controlled to prevent falls of the roof and ribs along the company No. 3 belt conveyor. The crosscut between No. 3 take-up and the track entry has the outby [ ] rib rolled out leaving wide bolts measuring from 52 [inches] to 74 [inches] from the rib through this area, exposing the loose and broken ribs. *Loose hanging ribs were observed from [the] No. 1 to the No. 4 crosscut on the offside of the belt. Crosscuts No. 6 through No. 7 have loose hanging ribs on both sides. Between crosscuts No. 11 and No. 12 loose hanging ribs were observed on the offside. Between No. 16 and No. 17 loose ribs were observed on the walkway side.* Onshift examinations are conducted each shift on a daily basis to recognize and correct hazardous conditions by a certified foreman. These hazardous conditions are obvious to the most casual observer. These hazards have not been recognized or recorded and no additional support ha[s] been installed in the cited areas. This is an unwarrantable failure to comply with a mandatory standard.
>
> Standard 75.202(a) was cited 21 times in two years at mine 1519193 (21 to the operator, 0 to a contractor).

(Gov. Ex. C) (emphasis added).

Preece and Adams testified these conditions were reasonably likely to result in injuries caused by falling rock, noting that separated ribs are subject to vibrations from the belt line, contact with mine equipment, and gravitational forces. (Tr. 118-121, 295, 299-300). They testified that miners frequently work along the belts to perform maintenance and conduct belt inspections. (Tr. 117, 278). They also concluded that any injury would have been serious, based on a mine industry history of fatal roof fall and rib roll accidents. (Tr. 118, 296). Consequently, the three cited violative conditions were designated as S&S. Preece testified that, with respect to Belt No. 1, even if no loose ribs had been found, the wide entry and loose roof bolts would have been enough for an S&S designation. (Tr. 96-99). Preece and Adams also attributed their

citations to unwarrantable failures. They concluded the negligence attributable to MCC was sufficient to support unwarrantable failures, primarily due to the approximately fifty cracked and loose ribs that they observed. (Tr. 130-31, 297).

At trial, consistent with his deposition testimony and his notes, Preece testified that the alleged hazardous conditions along the No. 1, 2 and 3 Belts existed for at least one month. (Tr. 167-173). Apparently aware that Wise had not observed these hazards during his EO-1 inspections, Preece modified his opinion by testifying that the cited conditions only existed for multiple shifts. (Tr. 131). It is not credible that the majority of the approximately fifty cited rib conditions in the No. 4 Entry were only several shifts in duration. In any event, regardless of their exact duration, Preece concluded the failure of belt examiners to note these multiple conditions constituted inadequate on-shift examinations. Consequently, Preece issued Order No. 8265805 alleging a violation of section 75.362(b). (Tr. 131-32, 142-43). Preece designated the violation as S&S and attributable to an unwarrantable failure. Order No. 8265805 states:

> An adequate onshift examinations is [sic] not being conducted on the company No. 1, 2, 3 and 4 conveyor belts as stated in citations and order numbers, 8269893, 8269894, 8269895, 8265794, 8265795, 8265796, 8265797, 8265798, 8265804, 8265799, 8265800, 8265801, and 8265803. Hazardous conditions existed along these conveyor belts for more than one shift and the examiners failed to recognize, record and correct these obvious hazardous conditions. The preshift/onshift examiners are the front line of defense in hazard recognition and correcting these conditions. The examiner had previously traveled these cited areas with none of the hazards recorded in the exam books. In failing to conduct an adequate onshift exam, miners are put at risk to work or travel in these areas. This is an unwarrantable failure to comply with a mandatory standard. The operator engaged in more than ordinary negligence in failing to identify these hazards.
>
> All examiners shall receive additional training on hazard recognition on regulations 75.362 and 75.363 as for the termination of this 104(d)(1) order.

(Gov. Ex. D).[6]

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[6] Order No. 8265805 refers to citations that were issued by Inspector Reynolds, in mine areas other than along Belt Nos. 1, 2 and 3. Reynolds did not testify in these proceedings. At trial, MCC's objection to the admission of these citations into evidence was sustained for lack of foundation. Moreover, MCC did not have an opportunity to depose Reynolds, as he was not identified as a witness of the Secretary during pre-trial submissions. (Tr. 133-36). In any event, Preece testified that the cited cracked rib conditions along the No. 1, 2 and 3 Belts were the primary basis for alleging the on-shift examinations were inadequate. (Tr. 137-40, 148).

Wise could not adequately explain how the Pikeville inspectors observed so many hazardous rib conditions given that he failed to observe any significant roof or rib hazards during his inspections of the No. 4 Entry only two weeks before.[7] In this regard, on cross-examination, Wise testified:

Q: Okay. And you've seen the – You've seen the enforcement actions that [Preece and Adams] wrote?

A: Yes.

Q: It was pretty drastic, wasn't it?

A: Yes.

Q: You never saw the conditions that were claimed to exist in these violations written by the Pikeville MSHA people, did you?

A: I didn't see anything when I went through there.

Q: You were very surprised and shocked when you heard about these enforcement actions that were lodged against Voyager, weren't you?

A: Yes.

Q: Now, just backtracking from February 1, 20—

COURT: Let me ask you, Mr. Wise. Why were you surprised and shocked at the citations?

A: Because I had traveled those belts and I hadn't seen the same conditions that they did.

(Tr. 435-36).

Both Preece and Wise noted that inspectors can reasonably disagree on whether roof or rib conditions caused by sloughage, a common occurrence in underground mines, pose hazards that require corrective action. (Tr. 147, 448). Having failed to note during his inspections the conditions cited by Preece and Adams, Wise conceded that he did not believe the cited conditions were obvious. (Tr. 443-44).

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[7] For example, Wise tried to explain the disparity between his observations and those of Preece and Adams by stating that he had inspected the roof and ribs while walking on the opposite side of the belts than that traversed by the Pikeville inspectors. (Tr. 436, 445-47). However, on cross-examination, Wise admitted that he walked on the same side as Preece along Belt No. 1 (the longest of the three with the greatest number of cited conditions). (Tr. 436, 445-47).

In order to view the cited areas in preparation for abatement, Hunt, Stratton and Safety Representative Joey Hammonds walked the belts on February 2, 2012, the morning after the citations were issued. (Tr. 519-20, 566, 585). Although they testified that they observed some cracked ribs, they maintained there were significantly fewer than fifty, and that the cracks they observed posed little, if any, hazard. (Tr. 542-44, 571-72, 589-91). In this regard, MCC's witnesses testified that it was very difficult to scale down the loose material, indicating that it would not have fallen on its own. (Tr. 521-23, 541, 569, 589-590).

Wise testified that when he arrived at the mine on the morning of February 3, 2012, a number of the cited conditions were still being abated. (Tr. 396-400). Wise explained that every cited condition must be addressed in order to be considered abated, and that his oversight of the abatement did not necessarily reflect his opinion regarding the conditions alleged in the citations. (Tr. 456-58). Consequently, the fact that Wise abated the citations is of little evidentiary significance with respect to obviousness and the degree of negligence attributable to MCC.

III. Further Findings and Conclusions

1. Evidentiary Framework

The Secretary has the burden of proving each element of a citation by a preponderance of the evidence. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). In articulating the preponderance of the evidence standard, the Commission has stated: "[t]he 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 Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted).

As an initial matter, Preece's testimony and notes reflect that the alleged hazardous conditions along the No. 1, 2 and 3 Belts existed for at least one month. (Tr. 167-173; Gov. Ex. E at 4, 5, 7). Thus, the evidence reflects that the rib and roof conditions observed by Preece and Adams on February 1, 2012, were substantially similar to those observed by Wise during his regular EO-1 inspections on January 17, January 18, and January 23, 2012. Resolution of whether the Secretary has satisfied his burden of proof with respect to the fact of the violation, S&S, and unwarrantable failure requires reconciling the observations of Preece and Adams with Wise's regular EO-1 inspections of the same areas of the mine, as well as the testimony of MCC personnel who participated in the abatement. While Wise's failure to confirm the observations of Preece and Adams does not estop the Secretary from demonstrating the fact of a violation, the Commission has noted that prior inconsistent MSHA actions may be a mitigating factor in determining negligence. *Mach Mining, LLC*, 34 FMSHRC 1769, 1774 (Aug. 2012) (citing *King Knob Coal Co.*, 3 FMSHRC 1417, 1422 (June 1981)).

2. Rib and Roof Condition Citations

As the majority of the cited conditions in Citation No. 8265796 and Order Nos. 8265798 8265804 involve similar roof and rib conditions, these citations will be addressed collectively.[8]

a. *Fact of the Violation*

As previously noted, the majority of the cited conditions observed by Inspectors Preece and Adams involve alleged compromised ribs. The inspectors testified that, as a general matter, they observed a total of approximately fifty loose ribs that were the result of cracks measuring approximately one inch wide, extending either from the floor or center of the six foot pillar to the roof, that were anywhere from 1-12 inches from the edge of the pillar. (Tr. 107-08, 115, 290-91). Consequently, the Inspectors opined that slabs of rib, from one to twelve inches thick, were at risk of separating from the pillar and falling. (Tr. 77, 273). Preece also observed two loose roof bolts and a wide entry along Belt No. 1. (Tr. 96, 78). In addition, the inspectors testified that they observed a rib roll with fallen material resulting in a wide entry in a crosscut along Belt No. 3. (Tr. 106-07, 282-83).

In their citations, both Preece and Adams characterized the cited roof and rib hazards as "hazardous conditions [that] are obvious to the most casual observer." (Gov. Exs. A, B, C). The rub is that the record reflects that the cited conditions apparently may not have been obvious to a casual observer. In this regard, the Secretary's witness, Inspector Wise, conceded that he "hadn't seen the same conditions that [Preece and Adams] did" when Wise travelled the three belt entries in the period preceding the February 1, 2012, inspection. (Tr. 436).

Consistent with Wise's testimony, Hunt, Stratton and Hammonds, who observed the subject roof and rib conditions on the morning of February 2, 2012, testified that there were significantly fewer than fifty discernible cracks, and that the cracks they observed were a result of sloughage that was not hazardous. (Tr. 542-44, 571-72, 589-91). They summarized their participation in the abatement by testifying that much of the cited loose material would not have fallen on its own because it was difficult to scale. (Tr. 521-23, 541, 569, 589-590).

The cited mandatory standard in section 75.202(a) requires roof and rib areas where persons work or travel to be adequately supported or controlled to protect persons from hazards related to falling material. Significant testimony fairly detracts from the weight of evidence supporting the Secretary's assertion of obvious and extensive rib hazards. However, it is reasonable to conclude that at least some of the rib cracks required scaling or supplemental support to ensure that the surrounding area was adequately controlled as required by section 75.202(a). In this regard, the Commission has held that the opinion of an MSHA inspector that a condition is hazardous is entitled to great weight. *See, Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278 (Dec. 1998); *see also, Buck Creek Coal, Inc.*, 52 F.3d 133, 135-36 (7th Cir. 1995). Consequently, the evidence when viewed in its entirety is sufficient to support the fact of the violations of section 75.202(a), even if the number of hazardous conditions that required remedial action was significantly less than that alleged.

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[8] The parties also jointly addressed all three citations in their briefs. Sec'y Br. at 8; Resp. Br. at 29.

b. *Significant and Substantial*

As a general proposition, a violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained:

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

Id. at 3-4; *see also Austin Power Inc., v. Sec'y of Labor,* 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). With respect to the third element of *Mathies*, an S&S finding requires a determination that the violation contributes significantly and substantially to the cause and effect of a hazard. *U.S. Steel Mining Co., Inc.* 6 FMSHRC 1866, 1868 (Aug. 1984). Resolution of whether a particular violation of a mandatory standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). Thus, consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986). In the final analysis, the essence of an S&S violation is whether it is reasonably likely that the hazard contributed to by the violation will result in an event in which there are serious or fatal injuries. *Bellefonte,* 20 FMSHRC at 1254-55.

With respect to the *Mathies* criteria, it is obvious that the first, second and fourth criteria are satisfied, in that a violation of a mandatory standard has occurred that creates a discrete safety hazard to mine personnel in the belt entries, and that such mine personnel are reasonably likely to sustain serious injuries by their exposure to the hazard created. The remaining third *Mathies* criterion requires an evaluation of the likelihood of a roof fall injury-causing accident.

I credit Preece and Adams' testimony that both belt examiners and maintenance personnel regularly travel and work along conveyor belts. (Tr. 116-17, 278). Consequently, they are routinely exposed to hazardous roof and rib conditions that are not adequately controlled. Compromised roof and rib conditions are, by nature, hazardous and unpredictable. Adequate rib and roof control is fundamental to creating and maintaining a safe mining environment. Having credited Preece and Adams' observations that at least some cracks required remedial action, it is reasonably likely, in the context of continued mining operations, that MCC belt examiners and belt maintenance personnel who continue to be exposed to

unattended hazardous roof and rib conditions will be struck by falling material that will cause serious or fatal injury. Consequently, the citations concerning adverse roof and rib conditions are properly designated as S&S. The violations are serious in gravity in view of their potential for serious injury.

c. *Unwarrantable Failure*

The elements of unwarrantable conduct are well settled. The Commission has determined that an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 135-36 (approving the Commission's unwarrantable failure test).

The Commission examines various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the violation poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12, 17 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard.[9] *Peabody*, 14 FMSHRC at 1263-64.

MSHA inspectors must be encouraged to issue citations when they believe miners may be exposed to violative hazardous conditions. Consequently, I have deferred to the broad discretion of Preece and Adams with respect to the fact of the violations. However, the question of unwarrantable failure is an entirely different matter. A prime example of an unwarrantable failure is an obvious and/or extensive violation that poses a high degree of danger that has existed for a considerable period of time. None of these elements can be discerned from the general language of Preece and Adams' citations. In this regard, with respect to obviousness, extensiveness and the hazard posed, the citations do not reflect what proportion of the cited rib cracks were only one inch from the edge of the rib, or precisely on which ribs such cracks were located. Fundamental fairness, if not due process, requires more.

Moreover, the boilerplate language in the citations that the cited conditions were "obvious to the most casual observer" does not make it so. Facts matter. In other words, it is the evidentiary facts that render a condition obvious. The general descriptions in the subject citations do not satisfy the Secretary's burden of demonstrating that the conditions were obvious

[9] While not dispositive, it is noteworthy that the history of violations in these matters includes prior violations committed by Massey Energy Company, a previous unrelated corporate operator of the Voyager No. 7 Mine.

to the casual observer, particularly in this instance, where they were not obvious to Inspector Wise. Significantly, at trial Wise, who was familiar with the general conditions in the mine, indicated that he was shocked at the number of conditions cited by Preece and Adams, and he conceded that the enforcement actions in the citations appeared to be drastic. (Tr. 435-36). The inconsistent findings of Wise may be considered as a mitigating factor in determining negligence. *Mach Mining, LLC*, 34 FMSHRC at 1774.

Wise directed abatement of the citations by requiring scaling and supplemental support. (Tr. 396-400). However, he testified that the scaling and additional support was a required response to abate the citations, and that it did not reflect his view as to whether violations had occurred. (Tr. 456-58).

With respect to the importance of a mine operator's participation in inspections, the statutory scheme of the Mine Act recognizes that mine operators must play an active role in creating and maintaining a safe mining environment. 30 U.S.C. § 801(e). To achieve this goal, section 103(f) of the Mine Act requires, in relevant part, that "[s]ubject to regulations issued by the Secretary, a representative of the operator . . . shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . for the purpose of aiding such inspection. . . ." 30 U.S.C. § 813(f). This statutory language places an affirmative duty on an MSHA inspector to provide a mine operator with the opportunity to accompany him during an inspection.

The fundamental importance of mine operators accompanying inspectors is evidenced by Preece's testimony that mine operators accompany inspectors approximately 97 percent of the time. (Tr. 185-86). Moreover, it is standard operating procedure for inspectors to provide the opportunity for accompaniment, as reflected in Inspector Wise's notes that require documenting, at the beginning of each day's inspection, whether or not the mine operator declined to accompany the inspector. (Gov. Ex. G at 1, 10, 17, 21, 27, 33, 38, 42, 48, 50, 53, 58, 63, 70). Satisfaction of this affirmative obligation to provide mine operators with an opportunity to participate cannot be accomplished by simply shifting to the mine operator the responsibility to seek permission to "tag along" during an MSHA inspection. While I am cognizant that MSHA is not required to provide advance notice of inspections, the statutory provisions of section 103(f) must be adhered to once the presence of an inspector is known because he has arrived underground.

The Commission addressed the issue of a mine inspector's failure to provide an opportunity for a mine operator's accompaniment in *SCP Investments, LLC*, 31 FMSHRC 821 (August 2009). Although the Commission concluded that the failure to provide an opportunity as provided in section 103(f) is not jurisdictional, the Commission stated that "under section 103(f) and our case law, the right of the operator to accompany the inspector during an inspection is an important right" which may not be curtailed without legal remedy. *Id.* at 825, 834. The Commission further noted that evidence may be excluded when walk-around rights are violated, if the mine operator can demonstrate prejudice. *Id.* at 835 (citations omitted).

The prejudice to MCC in this case is self-evident. As noted by Commissioners Young and Cohen, the failure to include operators during an inspection precludes the resolution of factual disputes that otherwise could be resolved on-site. *Id.* at 828. The mine operator's participation is particularly crucial in this case, where the inspectors could have directed MCC's attention with respect to the precise extent and location of each crack, and the hazards that the inspectors believed required remedial action. Thus, the prejudice caused by MSHA's failure to provide MCC with an opportunity to participate in the inspection provides an additional basis for deleting the unwarrantable failures.

In summary, while the nature and extent of the conditions observed by Preece and Adams, which were not confirmed by Wise, may have been attributable to an unwarrantable failure, the evidence, when viewed in its entirety, is insufficient to reach such a conclusion. Significantly, the Secretary does not contend that Wise's inspections were perfunctory in nature. Rather, the evidence reflects that the cited conditions are attributable to no more than a moderate degree of negligence. Accordingly, the unwarrantable designations in Citation No. 8265796 and Order Nos. 8265798 and 8265804 shall be deleted. As a result, 104(1) Citation No. 8265796 and 104(d)(1) Order Nos. 8265798 and 8265804 shall be modified to 104(a) citations.

d. *Civil Penalties*

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

> The principles governing the Commission's authority to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. § § 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:
>
> > [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600 (citing 30 U.S.C. § 820(i)).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. Id. at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the exercise of its de novo authority to assess civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

While the Voyager No. 7 Mine apparently is idle (Tr. 489), MCC does not contend that the proposed penalties in this matter are disproportionate to its size. The cited rib and roof conditions were serious in gravity, but are attributable to no more than a moderate degree of negligence. The record reflects the cited violations were abated in good faith and in a timely manner. It is true that the history of violations during the previous two years, as noted in the citations, would ordinarily be an aggravating factor, despite the change in mine ownership. However, in this case, the violation history is less significant as the Secretary has failed to demonstrate the violations were obvious, given the conflicting testimony by the Secretary's witnesses.

In view of the reduction in negligence, and the paucity of evidence with regard to the specific nature, extent and location of the cited conditions, a civil penalty of $4,000.00 shall be assessed for each of these 104(a) citations.

3. On-Shift Examination Citation

As a threshold matter, in resolving whether a violation of a regulation requiring an examination has occurred, the proper inquiry is whether the subject examination was adequately performed. *See, e.g., RAG Cumberland Resources LP*, 26 FMSHRC 639, 647 (Aug. 2004) (holding that although mandatory standards may not explicitly require adequate or effective measures by mine operators, such a requirement is implicit in the standard's underlying purpose), *aff'd* 171 Fed. Appx. 852 (D.C. Cir. 2005). Thus, 104(d)(1) Order No. 8265805 alleges, in essence, a series of inadequate on-shift examinations in violation of the mandatory standard in section 75.362(b).

In resolving the adequacy of the on-shift examinations, it is helpful to apply the Commission's reasonably prudent person test. The Commission has previously articulated the test to determine whether there was a reasonable basis for believing that roof and ribs needed additional support. The Commission stated:

> [T]he adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, *familiar with the mining industry and the protective purposes of the standard*, would have provided in order to meet the protection intended by the standard.

Canon Coal Co., 9 FMSHRC 667, 668, (Apr. 1987) (emphasis added). *See also, Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

Obviously, Inspector Wise, who (unlike the issuing inspectors) was familiar with the conditions in the No. 7 Mine, satisfies the Commission's criteria of a reasonably prudent person who understands the protective purposes of the roof control provisions in section 75.202(a). Yet, Inspector Wise did not find any unreported conditions requiring remedial roof or rib control during his relevant inspections of the ribs along the No. 1, 2 and 3 Belts.

Moreover, there is no evidence that the on-shift examinations were conducted in a perfunctory manner. Significantly, the on-shift examination book entries proffered into evidence by the Secretary reflect that there were rib conditions requiring remedial action which had been noted by the on-shift examiner during the week preceding the February 1, 2012, inspection. Specifically, MCC examiner Derrick Wright noted on January 23, 2012, that timbers were added at breaks 61 and 58 along Belt No. 1; he noted on January 25, 2012, that roof bolt plates were secured at break 6 along Belt No. 3; and he noted on January 30, 2012, that timbers were added at breaks 3 and 4 along Belt No. 3. (Gov. Ex. M at 1, 3, 6). Although Inspector Wise and the on-shift examiners may have missed a relatively small proportion of the one inch cracks cited by Preece and Adams, the dispositive question is whether the on-shift examinations were adequate based on a reasonably prudent examiner test.

Finally, although 104(d)(1) Order No. 8265805 references violative conditions in addition to the subject rib conditions in this matter, the Secretary failed to present any evidence of these conditions as the basis for demonstrating the on-shift examinations were inadequate. In fact, Preece admitted that the "fifty locations" where Preece and Adams cited rib cracks were the primary basis for issuing Order No. 8265805. (Tr. 148). Thus, on balance, Order No. 8265805 must be vacated as the Secretary has failed to satisfy his burden of demonstrating that the examinations were inadequate.

As a final note, this Commission protects miners from adverse actions taken by mine operators in response to a miner's protected activities. Protected activity includes testimony in Mine Act proceedings. Federal whistleblower statutes hold the government to the same standard. *See* 5 U.S.C. § 2302(f)(2) (2013). This litigation has caused MSHA inspectors to provide conflicting testimony with regard to their inspection findings. Consequently, Inspector Wise was required to testify under difficult circumstances. While I recognize retaliation may be extremely unlikely, it would be naïve to believe it never occurs. The Secretary should ensure that Wise does not experience any reprisals as a result of his participation in these proceedings.

ORDER

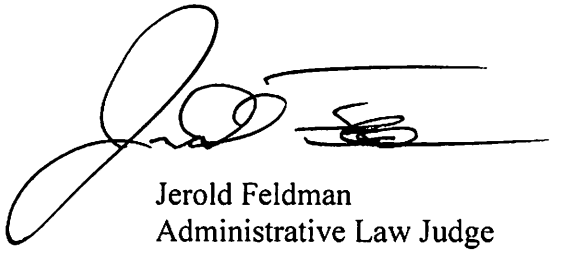
Consistent with this Decision, **IT IS ORDERED** that 104(d)(1) Citation No. 8265796 and 104(d)(1) Order Nos. 8265798 and 8265804 in Docket No. KENT 2012-1321 **ARE MODIFIED** to 104(a) citations to reflect that the cited conditions were not the result of an unwarrantable failure. **IT IS FURTHER ORDERED** that the degree of negligence attributable to Martin County Coal Corporation for each of cited violations in these citations is reduced from high to moderate. Accordingly, **IT IS ORDERED** that a civil penalty of $4,000.00 each shall be assessed for Citation Nos. 8265796, 8265798 and 8265804, constituting a total civil penalty of $12,000.00.

IT IS FURTHER ORDERED that 104(d)(1) Order No. 8265805 in Docket No. KENT 2012-1403 **IS VACATED**.

IT IS FURTHER ORDERED, consistent with the parties' partial settlement agreement, that Martin County Coal Corporation shall pay a total civil penalty of $4,850.00, consisting of $850.00 for 104(a) Citation No. 8251922 in Docket No. KENT 2012-1321, and $4,000.00 for 104(a) Citation No. 8265806 in Docket No. KENT 2012-1403.

Accordingly, **IT IS ORDERED** that Martin County Coal Corporation pay, within 40 days of the date of this decision, a total civil penalty of $16,850.00 in satisfaction of the citations in the captioned dockets, consisting of a civil penalty of $12,850.00 for Docket No. KENT 2012-1321, and $4,000.00 for Docket No. KENT 2012-1403.

Upon receipt of timely payment, the captioned contest and civil penalty proceedings **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

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