FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 27, 2010

KNOX CREEK COAL CORP.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. VA 2010-81-R
	:	Order No. 8169137; 11/04/2009
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	:	Docket No. VA 2010-82-R
	:	Citation No. 8169140; 11/04/2009
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	:	Docket No. VA 2010-83-R
	:	Citation No. 8169138; 11/04/2009
	:	
	:	Docket No. VA 2010-84-R
v.	:	Citation No. 8170372;11/02/2009
	:	
	:	Docket No. VA 2010-85-R
	:	Citation No. 8170368; 11/02/2009
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	:	Docket No. VA 2010-86-R
	:	Citation No. 8164762; 11/01/2009
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	:	Docket No. VA 2010-87-R
	:	Citation No. 8170373; 11/04/2009
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SECRETARY OF LABOR,	:	Docket No. VA 2010-88-R
MINE SAFETY AND HEALTH	:	Citation No. 8170374; 11/04/2009
ADMINISTRATION, (MSHA),	:	
Respondent	:	Docket No. VA 2010-89-R
	:	Citation No. 8170375; 11/04/2009
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	:	Docket No. VA 2010-90-R
	:	Citation No. 8170376; 11/04/2009
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	:	Docket No. VA 2010-91-R
	:	Citation No. 8170350; 10/26/2009
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	:	Docket No. VA 2010-92-R
	:	Citation No. 8169126; 10/27/2009
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	:	Docket No. VA 2010-93-R
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: Docket No. VA 2010-94-R
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: Docket No. VA 2010-95-R
: Citation No. 8170358; 10/28/2009
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: Docket No. VA 2010-96-R
: Citation No. 8170360; 10/28/2009
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: Docket No. VA 2010-97-R
: Citation No. 8170352; 10/26/2009
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: Docket No. VA 2010-98-R
: Citation No. 8170353;10/26/2009
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: Docket No. VA 2010-99-R
: Citation No. 8170361;10/28/2009
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: Docket No. VA 2010-100-R
: Citation No. 8170364;10/30/2009
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: Docket No. VA 2010-101-R
: Citation No. 8170363; 10/20/2009
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: Docket No. VA 2010-103-R
: Citation No. 8170387; 11/09/2009
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: Docket No. VA 2010-104-R
: Citation No. 8170387; 11/09/2009
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: Docket No. VA 2010-105-R
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: Citation No. 8169149;11/16/2009
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: Citation No. 8170398; 11/16/2009
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	:	Docket No. VA 2010-132-R
	:	Citation No. 8169155; 11/20/2009
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	:	Docket No. VA 2010-133-R
	:	Citation No. 8169156; 11/20/2009
	:	
	:	Tiller No. 1
	:	Mine ID 44-06804
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, MSHA,	:	Docket No. VA 2010-166
Petitioner	:	A.C. No. 44-06804-206368
	:	
v.	:	Docket No. VA 2010-214
	:	A.C. No. 44-06804-208717-03
	:	
KNOX CREEK COAL CORP.,	:	Tiller No. 1 Mine
Respondent.	:	

DECISION

Appearances: Douglas N. White, Esq., Benjamin D. Chaykin, Esq., Cheryl Carroll, Esq., Scott Hecker, Esq., Polly Anna Hampton, Esq., and Ann T. LyJordan, Esq., U.S. Department of Labor, Arlington, VA on behalf of the Secretary

Alexander Macia, Esq. and Mark E. Heath, Esq., Spilman, Thomas & Battle, PLLC, Charleston, West Virginia, on behalf of Knox Creek Coal Corporation

Before: Judge Barbour

These cases are before me on notices of contest filed by Knox Creek Coal Co., ("Knox Creek") and civil penalty petitions filed by the Secretary of Labor ("Secretary"), acting on behalf of her Mine Safety and Health Administration ("MSHA"), pursuant to sections105 and110 of the Federal Mine Safety and Health Act of 1977 ("the Act") (30 U.S.C. §§ 815, 820). In the contests Knox Creek challenges the validity of numerous citations issued pursuant to Section 104(a) of the Act (30 U.S.C. §814(a)) and one order issued pursuant to section 104(d) of the Act (30 U.S.C. §814(d)). The citations and order were issued at the company's Tiller No. 1 Mine, an underground bituminous coal mine located in Tazewell County, Virginia. In the civil penalty petitions, the Secretary requests the imposition of civil penalties on Knox Creek for the violations alleged in the contested citations and order. In the each of the contested citations and in the order, an MSHA inspector found a violation of a mandatory safety standard and that the violation was a significant and substantial contribution to a mine safety hazard ("S&S" violation). The inspector also made findings with regard the gravity of each alleged violation and the negligence of Knox Creek. The inspectors' S&S findings are especially important to the parties because the Secretary has put Knox Creek on notice that, depending on the outcome of these cases, the company may be subject to a Notice of Pattern of Violations issued pursuant to section 104(e)(1) of the Act. 30 U.S.C. § 814(e)(1).

Because of this potential consequence, counsels worked diligently to ensure the cases could be heard promptly, and a hearing was convened in Pounding Mill, Virginia on Monday, March 15, 2010.[1] The hearing was adjourned on Friday, March 19. Final arguments were heard in Washington, D.C. on Wednesday, March 24. On Friday, June 4, and on Tuesday, June 8, I reconvened the proceedings telephonically and entered an oral decision.[2] Excerpts of the decision follow. Editorial

[1] At the commencement of the hearing the parties advised me that they had settled their differences regarding five of the contested citations. Counsel for the Secretary explained the settlements on the record. Tr. I 64-68. I approved the settlements (Tr. I 68), and I will confirm my approval at the close of this written decision.

[2] I delivered a bench decision because I believed the transcript could be formulated rapidly into a written decision that complied with Commission Rule 69(a). 29 C.F.R. §2700.69(a). Unfortunately, practicalities trumped expectations. Formulation of the transcript proved to be much more difficult than expected, and post-hearing settlement discussions on citations included in the dockets, but not addressed at the hearing added to the time. In the future, the parties and the judge may want to explore other ways in which to reach a more prompt written decision. For example, perhaps they can agree that a one or two page decision summarizing the results of the bench decision and citing to the parts of the written transcript in which the judge sets forth his or her findings, conclusions and reasons will be regarded as

changes have been made.

DOCKET NO. VA 2010-91-R
DOCKET NO. VA 2010-166

CITATION NO.	DATE	30 C.F.R. §
8170350	10/26/09	75.202(a)

> The citation charge[s] that the coal ribs where miners are required to work and travel were not being supported at break two of one T [belt]. The Secretary charges [that at] the right [inby] corner of the intersection a loose portion of coal was separated from the pillar approximately one half inch. The Secretary further charges the [loose] part of the rib was located immediately adjacent to the [t]rack D[-]rail[er] and that a miner would be likely to be in the area to remove the [Tr. I 12] D[-] rail[er] and would travel immediately adjacent to the loose rib to enter the crosscut and allow the mantrip to go by before reinstalling the D[-]rail[er]. [In issuing] the citation the inspector, Jason Hess, stated[,] "It is reasonably likely if this condition . . . continued to exist a miner would . . . [receive] serious crushing injuries from the loose coal rib falling." [Gov't Exh. 6].
>
> The parties stipulated the cited conditions violated [s]ection 75.202(a). [Jnt. Exh. 1, Stip 16.] They further stipulated that Knox Creek['s] negligence was moderate and that should an injury occur, the degree of injury sustained by the miner affected would result in lost work [days] or restricted duty. [Jnt. Exh. 1, Stip's. 17-19].
>
> The key question is whether Inspector Hess properly found [that] the violation [was] S&S, and I conclude that he did. It is well established that a violation is properly found to be [S&S,] if based upon the [Tr. I 13] 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. In [*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984),] the Commission explained its interpretation of the term "significant and substantial" as follows:
>
> > [I]n order to establish a violation of a mandatory

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complying with Rule 69(a), especially if the transcript is made available on the Commission's web site. Further, the judge and the parties may want to clearly specify prior to trial the citations that have been settled and/or that will need to be settled before a final written decision is issued.

> safety standard as S&S, the Secretary 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.

[In] *U.S. Steel Mining Company, Inc*., 7 FMSHRC 1125, 1129 (August 1985) the Commission further stated [Tr. I 15] [:]

> [W]e have explained that the third element of the [*Mathies*] formula [Tr. I 14] requires the Secretary to establish a reasonable likelihood that the hazard contributed to [will] result in an event in which there is an injury. We have [emphasized] that in accordance with the language of section 104(d)(1)[,] it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial.
>
> In addition, application of the [*Mathies*] formula must be made not only in terms of the citations as they existed when they were cited, but also in terms of continuing mining operations. *U.S. Steel Mining*, 7 FMSHRC at 1130.

[As noted,] the parties agree that Knox Creek violated the standard. [Jnt. Exh. 1, Stip. 16]. Also, I find, based on Inspector Hess' testimony, that miners worked in the cited area. The presence of the D[-]railer meant that a miner or miners would be in the area to remove [the mechanism] [and] once removed, [a miner or miners would be in the area] to replace [it]. Further, I accepted [Hess'] testimony that miners would [Tr. 1 15] naturally congregate in the area adjacent to the cited rib. Finally, [and] again as Hess testified, if the mantrip stopped at the D [-] railer[,] a miner exiting the mantrip on the left would [be] exposed to the rib. In this regard, [Hess'] testimony with respect to [Gov't Exh.] 12 was especially helpful.

Moreover, by agreeing the violation existed the parties have essentially agreed that there was a possibility the cited rib could fall. This, together with my finding that the Secretary established [that] miners were exposed to the hazard, means that a miner could have been hit and possibly pinned by the falling [and cited] part of the rib. Certainly, given the size of at least part of the rib that was pulled down to abate the violation, there is no doubt that a miner who was hit by [a] cited part of the rib would have been reasonably

likely to suffer a serious injury.

The critical question is whether [it was reasonably likely that] the cited part of the rib would [fall] while miners [Tr. I 16] were close enough to be hit[.] I conclude that [it was]. I must consider this issue not only in the context of when [the violation] was cited but also in [terms] of ongoing mining operations, [a]nd I am especially persuaded by Hess' insistence that although he could not say for sure that the cited part of the rib would fall, as indeed no person could, the cited part was, in fact, loose and separated on both sides. My conclusion the cited part of the rib was indeed loose is strengthened by the fact that Hess, a thoughtful and forthright witness, explained that he did not measure the cited part of the rib until after it was pulled down, because, in effect, the rib was too unstable to measure. I accept Hess' judgment in this regard. I find [it is] supported by his credibility [and] by the fact that at least one side of the cited part of the rib exhibited a very wide gap that would have alarmed any experienced miner[Tr. I 17]. [*See* Gov't. Exh. 8]. Hess was right to proceed with great caution.

In addition, I conclude the cited part of the rib was reasonably likely to fall on a miner or miners. The fact that the D[-]railer was on the opposite side of the track when traveling inby and near the track's end did not mean that the hazard was eliminated or negligible. Hess credibly [stated] that during his years in mining he has seen numerous miners congregate in the vicinity of D[-]rail[er]s. Further, the D[-]railer could be moved[.] Despite section foreman Charles Reardon's testimony that the D[-]rai[er] was always relocated [in the same place,] I find it highly improbable [such] was the case. [In my opinion,] it [was] much more likely that the D[-] rail[er]'s position within the general area would have varied just as Hess maintained, and I conclude that at some point as mining continued a miner or miners attending to the D[-]rail[er] would have [been] in the very area where the cited part of the rib was likely [Tr. I 18] to fall.

Further, Hess saw the cited area because he rode there on the mantrip. When the mantrip reached the D[-] railer, Hess got out [of the mantrip.] [A]s Steve Addison, the mine's chief of maintenance who accompanied Hess testified, Hess could have walked by the cited area once he left the mantrip, and surely if Hess could [have done] it[,] so could any of Knox Creek's miners.

For these reasons I conclude within the context of continuing mining it was reasonably likely, [(1)] that the cited part of the rib would

fall, and [(2)] that when it did, a miner or miners would be near enough to be hit. In short[,] I find that the violation was S&S.

Having found the violation I am required to assess a civil penalty and to do so based upon the criteria set forth in Section 110(i) of the Act. [Tr. I 19] [(20 U.S.C. §820(i)]. The parties have stipulated to most of [the civil penalty] criteria, and I accept the stipulations. As stated in [Jnt. Exh. 1, Stip. 4], Knox Creek is a large operator and the mine also is large. As stated in [Jnt. Exh.1, Stip 6], any penalty [assessed] will not affect Knox Creek's ability to continue in [business]. As stated in [Jnt. Exh. 1, Stip. 14], the company exhibited good faith in timely abating the violation. As stated in [Jnt. Exh. 1, Stip. 12], Knox Creek's applicable history of previous violations is set forth in Exh. B of the stipulations, and based on the exhibit I find [Knox Creek's] history is large.

With regard to Citation 8170350, and as stated in [Jnt. Exh. 1, Stip. 17], Knox Creek's negligence in allowing the violation to exist was moderate. Finally, as stated in [Jnt. Exh. 1, Stips.18 and 19], one person was reasonably likely to experience an injury causing lost work days or restricted duty as a result of the violation. [Tr. I 20] This means, and the testimony establishes, that the violation was serious.

The Secretary has proposed a civil penalty of $2,106 [.] Given my findings and the stipulations[,] I conclude [that] the Secretary's proposal is warranted, and I assess a civil penalty of $2,106[.]

VA 2010-97-R
VA 2010-166

CITATION NO.	**DATE**	**30 C.F.R. §**
8170352	10/26/09	75.202(a)

The citation charges the coal ribs were not adequately supported or controlled at three locations on the 005 MMU (mechanical mining unit) for miners who were required to work and travel there. The three areas were [: (1),] the left inby corner of the [No. 5] entry[; (2),] the left inby corner of the [No. 3] entry[;] and [(3),] the left inby corner of the [No. 2] entry, two breaks outby the last open crosscut.

The parties stipulated that [the] conditions existed as stated in the citation and that the existence of the alleged violation [was] not at issue. [Jnt.Exh. 1, Stip 16]. Therefore, the violation of [Tr. I 21] [75.202(a)]

alleged in the citation existed as charged.

Also, based on Inspector Hess' testimony, I find that miners worked or traveled in each of three areas where the violative conditions existed. With regard to the left inby corner of the [No. 5] entry[,] I find that a roof bolting crew . . . traveled inby past the cited rib. Hess saw the miners inby, and he properly inferred they got where he saw them by passing the loose uncontrolled rib. With regard to the left inby corner of the [No. 3] entry, I find, again based on Hess's testimony, that miners passed the area while operating a shuttle car and that as mining continued it was reasonably likely other miners would travel past [the area]. Finally, with regard to the left inby corner of the [No.] 2 entry, two [b]reaks outby the last open crosscut, the scoop charger was in the general area as was the cable for the charger. *See* [Gov't. Exh.]16. I accept Hess' testimony that the presence of the scoop charger and trailing cable meant that [Tr. I 22] a miner or miners [was or were] reasonably likely to come dangerously close to the cited part of the rib as mining continued. Underground electrical equipment [has] to be recharged periodically and the scoop charger [has] to be moved periodically. It simply makes sense that in the course of ongoing mining, miners would come into the area to [work at] the scoop charger and/or to move it. Although maintenance chief, Steve Addison, [testified] that miners needed to travel behind the batteries to be in danger of being hit by the falling rib and that they would never place themselves behind the batteries, I accord his testimony little weight. The history of mining is replete with incidences of miners being injured[,] even killed, when working or traveling in areas where they were not supposed to be. Further, and as Addison agreed, nothing was in place to restrict access to the cited area.

I also credit Hess' belief that each of the conditions [had] existed since mining [began] or longer and that Knox Creek should have detected and corrected [Tr. I 23] [them]. Further, I fully credit Hess' on-site observation that it took little effort to pull down the loose unsupported ribs. I note that Addison was not present when one of the ribs, the rib in the [No. 5] entry, was pulled and that no testimony was offered by Knox Creek to dispute Hess' observation that the rib [was] easily pried loose. Moreover, as Addison testified, the two other cited areas also were pried loose and fell. Whether they came down easily or whether miners had to exert some effort to [bring] them down, I conclude that the very [f]act they fell when [they were] pried means [with] the additional pressure on the ribs [which] could be expected as mining continue[d] [they were reasonably likely to fall].

Miners' access to the area and the fact [that one of] the ribs [was] pulled down with little effort, convinces me that it was reasonably likely at least one miner would have been injured in at least one of the three cited areas. Further, given the size of the [loose] [Tr. I 24] rib[s], it was reasonably likely that the injury suffered by the miner would have been serious. For these reasons I find that the violation was S&S.

The Secretary proposed a civil penalty of [$2,106]. [T]aking into account my previous findings regarding Knox Creek's history of prior violations, as well as the parties' stipulations regarding Knox Creek's and the mine's size, the effect of the proposed penalty on Knox Creek's ability to continue in business, Knox Creek's good faith abatement[,] Knox Creek's moderate negligence [(Jnt. Exh. 1, Stip 17.),] and the fact that at least one person was reasonably likely to experience an injury causing lost work days or restricted duty as a result of the violation [(s*ee Id*., Stips. 18, 19),] I [assess a] penalty of [$2,106.] [Tr. I 25]

VA 2010-98-R
VA 2010-166

CITATION NO.	**DATE**	**30 C.F.R. §**
8170353	10/26/09	75.360(a)(1)

The citation states that because of [the rib] conditions cited [in] Citation [No.] 8170352 it is, "evident that the pre-shift examination conducted on October 26, 2009, between 4:15 a.m. and 4:55 a.m., was not adequate to ensure the safety of miners required to work and travel in this area." [Gov't Exh. 18]. The citation further states, "[W]ith the exception of the [No. 5] entry which could have received some affect[s] from the continuous miner there loading, there is no evidence that anything could have caused these conditions to occur after the examination. Therefore, the condition[s] should have been recognized and addressed during the pre-shift examination." [*Id*.]

The parties agree the conditions cited constitute a violation of [s]ection 75.360(a)(1)] which, in pertinent part, requires the pre-shift examiner to examine "for hazardous conditions," and that actions be taken to correct any [such] [Tr. 1 26] conditions[.] [Jnt.Exh. 1, Stip.16; 30 C.F.R. § 75.360(a)(1)].

Inspector [Hess] testified that pre-shift examiner Buster [Lamin,] who conducted the pre-shift examination between 4:15 a.m. and 4:55 a.m., on October 26th[,] did not report any of the cited rib conditions[,] and a copy of Mr. [Lamin's] pre-shift report confirms this[.] [Gov't Exh. 20.] Hess also testified that although in the [No. 5] entry, [the loose condition

of a] piece of coal rib measuring [3 ½] feet by 4 feet and up to 15 inches thick had possibly worsened after the examination, the other two areas of inadequately supported roof – [that is] the left inby corner of the [No. 3] entry, one break outby the last open crosscut, and the left inby corner of the [No. 2] entry, two breaks outby the last open crosscut at the scoop charger station – had existed in the condition Hess found when [Lamin] conducted his examination. [Tr. 1 27] However, Hess also agreed that in his notes he stated that the cited conditions were "not extremely obvious[."] From all of this I conclude that the violation of [section 75.360(a)(1)] did not include the cited conditions in the [No. 5] entry. The pre-shift examiner can not be held responsible for failing to find a cited condition that [was] not proven to [exist] in [a] hazardous state when the examination was conducted.

I further find, however, that Mr. [Lamin] did indeed fail to observe and record the then hazardous conditions in the [No. 3] entry and [in] the [No. 2] entry. Mr. [Lamin] testified that he [passed] the conditions and did not see them. I have no reason to doubt his testimony, but I conclude the conditions were there and that more careful observation[s] on Mr. [Lamin's] part [were] required.

The result of the violation was that the ribs in the [No. 3 entry] and the [No. 2 entry] were inadequately supported and miners were exposed to the hazards of the [Tr. 1 28] cited parts of the ribs falling and injuring the miners as mining continued. Had the condition[s] been reported by Mr. [Lamin,] they should have been, and I presume [they] would have been, corrected or [the areas would have been] dangered off prior to [the] miners being exposed[.] Given my findings regarding the S&S nature of the violation of [s]ection [75.202(a)] cited in [C]itation [No.] 8170352[,] I have no doubt the failure to conduct an adequate pre-shift examination prior to the shift in which the miners were exposed to the [rib fall] hazards was likewise an S&S violation.

The Secretary proposed a civil penalty of $1,203[.] Taking into account my previous findings regarding Knox Creek's history of prior violations[,] as well as the parties' stipulations regarding Knox Creek's and the mine's size, the effect of the proposed penalty on Knox Creek's ability to continue [in] business, Knox Creek's good faith abatement, Knox Creek's moderate negligence [Tr. 1 29] [See Jnt.. Exh. 1, Stip. 17,] and that fact that at least one person was reasonably likely to experience injuries causinglost work days or restricted duty as a result of the violation [(*Id*. Stips. 18, 19),] I find the proposed penalty of $1,203 to be appropriate, and I assess that amount[.] In assessing the penalty I have fully considered the fact that Mr. Hess believe[d] the cited conditions were "not extremely obvious"

[Gov't.Exh. 19)], but I conclude [he took] this into account [when he found Knox Creek to be moderately negligent.]

VA 2010-97-R
VA 2010-166

CITATION NO.	**DATE**	**30 C.F.R. §**
8170360	10/28/09	75.202(a)

The citation charges that ribs were not adeqately supported or controlled where miners were required to work and travel in the [No. 4] entry, four breaks outby the 005 MMU dumping point. The left outby corner of a pillar had [what] Hess described [as] a massive broken section of rib that was six feet thick and extended down the [Tr. 1 30] entry and nine feet into the crosscut. The cited part of the rib was rock and down the side of the rock were cracks one-eighth inch to one-fourth inch wide. Hess also [saw] small pressure cracks[.] The roof along the top of the cited loose rock was raveling, meaning it was breaking into small pieces and falling[.] The [cited] rock was resting on a coal seam and the coal had raveled from [underneath] the rock. [T]wo wooden posts [were] set under the rock where the coal had been. Also, a row of posts [was] set along the rib but the posts were offset several inches from the rib. Hess maintained the position of the posts was dangerous because it allowed [falling] rock to [contact] and possibly [dislodge] the posts. See [Gov't Exh.] 21.

Hess [testified] that miners performed required examinations in the area and that miners maintained the conveyor belt in the area. [Tr.-31.] Moreover, miners [were][working] in the area. In addition, the cited area was [along the] secondary [escapeway] for the [No.] 005 MMU[. Gov't Exh. 21]. Hess also testified that the lifeline from the MMU ran adjacent to [the] condition[s].

Hess photographed the condition[s]. [(Gov't Exhs. 24 - 31)]. Some of the photographs show[ed] evidence of the raveling that Hess noted (*See e.g.,*Gov't Exh. 30) [and m]any of the photographs show[ed] the cracks. [*See e.g.* Gov't Exhs 24, 25, 27 and 28]. The cracks also show[ed] in a photograph that was taken by a Knox Creek official [and] that was obtained by the [Secretary].[Gov't Exh. 134].

In Hess' opinion, the two posts that [were] set under the cited rock where the coal had raveled . . . would not . . . [keep] the rock from falling if the rock separated from the rib and started to move. Indeed, to stabilize

the rock and terminate the [cited conditions] Knox Creek had to place timbers and [Tr. I 32] steel cables adjacent to the cited area.

Hess [stated that] the belt drive was being installed in the area and that more equipment would be brought into the area as mining continue[d]. He testified that it would not be unusual for such equipment [-] for example, scoops or forklifts [-] accidentally to hit the rib and dislodge the corner, sending rock in the direction of the equipments' operator[s]. Further, the pre-shift examiner had to travel past the cited area when conducting the pre-shift examination[,] and if the [No.] 005 [MMU] unit had to be evacuated, miners would [follow] the lifeline in the immediate vicinity of the cited area.

Hess' testimony was detailed and persuasive. It was supplemented and confirmed by the [photographic evidence]. The record fully supports finding the cited rib was not adequately supported or controlled where miners were required to work and travel, and I find the violation of [section 75.202(a)] existed as charged.

The record also supports finding that the cited rock easily could have become [Tr. 1 33] unstable, that the coal [surrounding] it was raveling at the top and that it [had raveled at the] bottom. [The raveling] lessened the rock's stability. [As Hubert] Payne, one of the Secretary's expert witnesses, pointed out[,] pillar failure is a continuum and a deterioration or reduction in [a] pillar's size most likely indicates that the pillar has begun to fail. Moreover, and as Knox Creek's expert [witness], Alan Campoli, testified, the very fact that the rock fractured meant it was losing its continuity and that the rib had moved or was moving. It therefore seems clear that forces were being applied to the rock that were causing it to fracture and to move. Hess rightly observed [that] if the rock or [if a] part of the rock detached from the rib, [the weight of the loose rock] [was] such that [the] two posts would not have held it.

Further, as mining continued, equipment would have been in the area[,] [equipment] that could accidentally [have bumped] the rib and caused the inadequately supported rock to fall. [As] Hess also noted, even if the two timbers [remained] in place[,] [Tr. 1 34] the area above the rock would have continued to deteriorate and parts of it [easily] could have fallen[.]

[W]ithout considering the presence of the lifeline[,] it is clear that as mining continued it was reasonably likely the cited rock or parts of the rock would have fallen while miners worked or while the pre-shift examiner traveled in [the] vicinity [of the subject rib] and that [the miners'] duties would have

brought them near enough to the fall[ing rock] to be struck. I conclude, therefore, that the Secretary established [that] the violation was S&S. In reaching this conclusion I understand that section foreman Les Blankenship, who was with Hess, did not believe that the cited rock was dangerous because it was [wedged] between coal seams and [therefore, in Blankenship's view,] could not move. I [do not] doubt the sincerity of Blankenship's conviction[,] but I conclude he was wrong. Payne's opinion that the cited rock showed evidence of being on a continuum of failure and Hess' opinion that should the cited rock separate from the rib, the posts [Tr.135] would not [hold it,] convinces me that Blankenship misjudged the situation.

The Secretary proposed a civil penalty of $6,996 [.] In determining [whether the amount is] proper, I [take account of] myprevious findings regarding Knox Creek's history of [prior] violations[,] as well as the parties' stipulations regarding Knox Creek['s] and the mine's size, the effect of the proposed penalty on Knox Creek's ability to continue in business, and Knox Creek's good faith abatement. I additionally note that Hess found the violation was due to Knox Creek's moderate negligence [(*See* Gov't Exh. 21), a]nd I find this was the case. For the most part the cracks in the rock were visibly obvious[,] as was the raveling at the top and the bottom of the rib. Due diligence required that the condition of the ribs be noted and corrected [.] Hess also found that one person was reasonably likely to suffer a fatal injury if the cited rock or part of the rock fell. The size of the rock indicates [Tr. I 36] that Hess was right[,] and I find that this was a very serious violation. Given these findings[,] no reason is [apparent] why I should not accept the Secretary's proposal, and I assess [a] civil penalty of $6,996[.]

VA 2010-99-R
VA 2010-166

CITATION NO.	**DATE**	**30 C.F.R. §**
8170361	10/28/09	75.202(a)

The citation alleges that the mine roof where miners were required to work and travel, that is [the roof] in the [No. 3] entry adjacent to the section dumping point and extending inby, was not adequately supported. The citation asserts that tests conducted in the test holes of the [roof] reveal[ed] cracks at 76 inches and 79 inches when measuring from the roof up] into the top and that in the adjoining crosscuts tests reveal[ed] cracks at 61 inches and 67 inches. Finally, the citation [states] [Tr. I 37] that miners traveled through the cited area prior to the condition[s] being observed and that as mining continue[d] miners could be expected to [again] travel through the area to install equipment on the section. [Gov't Exh. 32].

Inspector Hess testified that on October 28, he and Blankenship [were in] the 005 MMU when [they] heard the roof crack. Although there was no visual indication of a problem, the roof noise indicated to Hess that the roof[’s] strata [was] separat[ing.] Hess and Blankenship were in the [No. 3] entry, which [is] a main travelway. There and throughout the entry eight-foot test holes had been drilled into the roof as required. Hess wanted to check the stability of the roof[,] and he described how he took his metal tape measure and pushed it up into one of the test holes. Rather than slide all [of] the way up, the tab at the beginning end of the tape snagged and caught at 79 inches. Hess let go of the tape and rather than fall [to] the mine floor, it remained fixed in the hole. He pulled [the tape] . . . free and inserted [it] into [Tr. I 38] another test hole. This time [the tape] caught at 76 inches.

Hess described how he and Blankenship proceeded up the entry to the next crosscut where Hess inserted the tape in two more test holes, one on the left side of the crosscut and one on the right [side]. The tape caught . . . at 61 inches and 67 inches[.] Hess believe[d] that the tape . . . [caught] on internal fractures in the roof strata, fractures that developed since the test holes were drilled. The roof was shifting along the crack[s] and the integrity of the “beam” created by bolting the roof with 72-inch resin bolts was [being] compromised. As Hess put it, the roof was beginning to “sag.” This was especially true in the area where the tape caught and held at 79 inches, 7 inches above the [upper] extent of the roof bolt[[s]. Hess testified that he believed a total roof failure in the area was reasonably likely to occur and because the [No.3] entry was a main travelway into the 005 MMU, a fatal injury or injuries was [Tr. I 39] or were reasonably likely to result.

Hess noted that during the previous August there had been a roof fall at the power center. In Hess's opinion [that] fall should have put Knox Creek officials on notice . . . additional roof support in the form of ten-foot supplemental roof bolts was necessary[.] He believed it incumbent on Knox Creek’s management officials to frequently monitor the test holes in the entry for signs of roof problems, something [he concluded they] ha[d] not done given the fact additional roof support had not been installed in the area[s] where his tape snagged and held. Hess [stated] that “any prudent miner” [TR. I 39] would have recognized the hazard[,] and he testified Blankenship essentially agreed that the roof was hazardous.

Although Knox Creek dispute[d] the alleged violation, I am convinced from Hess' testimony that it existed. It is important to recognize the government is not charging that Knox Creek violated its roof control plan. The plan required 72-inch, fully [Tr. I 40] grouted roof bolts to be installed in the area and Knox Creek complied[.] However, [s]ection 75.202(a) requires a roof to be adequately

supported so as not to be a hazard to miners who work or travel under it. Thus[,] an operator can be in full compliance with its plan and still be in violation of the standard.

Clearly, the [No. 3] entry was, as Hess testified, an area where miners worked and traveled. The entry was the main travelway into the mechanical mining unit. More to the point, I find that . . . the roof was inadequately supported. In making this finding, I recognized there is not much objective evidence point[ing] to inadequate support. However, [I believe it certain] that at some point after the test holes were drilled [the] upper strata in the roof crack[ed] and shift[ed]. This is the most logical explanation [for] why Hess' tape caught and held in the [test] hole[s].

I also find that Hess was right when he concluded the cracking and shifting indicated a serious situation and that supplemental roof support was needed to stabilize the roof. Hess was an experienced [T. I 41] inspector and his [view] that the roof was hazardous is [entitled] to considerable weight. For these reasons I find that Knox Creek violated section 75.202(a) as alleged.

Hess found that the violation was S&S[,] and I agree. It is true there was a violation and that the violation created a safety hazard. The cracking of the strata signaled the danger that the roof would fall, and it almost goes without saying that any injury caused by a roof fall would [have been] of a reasonably serious nature[.]

[However, the primary] question on which the validity of Hess' S&S finding turns is whether the Secretary established a reasonable likelihood of an injury-producing [roof fall,] and I conclude that she did.[O]nly one of the test holes revealed a crack above the roof bolt[s], [which] means that in three of [the] four areas[,] the bolts were still providing some support to the roof[.] [B]ut the shifting of the strata [indicates] the support was not the full support envisioned by the roof control plan. [Tr. I 42] [Further, in] the area where the strata shifted above the roof bolt[s,] there was no support to hold together the separating roof[.] A fall above the roof bolts in the area [was] not just a possibility, [with] no roof support, and with the roof actively working, as evidenced by the cracking noise that alerted Hess to the perilous condition, a fall [from] above the roof bolts was reasonably likely. This is true even though there was no external evidence of [inadequate roof support – evidence such as] flaking draw rock or bent roof bolts. It would not be unusual for defective roof above the roof bolts to produce no external visual signals which is why massive roof falls [originating] high [in] the roof [pose] such insidious hazard[s.]

Because I conclude the danger of just such a roof [fall existed] and that

without supplemental roof support – for example, ten-foot roof bolts – the roof was reasonably likely to come down at any time, and ecause the entry in which the defective roof existed was regularly traveled, I [conclude] the inspector properly found [that] the violation [was] S&S [Tr. I 43]. [I]n reaching this [conclusion] I [give] little weight to the testimony offered [by] the Secretary about [prior] roof falls at the Tiller [No. 1 Mine] and [at] other mines. Roof conditions can vary considerably from section to section, and the Secretary did not[,] and I assume could not, show that any prior falls occurred where the conditions were the same as those cited. While [Hubert] Payne maintained that a fall eight crosscuts and two entries from the cited area should have put Knox Creek on notice that supplemental roof support was required in the cited area, Payne's belief appears to have been premised his understanding that a prominent geological feature, the Keen[e] Mountain [F]ault, adversely affected both the area where the roof fall occurred and the cited area. [Indeed,] . . . Payne believed that [the fault] affected the entire mine. Payne could not say, however, to what extent the fault affected the cited area, and in fact, Payne's testimony regarding the [Tr. I 44] fault and [the government's] other evidence about the fault, failed to conclusively establish [that] the fault had any effect whatsoever on the cited parts of the [No. 3] entry. [On the contrary,] I accept the knowledgeable testimony of David P. Kramer, the president of Knox Creek, that while the [Keene Mountain F]ault crossed [the] mine [its] adverse effects were generally . . . found within 100 feet to 150 feet on either side of the faultline. [Kramer] carefully drew the [faultline] on the mine map[,] and it was clear that the cited area was much more than 150 feet from the [line. Gov't Exh. 1].

Turning to the gravity of the violation, I note that the S&S nature of a violation and the gravity of a violation are not the same[.] The focus of the seriousness of a violation is not necessarily on the reasonable likelihood of [a] serious injury but rather on the effect of a hazard if it occurs. *See Quinland Coals Inc*., 9 FMSHRC, 1614, [1622, n.1] (September 1987). [When] viewed from this standpoint[,] the violation was obviously serious. [H]ad a miner been struck by falling roof a [Tr. I 45] serious or even a fatal injury [was] likely to result.

When he issued the citation, Hess found that it was due to Knox Creek's low negligence. The finding is [somewhat] at odds with his later testimony that Knox Creek's officials should have known from previous roof falls that they needed to more frequently monitor the test holes and install supplemental roof support in the cited area. But having considered all of the testimony and documentary evidence[,] I conclude Hess's initial finding [was] correct. It was made at the time he cited the violation and when the facts were freshest in his mind. Moreover, the lack of visually obvious indications of unstable roof supports the finding. [Further,] there was no testimony that the cracking or

popping of the roof, the sound that first alerted Hess to the danger posed by the shifting of the roof strata, [was] heard previously. For these reasons, [I agree] with Hess' assessment and find that Knox Creek's negligence was low.

The Secretary proposed a civil penalty of $3,143 [Tr. I 46.] Taking into account my previous findings regarding Knox Creek's history of prior violations, as well as the parties' stipulations regarding Knox Creek's and the mine's size, the effect of the proposed penalty [on] Knox Creek's ability to continue in business, Knox Creek's good faith abatement and [the fact that] the violation was very serious and was due to Knox Creek's low negligence, I assess a civil penalty of $3,143[.]

VA 2010-87-R
VA 2010-166

CITATION NO.	DATE	30 C.F.R. §
8170373	11/04/09	75.202(a)

The citation alleges that coal ribs were not being adequately supported or controlled in two areas where miners were required to work or travel. The first area was in the [No. 6] entry at the left outby corner of survey station 1160 where loose coal and rock was separat[ing] from the ribs. The separat[ing] piece measured four inches wide by six [feet] high by 15 to 31 inches thick. The [Tr. I 46] piece had half-inch gaps on each side. The entry was seven [feet] high and one foot of coal had raveled from under the loose part of the rib. The cable from a continuous mining machine that was parked in the [No. 7] entry was five feet from the rib. [Gov't Exh. 37].

The citation [also alleges] that a second place where the coal rib was not adequately supported was in the [No. 5] entry at the left outby corner at survey station 11689 where loose material was broken on each side of the corner and where each side exhibited a one-fourth inch crack. The citation asserts that [the] loose rib [measured] 40 inches high by 39 inches wide by 12 to 24 inches thick. [Gov't Exh. 37.]

Hess testified that he believed the conditions violated[s]ection75.202 (a). In the [No. 6] entry at survey station 1690 [Tr. I 48] Hess observed separation [s] from each side of the [left outby] pillar corner. After the separated part of the [corner] was pulled down[,] Hess measured it [and] found it to be, as [he] subsequently stated on the citation, four [feet] wide by six [feet] high by 15 to 31 inches thick[.] In the second area, that is, the left outby corner at survey station 11689, there was a one-fourth inch separation on each side of [broken] material in the rib. The loose material measured 39 inches wide by 40 inches

high by 12 to 14 inches thick. Hess agreed that in his notes he described both conditions as, "not extremely obvious," [Gov't Exh. 38 at 2] [b]ut he nonetheless believed that they should have been observed and corrected by mine personnel whose [Tr. I 49] responsibility it was to ensure miners' safety. [However,] Hess [contemporaneous written] description of the conditions offer[ed] a believable explanation for the testimony of section foreman Charles Reardon, that he traveled by both areas during his pre-shift examination and saw nothing reportable.

Hess also testified that the loose ribs subjected miners to danger in that the cited areas could break loose and fall, striking passing or standing miners. Hess noted that in the first cited area, that is in the [No. 6] entry, the trailing cable for the continuous mining machine was within five to six feet of the cited condition and that the miner operating the remotely controlled machine stayed on the cable side of the machine and passed the cited rib [in order] to operate the machine. In addition, in the second cited area, that [is] in the [No. 5] entry, miner[s] servicing equipment [were] exposed to the cited rib five or six times during the course of the shift[.] In Hess' view, both conditions should have been found during the prior pre-shift [Tr. I 50] examination and [neither was].

The parties [agree] that cited condition[s] constituted a violation of [s]ection 75.202(a). *See* [Jnt. Exh. 1, Stip 16]. I credit Hess' testimony that the inadequately supported ribs exposed miners to the hazard of being struck by falling rib rock as they traveled both areas. I [concur] with Hess that the presence of the trailing cable adjacent to the cited rib in the [No. 6] entry meant that the continuous mining machine operator would have passed by . . . the rib to reach the machine's controls. I further agree that [other miners] would have traveled past the [loose rib in the No. 5] entry multiple times during the shift. The result is that in both entries miners were exposed to the hazard of parts of the rib falling [on them] as mining continue[d]. Obviously, given the size of the ribs that were pulled down [(*see* Gov't. Exh 38 at 2),] the injuries could have [Tr. I 51] been reasonably serious [and they] also could have been [reasonably] expected to occur.

There [was] conflicting evidence as to how easily the ribs were [pulled] down. Hess testified they were freely dislodged[,] and he was there. He saw them pulled, and he recorded his observations [Gov't Exh. 38]. However, Anthony Belcher, who traveled with Hess and who pulled down the first cited area[,] testified he had to work [hard] to bring down the rib by prying and jabbing at it with his slate bar. [In Belcher's opinion,] the rib did not come down easily. While Hess' and Belcher's testimony [was] in conflict, when viewed from the standpoint of continuing mining operations

on the 005 MMU, the ease with which the cited conditions were abated is not critical. The ribs were loose, and as mining continued both areas would [have been subject] to the ongoing stresses of mining, making an injury-causing accident reasonably likely to [Tr. I 52] occur.

In fact, I find that the [cited areas of the] ribs could have fallen at any time as mining continued. In this regard I have no trouble crediting the testimony of Inspector Hess over the opinion of Knox Creek's expert witness, Alan Campoli, [who believed the ribs did not present a hazard, but who] was not on-site when the conditions were cited and abated. It is lucky for those who worked and traveled in the vicinity of the cited ribs that the conditions were observed and corrected before someone was [seriously] injured. [T]he violation [clearly] was S&S.

The Secretary proposed a civil penalty of $1,944[.] In deciding whether the proposal is appropriate, I have taken into account my previous findings regarding Knox Creek's history of prior violations as well as the parties' stipulations regarding Knox Creek's and the mine's size, the effect of the proposed penalty on Knox Creek's ability to continue in business, [Knox Creek's good faith abatement,] and the fact that at least one person was reasonably likely to experience lostwork days [Tr. I 53] or restricted duty as a result of the violation. [Jnt. Exh. 1, Stips 18 and 19]. I also have considered the fact that although the inspector found and the parties stipulated that Knox Creek was moderately negligent, [the] testimony establishes the company's level of negligence was on the low side of moderate. Hess testified the cited areas were "not extremely obvious," [a]nd his belief that the pre-shift examiner should have noted the conditions and had them corrected was, as he stated on [c]ross [e]xamination, more a hope than an expectation. Given the fact that the conditions were not readily apparent, Reardon's failure to detect them is understandable and represents a moderately low lack of care, one that warrants somewhat less of a civil penalty than the Secretary proposed. Accordingly, I assess a civil penalty of $1,600[. Tr. I 54].

VA 2010-111-R
VA 2010-166

CITATION NO.	**DATE**	**30 C.F.R. §**
8170391	11//09/09	75.202(a)

[The citation states that] ribs that were composed of coal and rock located at break [No.] 29 along the [No.] 1C belt were inadequately supported and controlled. According to the citation, a loose, unsupported area was

[present] on the inby right rib on the offside of the belt. The rib measured five and [one] half feet high by six feet wide and . . . [averaged] 22 inches [thick]. [Tr. 1 55] The loose part of the rib [was] separated from the pillar one half inch to one and [one] half inches. Although part of the rib had previously fallen and timbers had been set down the rib [line] and along the side of the belt, the inadequately supported part of the rib had no timbers set to offer any protection and miners [were] exposed to the loose rib when they cleaned the [No.] 1C belt. In addition, the unsupported part of the rib led back into the crosscut and there was a man door in the crosscut that led into the primary escapeway. The citation [also] states that it was reasonably likely . . . a miner would [receive] crushing injuries [from a rib fall. Gov't Exh. 39].

Inspector Hess, who issued the citation, described the condition and extent of the cited rib, and his testimony basically corresponded with what [wrote on the citation.] (I note here that Hess measured the loose part of the rib after it was pulled [down.]) Hess [testified that he] noticed the condition of the rib as he passed [the rib] on the mantrip. The rib was three feet from the mantrip. Moreover, because timbers . . . [were] set where part of the rib already had fallen, his attention was directed to the area.

Hess explained that he feared for the safety of miners who had to clean the conveyor belt from the offside. [Although he] agreed on [c]ross [e]xamination that those assigned to clean the belt were given long-handed shovels to keep them from going on the offside of the belt[,] he nonetheless feared for the miners' safety because he had seen miners working on the offside. He also feared for miners who had to pass in the vicinity of the loose rib to reach the mandoor in the crosscut. The mandoor [lead] to the primary escapeway.

The parties agree that the cited conditions constituted a violation of [s]ection 75.202(a) [Jnt.Exh. 1, Stip. 16] [Tr. I 57], and I credit Hess' testimony that the inadequately supported rib exposed miners to the hazard of suffering crushing injuries as they cleaned the conveyor belt from the offside and as they traveled to the mandoor. Obviously, given the size of the rib that was pulled, the crushing injur[ies] could have been reasonably serious, even fatal[.]

The injuries also could have been expected to occur. While miners were issued long-handed shovels and were expected to clean [the] belt from the track side, I find compelling Hess' testimony that he had seen miners working on the offside. This testimony confirms what we know, [that] miner[s] [do] not always act as [they are] instructed.

In addition, from the totality of the testimony it is clear that in an

emergency miners choosing to use the mandoor to reach the primary escapeway would have been reasonably likely to pass close enough to the [Tr. I 58] cited rib to be injured [when] it fell. To expect such miners to stay in the center of the crosscut is to fail to take account of the distractions [they] would [experience] as they hurried toward the mandoor. For all of these reasons, I conclude that Hess properly found the violation to be S&S.

The Secretary proposed a civil penalty of $1,944[.] [Taking] into account my previous findings regarding Knox Creek's history of prior violations[,] as well as the parties' stipulations regarding Knox Creek's and the mine's size, the effect of the proposed penalty on Knox Creek's ability to continue in business, [Knox Creek's good faith abatement,] the fact that at least one person was reasonably likely to suffer lost work days or restricted [duty] as a result of the violation (*See* [Jnt. Exh. 1, Stips.8 and 19]) [and] the fact that the violation was due to Knox Creek's moderate negligence (*See* [Jnt. Exh. 1, Stip 17)] [Tr. I 59], I assess a civil penalty of $1,994[.]

VA 2010-107-R
VA 2010-214

CITATION NO.	**DATE**	**30 C.F.R. §**
8170398	11/16/09	75.202(a)

The citation states that on the 003 MMU, the coal and rock rib at a crosscut corner [was] not supported and controlled where miners were required to work and travel. Specifically, the left inby corner of the rib at survey station number 11730 had a separation of one fourth inch on each side of a "V" shaped corner. The loose part of the rib was 32 inches high and up to 23 inches wide. The citation also states that the loose corner was located along a traveway regularly used by miners . . . in equipment and on foot[.] [Gov't Exh. 39].

Inspector Hess' written description of [the] loose corner was confirmed by his testimony. He agreed that he passed the corner at least once and that he did not see the [Tr. I 60] crack in the rib that [signaled] the loose corner. However, later that day when he was leaving the area he saw the crack on one side of the corner. He then looked more closely at both sides of the corner and he saw [that] both . . . were cracked. *See* [Gov't Exhs. 44 and 45.] (I note parenthetically that the government exhibits to which I have just referred are reproductions of photographs taken by Hess prior to the abatement of the cited conditions and that they clearly show the cracks.) Hess could not venture an opinion as to how long the cracks existed. He [acknowledged,] however, that no rock dust was visible in [them].

Hess also testified that when the condition was abated [by pulling down the corner,] [the rib's] bottom half fell [quickly] and relatively easily[.] [The] top half took longer to dislodge. [T]wo miners, [working] on each side of the corner, [were required] to pry the top [half] down.

Knox Creek foreman, Mark Jackson, who was traveling with Hess[,] [Tr. I 61] described the abatement process as requiring more time and more effort than Hess indicated. [Richard] Smith, one of two miners who [brought] down the corner, described how the top half wedged on an item of roof support [and as a result] was much more difficult to [dislodge.]

[D]uring the course of his testimony, Jackson stated that although he took contemporaneous notes about the cited condition and used [the] notes to prepare information for Knox Creek's management about the condition, he threw away the notes. Because the notes were not available to the Secretary, [c]ounsel [for the Secretary] moved that I draw an adverse inference from Jackson's testimony. I declined at the hearing, and I decline in this decision. The Secretary was provided with a copy of information Jackson gave [to] Knox Creek's management, information that was based on the missing notes. (Knox Creek refers to the written] information [it provided the Secretary] as a "rebuttal form[.]") [As a result, the Secretary could not show that she was prejudiced. Moreover,] it is clear to me that Jackson's [Tr. I 62] disposal of the [underlying] notes [was] not premis[d] on an attempt to hide information. He simply did not [understand] that he should retain the [original notes]. ([The same] issue arose later with regard to several other citations and I [ruled similarly].)

Hess did not measure the extent of the loose area until it was pulled down because he . . . [believed that the rib] was too dangerous to measure while it was still standing. Hess noted that miners traveling in shuttle cars and scoops regularly passed the corner. The hazard was that the corner would fall and that parts of it would strike a passing miner, causing a serious injury.

I credit . . . [Hess'] testimony regard[ing] the hazard. I do not doubt Smith's testimony that the top half of the cited corner wedged against [some] roof support material and was more difficult to pull down. Indeed, Inspector Hess agree[d] that the top half was harder to pull down than the bottom half. However, [Hess] also testified [Tr. 1 63] that the bottom half fell fairly easily and quickly. He saw it come down and his eyewitness account is entitled to great weight. [T]he ease with which the bottom half fell confirms the serious hazard [that threatened] the miners who pass[ed] . . . the [corner.]

[The parties agree that the] violation existed as charged. [Jnt. Exh. 1, Stip 16]. The loose rib at the corner created a hazard [in] that a miner passing in a

mantrip or other equipment [could have been] struck by [its] falling pieces. The size of the loose corner was such that if a miner was struck, an injury of a reasonably serious nature [was likely].

I further find that the hazard was reasonably likely to occur as mining continued. First, Knox Creek's witnesses made much of the fact that part of the corner was difficult to [bring] down, [but] I find this was only true in part because I [accept] Hess' testimony that the bottom half was pulled down easily and quickly. Further, although Mark Jackson [Tr. 1 64] testified that when the rib was pulled . . . it fell straight down and the pieces did not extend far into the entry, this is not necessarily indicative of what would have happened had mining continued. Passing equipment could well have hit the corner, causing it to collapse onto a miner, or normal pressure and stress on the rib could have caused the loose corner to burst, propelling pieces of the rib into the entry. I conclude that as mining continued it was reasonably likely that either of these events would have occurred and that a miner would have been seriously injured. In my opinion, Hess properly found [that] the violation was S&S.

[Further,] given [that] the injury that was likely to result from the violation would have caused lost work days or restricted duties to one miner, the violation was serious. *See* [Jnt. Exh. 1, Stips 18 and 19].

The parties . . . stipulated that [Tr. 1 65] Knox Creek's negligence in allowing the violation to exist was "moderate." [Jnt. Exh. 1, Stip 17]. I accept the [stipulation,] but I find the company's negligence as on the low side of moderate. I conclude from the testimony of Mark Jackson that the cracks signal[ing] the [violation] were difficult to detect, [and I note] Jackson's [unrefuted] testimony that Hess twice passed the corner before he noticed the cracks and [the] loose parts of the corner. [Further,] it is clear from the testimony of both Jackson and Hess that the crack on the crosscut side of the corner was especially hard to see [, and as] Hess agreed on cross examination, no rock dust was visible in the crack, which means that [the loose] part of the corner [likely was] of recent origin.

The Secretary proposed a civil penalty of $1,944. Taking into account my previous findings regarding Knox Creek's history of prior violations, as well as the parties' stipulation[s] [Tr. I 66] regarding the company's and the mine's [size], the effect of the penalty on Knox Creek's ability to continue in business, [Knox Creek's good faith abatement], the fact that the violation was serious and [the fact] that the testimony establishe[d] the company's negligence was on the low side of moderate, I conclude that a [small] reduction in the Secretary's proposed penalty is warranted. Accordingly, I assess a civil penalty of $1,600[.]

VA 2010-92-R
VA 2010-166

CITATION NO.	DATE	30 C.F.R. §
8169126	10/27/09	75.202(a)

The citation states that the roof [of] the [No. 3] entry in the 002 MMU was not adequately supported to protect persons from [the] hazards of roof falls. A rock that measured 84 inches long, four inches to 17 inches wide, and one inch to nine inches thick was hanging across the [No. 3]entry approximately . . . 20 feet inby the last open crosscut, an area where miners regularly traveled to clean and to do other jobs[. Gov't Exh.] 46.

MSHA [I]nspector [Tr. I 67] Michael Colley testified to the facts set out in the citation. He stated that the [loose nature of the] cited rock was obvious from [nearby] cracks[.] Colley did not [sound] the roof prior to citing the [condition] because he could tell from the cracks that the [rock] was loose and dangerous. He feared that [it] would give way and fall, striking a miner who was traveling [in] the [No. 3] entry. There were, he noted, numerous miners whose duties required them to [go] under the rock[; f]or example, shuttle car operators, continuous mining machine operators, roof bolt[ing machine] operators and scoop operators, as well as foremen who conducted pre-shift examinations[.] While Colley agree[d] the machines [on which miners traveled and worked were] equipped with canopies and that the roof bol[ting machine] operators also were protected by steel netting, he nonetheless believed the roof [posed] the hazard of lacerations and/or broken bones to [the] miners. The rock could [Tr. I 68] break in pieces and enter the sides of the equipment striking miners, or it could fall and strike an arm or other body part of [a] miner that migh [protrude] into the entry from under [a] canopy. It could even fall with such force that it could bend steel netting and strike a roof bolt[ing machine operator.] [In addition,] the pre-shift examiner and other miners who traveled the entry on foot [had] nothing [to protect them].

The citation was written at 12:50 a.m. on October 27. [Gov't Exh.] 46. At that time the maintenance shift was on the section, but Colley [testified] [that any] maintenance work would [have been] done outby the cited area. Thus, when the citation was written, no miners were [actually] working in the area[,] and Colley did not know if miners would be assigned to work in the area during the [rest of the] shift. Colley [also] agreed the cited area was [pre-shift examined] on the previous shift and that the next pre-shift examination would not take place until 4:30 a.m., [approximately] three and [one] half hours after he cited the violation.

[T]he next production shift would [Tr. I 69] begin at 6:30 a.m.
It was the first shift that would bring miners under the loose rock as mining continued. [Colley] thought it likely that miners would be in the cited area [and under the rock] between 7:00 a.m. and 7:30 a.m.

David Ellsworth, who conducted the pre-shift examination for the shift on which Colley found the loose roof, testified that when he [examined the area], he did not see the condition. Further, mine foreman, Brian [Van Dyke], who traveled with Colley, agreed with Colley that the area where the loose roof existed would have been pre-shift examined before miners working on the next shift enter[ed] the area.

Colley testified that the cracks signal[ing] the loose roof were of recent origin, since he saw no rock dust in the cracks. As for Colley's belief that the loose roof created a hazard, Van Dyke pointed out that during the maintenance shift on October 27, miners were assigned to move belts, work that did not bring them under the cited roof area. [Tr. I 70.] He also testified that it took approximately 15 minutes to pull down the loose rock with a slate bar and that it came down in three pieces.

There is no doubt that a violation of section [75.202(a)] occurred. The parties have stipulated as much. [Jnt. Exh. 1, Stip. 16]. It also [is] clear that the cited condition constituted a hazard. I accept Hess' extrapolation from the lack of rock dust in the cracks that the condition had originated recently[,] and I conclude from this that roof conditions causing the loose rock were fluid and worsening. While I accept Van Dyke's testimony that miners on the maintenance shift would have had no occasion to travel under the [rock,] the same cannot be said [of] miners on the next production shift and [of] the [foreman who was] required to conduct the pre-shift examination for that shift. As mining continued [those] miners [would have been] subjected to the hazard that the loose rock would suddenly give way and fall as they traveled beneath it[.] If a miner was struck by the falling [Tr. I 71] [rock] as he [or she] traveled on foot beneath it, the least injury the miner could reasonably expect was a broken bone or bones, and death was not out of the question.

Even if [a] miner [was] traveling under the [rock] in [canopied] equipment, the falling rock could reasonably [have been] expected to cause a serious injury by striking a miner's arm or other part of the miner's body [that] protrud[ed] from underneath the canopy, or by bouncing off the equipment and [flying under the canopy.] Moreover, given the size of the loose rock, the force of the fall could [have been] expected to damage, even to dislodge, the steel [netting] that also protected [the] roof bolt[ing machine] operator [, and s]uch an event would have caused [a] serious injury[.]

[These] injuries [were] reasonably likely to occur. As I have noted, the condition of the roof was fluid and deteriorating. I place no weight on the fact that it took up to 15 minutes to [pull] down the loose rock[,] because I [must look] at the situation in terms of continuing mining operations and the loosening of the rock [was] ongoing. [Tr. I 72] I also, in this particular instance, place little weight on the fact that the area would have been pre-shift examined before the next production crew [had to travel] the [No. 3] entry. I cannot [assume] that the pre-shift examiner would have found and reported the condition. Of course, he or she should have done so, yet as these cases [reveal], roof and rib conditions of the mine that should have been reported and corrected frequently were not.

[Therefore,] I conclude [that] the violation was S&S and serious and that because of the violation one miner could reasonably have been expected to suffer an injury resulting in lost work days or restricted duties. *See* [Jnt. Exh. 1, Stips. 18 and 19].

I also conclude that [even though] the parties have stipulated that Knox Creek's negligence was ["moderate"] [(*see* Jnt. Exh. 1, Stip. 17),] the [c]ompany's lack of care was on the low side of moderate. Inspector Colley wrote in his notes that the condition had existed for ["less than eight hours"] and the Secretary did not, and I presume could not, show the [Tr. I 73] condition existed before the pre-shift examination [for the shift] on which it was cited[.]

The Secretary proposed a civil penalty of $2,106[.] Taking into account my previous finding regarding Knox Creek's history of prior violations, as well as the parties' stipulations regarding the [c]ompany's and the mine's size, the effect of the penalty on Knox Creek's ability to continue in business, [Knox Creek's good faith abatement,] the fact that the violation [was] serious and the fact that the testimony establishes Knox Creek's negligence was on the low side of moderate, I conclude that a reduction in the Secretary's proposal is warranted, and I assess [a] civil penalty at $1600[.[3]]

[3] The proposed assessment and the assessment amounts were incorrectly stated when the bench decision was delivered. *See* Tr. I 84-85. This written decision corrects the error.

CITATION NO.	**DATE**	**30 C.F.R. §**
8169138	11/04/09	75.202(a)

The citation states that on crosscut [No. 5] a rock measuring 36 inches long, 56 inches wide and three inches thick was hanging [above] the left side of the entry. The rock extended over the track. The rock [was not] supported[.] The citation also states that the entry was used each shift by miners traveling to and from the belt and the 002 MMU, [Tr. I 75] [a section located] inby the cited area. [Gov. Exh. 48].

Inspector Colley's testimony describing the cited condition faithfully tracked the citation. He orally added, after some initial hesitation, that he believed the entry in which the condition existed, in addition to being used as a travelway to and from the belt and the 002 MMU, served as part of an alternate escapeway. Colley was certain the track ran through the entry[,] and as Colley remembered, the left side of the cited rock, when facing inby, extended over the track.

The Secretary introduced and Colley identified a photograph of the cited rock. [Gov. Exh. 50]. Colley also pointed out three cracks that were visible in the photograph and that Colley stated signaled the [violation]. [*Id*.] In another photograph introduced by the Government, he pointed out where one of the cracks had caused a separation in the roof[,] and he noted that adjacent roof bolts were outside the unsupported rock and [Tr. I 76] thus did not stabilize it[. Gov. Exh. 51.] According to Colley, the cited rock had almost broken free from the roof and was loosely hanging. He did not know how long the rock would remain in place, [but r]ock dust in the cracks and separation indicated to Colley that the condition had existed for some time. Although Colley acknowledged the cited rock was difficult to see from a passing man trip, he was of the opinion that anyone evaluating the roof should have noticed it and that the rock should either have been taken down or [have been] supported before it came to [his] attention.

In Colley's opinion the loose rock endangered miners passing it [while riding in mantrips] or other vehicles. Even though such miners were protected by canop[ies], the rock or pieces of it could enter the compartments in which the miners were sitting and strike the miner[s] or the falling rock could hit an arm or leg or other part of the body of a

miner that protruded from under a canopy. Further, water was prevalent in the [No. 4] entry and could cause a serious [Tr. I 77] accident if [the rock or part of the rock] fell and [was] covered by water and a passing vehicle struck the unseen debris.

Colley also testified that equipment was being removed inby the rock[, which meant that] the track had been and would continue to be used [and that] miners had been and would continue to be exposed to the loose rock as they passed the area. Colley acknowledged, however, that the area where the water collected had been dangered off.

[Finally,] Colley feared for the safety of [the] pre-shift examiners who were required to walk the [No. 4] entry pursuant to the mine's "action plan" [(Gov. Exh. 2), which] required fire bosses to walk the mine's belts each week. [T]he cited area came within the action plan. Colley [also] believed the loose rock posed a danger to miners sent to pump down the water in the entry. In Colley's view, broken bones and lacerations could be expected to result from the condition.

Jack [Tr. 1 78] Snow, Knox Creek's [S]afety [D]irector, testified that on November 4, the date the citation was issued, he went to the area to check a report that water had covered the [track]. Upon arriving, Snow saw that foreman Mark Jackson had dangered off the water by placing red flags at either end of it. According to Snow, no one [would proceed] inby the flags[,] nor would anybody travel through the water and thus be under the cited rock. Further, although the [No. 4] entry was a travelway and a secondary escapeway, nobody was working inby the cited area on the morning shift of November 4[,] and production had ceased. However, Snow agreed that even though the pump was not in the track entry, if someone wanted to know if the pump was working . . . [he or she would have] to walk in the area where the water existed.

After he reached the [No. 4] entry, Snow saw Colley and they waded into the water to look at the cited rock. According to Snow they saw a cavity that extended up into the roof and that contained rock. In notes [Tr. I 80] recording his recollection of the circumstances surrounding the citation, Snow wrote that the cite rock was, "hard to see." [Knx. Crk. Exh. 19.]

There [is] no doubt the violation existed as charged. [T]he parties have stipulated as [much. Jnt. Exh. 1, Stip 16]. It is clear to me that the violation contributed to a hazard, one, that could have resulted in at least broken bones and/or lacerations. In other words, the violation

contributed to a hazard that could have resulted in a miner being seriously injured. The cited rock was loose, . . . it was large and it at least partially overhung the track. [I]f a miner were traveling under it or were riding beneath it, the miner easily could have been struck and seriously injured.

I agree with Colley that the presence of the canopies on the equipment [traveling the track did] not eliminate the hazard. The rock could have fractured and parts of it could have bounced under the canopies and into the equipment from the side or front. [Tr. 1 80] [O]r, a miner could have had a body part [protruding] from under the canopy and [in] that way could have been hit by falling rock. Further, pre-shift examiners and those complying with the mine's action plan could have been hit as they passed beneath all or part of the cited rock [and] it fell.

The crucial question is whether such accidents were reasonably likely, and here, in my opinion, the Secretary [proved] her case. First, I recognize that when the inspector cited the violation, access tothe area . . . [was] severely limited. The Secretary did not challenge now's testimony that mining inby the area had ceased. [Thus,] the only reason rank and file miners would have traveled inby and returned outby and passed under the cited rock [was] to remove equipment that was no longer in use[, but] such travel would not have taken place when the condition was cited because the area where the loose rock was hanging had been dangered off. Further, [Tr. I 81] even though a miner checking the pump would have been in the area where the water accumulated[, there] was no showing [the] miner would have [necessarily] traveled beneath the loose rock.

In fact, the record establishes that the hazard endangered not the rank and file miners, but rather the pre-shift examiners. Colley testified that rock dust in one of the cracks associated with the loose rock convinced him the condition had existed a long time. While he [did not] quantify the time and while the Secretary did not show when rock dust[ing] had last taken place, I find it reasonable to infer that at least one pre-shift examiner, the examiner for the morning shift during which Colley found the condition, traveled under and passed at least part of the loose rock and did not report it. In this regard I note Knox Creek's failure to introduce a pre-shift report establishing the examiner's knowledge of the condition. Further, I conclude that having missed the condition at least once, it was reasonably likely Knox [Creek]'s pre-shift examiners would have continued to miss it as [Tr. I 82] mining continued. Therefore, it [was] reasonably likely the pre-shift examiner for the morning shift on November 4, would have been injured by the falling rock and other pre-shift examiners [would have been] similarly [endangered] as mining continued. ([T]his is also true for those doing examinations under the [mine's] action plan.) For these reasons I conclude that the violation was both

serious and S&S. *See* [Jnt. Exh.1, Stips. 18 and 19].

I further find based on the parties' stipulations that the violation was due to Knox Creek's moderate negligence. [Jnt. Exh.1, Stip. 17].

The Secretary proposed a civil penalty of $1,944[.] Taking into account my previous findings regarding Knox Creek's history of prior violations, as well as the parties' stipulations regarding the [c]ompany's and the mine's size, the effect of the penalty on Knox Creek's ability to continue in business, [Knox Creek's good faith abatement,] the fact that the violation was serious – meaning that it was reasonably likely to cause lost work days or restricted duty – [(Jnt. Exh. 1, Stips. 18 and 19)], and the fact that the violation was due to moderate negligence [on Knox Creek's part (*Id,* Stip. 17)], I assess the civil penalty of $1,944[.]

VA 2010-108-R
VA 2010-166

CITATION NO.	**DATE**	**30 C.F.R. §**
8169141	11/09/09	75.202(a)

The citation states that at crosscut [No. 2] on the [No. 5] conveyor belt, [part] of the rib [measuring] 30 inches long, 18 inches wide and seven to nine inches thick [was] hanging on the left side of the entry beside the track. The citation [also] state[s] that the area in which the [loose rib] existed [was] used each shift by miners traveling to and from the 002 MMU. The citation [charges] that it [was] reasonably likely that a miner traveling on foot [and] passing the loose part of the rib or traveling in rail equipment along the track next to the rib would [be struck] and seriously injured by the falling rib[. Gov. Exh. 52].

Inspector Colley testified that the cited rib was located on the left side of the track heading inby. [The areas is] commonly referred to as the ["off" side of the track. Gov. Exh.] 53. Colley identified two photographs of the cited rib. Government Exhibit 54 show[s] a separation between the body of the rib and the loose [part] of the rib. In addition, to the left of the separation, the rib [is] cracked[.] Government Exhibit 55 shows the same separation and cracks on both the left and the right sides of the separation. Colley believed that the cited part of the rib . . . [was] "waiting to fall." [In fact,] Colley [thought] that the danger of a fall was [so] acute, he stood to one side [Tr. I 86] so [as] not [to] be hit.

Colley observed that [the] cracks [in] the loose rib area were darker than the surrounding [rib] and that the cracks aside[,] everything was well rock dusted. Because rock dust was not present in the cracks, Colley believed the cracks and presumably the loose part of the rib, existed [less than a day] and that the rib loosened after the last rock dusting. *See* [Gov. Exh. 53]. Colley issued the citation at 11:15 a.m. The most recent pre-shift examination of the area occurred between 4:30 a.m. and 5:00 a.m., some seven hours before Colley saw the rib.

Colley feared miners passing the rib would be struck [and] injured when the loose rock fell. He testified the cited [rib] was so loose, vibrations from passing equipment could . . . [cause] it to fall. He further noted that mantrips [Tr. I 87] traveling the [track] adjacent to rib had 18 inches to 21 inches of overhang on the outer side of the rail. This meant that miners [riding in the mantrips passed] close to the affected rib.

Colley acknowledged that it was [possible] if the [rib] fell when a mantrip or other equipment passed, rock [from the falling rib] might harmlessly hit canop[ies] that covered most of the passing equipment. But although Colley recognized Knox Creek also provided protective steel netting on the sides of [some] mantrips, he had previously testified that falling rock could bend [similar] netting and could strike and injure miners sitting next to the netting. Colley also noticed sloughage beneath the cited part of the rib which indicated to him that the ribs in the area were [under] stress, making the cited rib even more likely to fall.

Further, the cited area had to be pre-shift examined. This meant that every shift an examiner would pass the cited [area] on foot[.] In addition, under the mine's action plan, another management examiner would pass the rib on [Tr. I 88] a weekly basis, also on foot. These examiners were in even more danger of being struck and injured by the falling, loose rib than those who passed it in mantrips [because nothing protected them from falling rock].

Colley testified that when he observed the loose rib, the section was idle. He did not recall if any miners [then] were inby[.] He also did not know if miners were scheduled to work inby, but he was sure that at some point miners would have to proceed [past] the cited rib to remove idle[d] mining equipment. In fact, he stated that after he talked to [several] miners and to [foreman,] Mark Jackson, who was traveling with Colley, he learned that Knox Creek definitely planned to move the idle[d] equipment by transporting it along the track[.]

Jackson [testified] that [when] he and Colley were headed inby on [Tr. I 89] the mantrip, Colley saw the cited area and asked Jackson to stop the [vehicle]. Jackson [did and] . . . he and Colley left the [mantrip]. After examining the rib, Colley asked Jackson to pull down the loose rock. Jackson [stated] that he worked on the rock with a four foot slate bar. He maintained that the rock was "not extremely loose," but after he jabbed and pried at it several times, the [rib] fell straight down. Jackson recalled [that] it landed about one yard away from the track. In Jackson's opinion, the [rib] was not a hazard because canopies and side netting protected miners passing on mantrips. However, Jackson did not address the possible hazard the [cited rib] posed to examiners traveling on foot in the area.

From the testimony and from [the stipulations,] I conclude a violation [of section 75.202(a)] existed as charged. *See* [Jnt. Exh. 1, Stip. 16]. I also find [that] the violation contributed to a hazard that could have caused broken bones, . . . cuts or worse as mining continued. The rock was not only loose when Colley saw it, it was under stress. I credit [Tr. I 90] Colley's testimony that sloughage at the foot of the subject rib signaled that the rib was [the] object of ongoing forces[,] and I find [that this made] the cited rock an evolv[ing] danger as mining continued. I recognize that Jackson and Colley agreed that canopies offered some protection to miners passing in mantrips, [b]ut I accept and I credit Colley's testimony that the mantrips' side netting could have yielded to the point where miners sitting adjacent to the netting could have been injured despite the netting's presence. Given this and the fact that miners would be working intermittently to remove inby idle equipment and therefore would travel past the cited rock, I conclude that as mining continued the loose rock posed a serious hazard to those in [the] mantrips. Moreover, miners conducting the required pre-shift and action plan examination[s] were [in] even more [danger.] They had to pass the loose [rib] on foot with nothing to protect them from serious injury.

The crucial question [is] whether [Tr. I 91] the Secretary proved a reasonable likelihood of an injury-producing event, [and] I find that she [did]. First, Colley testified and I find that the loose [rib] had been in existence a short period of time. Certainly, it was reasonable to infer, as Colley himself did, that the lack of rock dust in the crack[s] meant that the violation had developed since the area was last rock dusted. The Secretary did not show that the condition of the rock was noted by the last pre-shift examiner [who inspected] the area approximately seven hours prior to Colley citing the condition. Nor did the Secretary

establish that the miner who conducted that pre-shift examination [missed] other violative conditions. I conclude from this that the prior pre-shift examination was conducted properly and that the condition of the rock had not evolved to the point where it violated [[s]ection [75.202(a)] when the previous pre-shift [Tr. I 92] examination was conducted. However, given the frequency with which adverse rib conditions were missed by pre-shift examiners in these cases I cannot conclude that the loose rib would have been noted on the next pre-shift examination and would have been corrected as mining continued.

Although the 002 MMU was idle when Colley cited the violation and although Colley readily admitted that he did not know if any miners [then] were inby, it [is] clear, as Colley and Jackson both testified, that at some point miners would travel . . . past the rib as mining continued and as they worked to remove idle[d] equipment. This would have brought them adjacent to [a] rib that was ready to collapse. The violation [was] S&S.

The violation also was serious. The parties stipulated that had the loose [rib] fallen and struck a miner the result would have been at least lost work [days] and restricted duty. [Jnt. Exh.1, Stips.] 18 and 19.

The parties also stipulated that the violation was the result of [Tr. I 93] "moderate negligence." *See* [Gov't Exh. 1, Stip. 17]. I am loathe to reject any of the parties' stipulations because [c]ounsel[s] diligently and commendably worked with great success to reduce the issues by agreeing to [them], [and] . . . [c]ounsels' efforts made the hearing manageable. However, in this instance, the stipulation is at odds with [the facts.] Given that I have found the cited part of the rib developed after the last pre-shift examination and . . . [that] the record does not [support finding that any [of] Knox Creek's officials [knew] or should have known of the condition before it was cited, I find that Knox Creek was, in fact, not negligent.

The Secretary proposed a civil penalty of $1,944 [.] Taking into account my previous findings regarding Knox Creek's history of prior violations as well as the parties stipulation regarding the [c]ompany's and the mine's [size], the effect of the penalty on Knox Creek's ability to continue in business, [Knox Creek's good faith abatement,] the fact that the violation was serious, and [the fact that it] was not due to Knox Creek's negligence, I assess a penalty of $1,200[.]

CITATION NO.	**DATE**	**30 C.F.R. §**
8169142	11/09/09	75.202(a)

The citation states that between crosscuts [No.] 53 and [No.] 54 on the 7D belt a loose piece of rib was hanging beside the track on the left side of the entry. The [loose] rib measured eight feet long by three [Tr. I 95] feet high by three and [one] half [inches] thick. The citation assert[s] that miners traveled past the rib both on rail and on foot, to and from [the] 003 MMU. These miners were recovering belt and track and were making pre-shift examinations. If a miner [was] struck by the falling rib, he or she would be seriously injured. [Gov't Exh.] 56.

Colley's testimony faithfully reflected the conditions he described in the citation relating to the size and loose nature of the rib. He added that the loose piece was composed of coal and that the 003 MMU, which miners traveled to and from, was idle on November 9. No active mining was taking place. Although he did not know if miners were inby doing recovery work when he observed the loose rib, he was sure some recovery work had been done and he [expected things] such as removal of the belt and recovery of the track to take place in the future.

Colley took photographs of the allegedly loose piece of rib. [Gov. Exhs.] 58 and 60. He testified that the loose nature of the rib was signified by [Tr. I 96] obvious cracks in the rib, cracks that most clearly show in Government Exhibit 69. The cracks ran under and to the right and left of the point where someone had written "7D" in yellow chalk near the top of the rib.

Colley recalled [that] the [loose part of the] rib [had] pulled away from the [main] rib[.] He added that the cracks in the surrounding area were rock dusted. Colley testified that the rib had not fallen because a small part of the loose [area] was still attached to the main rib. However, he emphasized that there was no question about the fact that the piece was "visibly loose."

Colley found the condition to be S&S because he believed miners doing recovery work had to pass and would continue to pass the cited area. In addition[,] mine examiners had to pass the area. He [testified] that the cited piece was so loose it could have fallen at any time on a passing miner and seriously injured him or her.

[A]t [Tr. I 97] [Colley's] direction, Mark Jackson [pulled] down the loose rib. Colley remembered the process as taking less than a minute. After the rib fell, Colley measured it. [A]s he stated on the citation, [he found] the loose area was, in fact, eight feet long by three feet high by three and [one] half inches thick.

Jackson's opinion as to whether the cited rib was reasonably likely to fall differed from Colley[']s. As Jackson remembered the inspection, he and Colley were [on] a mantrip heading outby. The entry in which they were traveling went to and from an idle section. As they traveled outby, Colley asked Jackson to stop. Jackson brought the mantrip to a halt. [H]e and Colley got out and looked at what Colley [suspected] was a loose rib. Colley told Jackson that he, Colley, [beleived] the condition was an S&S violation of [s]ection [75.202(a)]. Jackson [did not] dispute Colley's finding [that] the condition [was a] violation, but he believed [Tr. I 98] the loose part of the rib was very thin and that if it fell it would not come into the entry far enough to endanger anyone in a passing mantrip.

When Jackson was cross examined, additional details regarding the citation emerged. Jackson agreed recovery work on the inby section had been done in the past and would continue to be done in the future. This meant that miners had traveled and would continue to travel along the track and past the rib[.] Jackson acknowledged that Colley measured the loose area of the rib right after it was pulled. Jackson watched Colley make the measurements. Jackson did not recall disagreeing with [Colley's] results. Moreover, photographs taken by Knox Creek and [offered into evidence] by the company showed the debris after the rib was pulled. Jackson [Tr. I 99] confirmed that two of the photographs show[ed] coal [chunks on,] between, and adjacent to the track[. Knx. Crk. Exh.] 22 [at 1 and 2]. Morever, [Jackson] agreed the debris extended from the base of the rib to the track, a distance of approximately 31 inches [(*See Id.* at 2),] [a]nd that the mantrip overhung the outer edge of the track by 18 inches.

From the testimony of both Colley and Jackson and from [the] stipulation[s], I conclude that the violation existed as charged. [Jnt. Exh. 1, Stip. 16]. I also find that the violation contributed to a hazard that could have caused broken bones and/or lacerations as mining continued. I accept Colley's testimony that the loose [area] was only minimally affixed to the body of the rib. I also accept in full the dimensions of the loose piece as described [and measured] by Colley[.] I find it revealing that Jackson did not protest the accuracy of the measurements at the time Colley made them, and I [Tr. I 100] conclude that far from being ["] paper thin, ["] and unsubstantial, the loose

[rib] represented a significant hazard. In fact, [it] was large enough and substantial enough to place miners who traveled adjacent to it in danger of crushing injuries and contusions[.] Further, I conclude at least one miner had passed the loose rib and that others would [have passed] it as mining continued[,] because I accept Colley's testimony that pre-shift examiners passed the area and Colley[’s] and Jackson's testimony that recovery work would be ongoing as mining continued.

As with every violation at issue in these proceedings the principal issue is whether the violation was S&S[, and] I [conclude] that [it] was. I have found that Knox Creek violated [s]ection [75.202(a).] I also have found that the cited part of the rib could fall. I further have found that at least one miner had [Tr. I 101] passed the loose rib and others would pass it as mining continued[.] Certainly, the violation presented a safety hazard to those miners, a hazard that was reasonably likely to result in broken bones and/or and contusions.

Further, it was reasonably likely the hazard would result in an injury, [because I find that] the cited part of the rib could have fallen at any time . . . . I accept Colley's testimony that the [rib] was very loose. Moreover, Colley testified that the cracks signifying the loose part were rock dusted[,] and I conclude from this that the loose rib existed and was passed by the pre-shift examiner for the shift [on] which Colley found the condition. I note that Knox Creek did not provide any evidence that the loose rib was reported by the examiner[,] and I [find] it was not. Further, having failed to report it once, I conclude it was reasonably likely the condition would be missed on future pre-shift [Tr. I 102] examinations and that miners passing on the track going to and from recovery work were reasonably likely to be struck by [the] falling rib.

I am also persuaded that the rib and/or pieces of it could have reached the track. Knox Creek's own exhibit shows that pieces of the rib, in fact, did reach the track when Jackson pulled down the rib. *See* [Knx. Crk. Exh. 22 at 1 and 2]. I have previously found that even if miners were riding in vehicles protected by canopies and netting, they were reasonably likely to be subject to serious injuries if an adjacent cited rib [part] gave way, and the same is true here. [A] serious injury was even more likely for the pre-shift examiner[s] who pass[ed] the cited rib on foot and for examiners and other miners who would pass it on foot as mining continued. The cited part's “hold” on the [main] rib was so tentative a piece could have fallen at any moment and [the size and weight of the loose rib] meant that those struck [Tr. I 103] would surely have suffered reasonably serious injuries[.]

[In addition to being S&S, t]he violation was serious. The loose part of the rib was large enough and substantial enough to gravely injury any miner struck by it or its parts. The result would have been at least lost work days and restricted duty to one miner, as the parties stipulated [. Jnt. Exh. 1, Stips 18 and 19].

The parties also stipulated that the violation was [the] result of Knox Creek's " moderate negligence," and I accept the stipulation. [Jnt. Exh. 1, Stip. 17].

The Secretary proposed a civil penalty of $1,934. Taking into account my previous findings regarding Knox Creek's history of prior violations as well as the parties' stipulations regarding the company's and the mine's [size], the effect of the penalty on Knox Creek's ability to continue in business, [Knox Creek's good faith abatement,] the fact that the violation was serious and that it [Tr. I 104] was due to Knox Creek's moderate negligence, I assess a civil penalty of $1,944[.]

VA 2010-131R[4]
VA 2010-214

CITATION NO.	DATE	30 C.F.R. §
8169147	11/16/09	75.220(a)(1)

The citation states that the approved roof control plan was not complied with in the [No. 3] MMU in the crosscuts between the [No. 4 and No. 5 entries.] A roof bolt had broken, causing the distance between [two]bolts to be 84 inches wide and 67 inches long. The broken bolt was adjacent to the corner of the crosscut and the [No. 4] entry. The citation [also] assert[s] that the mine has a history of roof fall accidents. The crosscut in which the broken [bolt was located] was the last open crosscut and it was regularly traveled by miners during production and maintenance shifts. The citation [states] that if a miner was struck by falling [roof] materia[,] he or she [could] be seriously injured [. Gov't. Exh. 61]. [Tr. I 105]

Inspector Colley's testimony described the conditions he reported in the citation and added additional details. Colley stated that the

[4] Knox Creek's contest of citation No. 8169147 was docketed twice. The correct docket number for the contest is VA 2010-131-R.

roof bolt's head [was] sheared and that the [roof] bolt's bearing plate was missing. [Draw] rock had fallen in the area of the damaged bolt. The roof was drummy when sounded. [This] indicated to Colley that the roof was not stable [and that it] was in the process of changing.

Colley reported a conversation with [m]iner Joe Hess. Colley cited the condition at 11:15 a.m. Hess, a shuttle car operator, told Colley that he had scaled the roof earlier that morning and had reported the damaged bolt to a roof bolt[ing machine] operator three or four hours before Colley saw the condition. Despite Hess' report, the condition was not corrected.

Colley identified a part of the mine's approved roof control plan that required roof bolts to be installed in the crosscuts on four foot centers. [C]rosscuts and entries in the mine are 20 feet wide. Therefore, the plan required four bolts, one [Tr. I 106] every 48 inches, across the width of an entry and [bolts] every 48 inches along an entry's length. [Gov't Exh. 63 at 18, sketch 3].

To Colley, the presence of the broken and plateless roof bolt meant that an area of roof in the crosscut and on into the entry was unsupported. He was especially concerned about rock in the area falling [onto] the continuous [mining machine] operator[,] [the roof bolting machine] operator, [and/or] the electrician [and] the section foreman, each of whom worked and/or traveled in the area[.]

The roof bolts used under the plan were 72 inches long and they were fully grouted. However, with the bolt head and the bearing plate gone, the defective bolt no longer exerted the tension required to maintain the stability of the "beam" [formed in the roof when] the [bolt's] resin/grout was exuded [as] the bolt was tight[ened]. In other words, the defective roof bolt did not provide full support for the upper layers of the roof.

In addition, with [Tr. 107] no bearing plate there was little, if anything, that remained to hold draw rock [in place] around the bolt[.] Colley did not know when or how the bolt's [head was] sheared [and its plate was lost], but he was certain that [the head and the plate] were missing.

Anthony Belcher, who was the foreman for [the No. 3] MMU, testified that [the MMU] was a production [section], one on which he supervised nine miners. Belcher was present when Colley conducted the inspection. Colley saw the sheared bolt and asked Belcher to look at it. Belcher emphasized that roof bolts used on the section

[had] not one, but two units of resin/grout and that [the resin/grout] cement[ed] the [roof] when [the] bolt was inserted into a drill hole and tightened. The [metal] bearing plate[s] . . . [measured] six inch[es] by six inch[es] square. They [were] commonly referred to as a "pizza pans." Belcher agreed that the roof in the area had a problem with draw rock[, which] [Tr. I 108] [was] why the company had designated [miners] to scale down the rock. [I]n fact, miners had done just that at the start of the shift. Thus, although there was some loose draw rock in the area near the cited condition, there was none in the area where the sheared bolt and the pizza pan [had been.] [Finally,] Belcher agreed that the cited condition had not been reported by the pre-shift examiner.

Scott Jesse, the [mine] superintendent, traveled with Colley on November 16. Like Colley, Jesse saw the sheared bolt head and the missing bearing plate. Jesse testified that he learned Joe Hess and another miner had scaled draw rock around the cited bolt. Jesse explained that scaling the draw rock was one of the first jobs done on [a] shift. It was important to do it first because roof conditions [could] change from one day to another[.] Joe Hess and the other miner saw that the roof [Tr. 1 109] bolt and the bearing plate were missing[,] but neither told the section foreman [.]

The parties stipulated that a violation of [s]ection [75.220(a)(1)] occurred as described in the citation [Jnt. Exh. 1, Stip. 16]. I accept the stipulation. I also find the violation contributed to a hazard, [one] that at the very least could have caused broken bones, bruises and/or cuts had [the violation] continued. The lack of a bolt head and a pizza pan meant that there was nothing to support draw rock that might develop around the bolt head. Moreover, I accept Colley's testimony that the [missing] bolt head and the bearing plate meant that the [roof] bolt [had] lost much of its tension and that the "beam" created by the resin/grout in the roof's upper strata was compromised. None of Knox Creek's witnesses disputed Colley's testimony that miners were required to work and travel under and around the defective bolt. These miners easily could have been injured by falling [roof.] [Tr. I 110]

Was it reasonably likely if mining continued [that] pieces of the roof would fall and strike or injure a miner? The answer is, "yes." First, I want to make clear the hazard . . . [is] not that draw rock would fall on a miner or miners. The [No. 3] MMU had been scaled prior to Colley's arrival, and he saw no draw rock in any areas where the defective bolt would have offered support. Rather, the hazard the Secretary proved was reasonably likely [to occur] relates to the fact that the missing bolt head and pizza pan lessened the effectiveness of the "beam"

created in the roof's upper strata by the resin/grout. The damaged bolt had lost its ability to maintain its [full] tension, something that [was] absolutely necessary [for] effective roof control. I conclude that [as] mining continued and [as] the roof was subject to the ongoing dynamics of change inherent in mining, it was reasonably likely [parts of] the upper strata of the roof would have given way and fallen on miners working or traveling below. I therefore affirm Colley's finding that the violation was S&S.

The violation was also serious. Falling roof is notoriously likely to injure or kill. The least that could [have been] reasonably expected is that one miner would have suffered lost work days or restrictive duty [Jnt. Exh. 1, Stips.] 18 and 19.

The parties . . . stipulated that the violation was the result of Knox Creek's moderate negligence, and I accept the stipulation [Jnt. Exh. 1, Stip.] 17.

The Secretary proposed a civil penalty of $1,944[.] Taking into account my previous findings regarding Knox Creek's history of prior violations, as well as the parties' stipulations regarding the mine's and the company's size, the effect of the penalty on the company's ability to continue in business, [Knox Creek's good faith abatement,] the fact that the violation was serious and [that it was] due to Knox Creek's moderate negligence, I assess a civil penalty of $1,944[.] [Tr. I 112.]

VA 2010-86-R
VA 2010-166

CITATION NO.	**DATE**	**30 C.F.R. §**
8164762	11/01/09	75.202(a)

The citation states that the roof and ribs on the [No. 3] entry adjacent to the belt/track entry starting at survey station 9978 and extending inby for 90 feet [were] not adequately support[ed to protect] miners from roof and rib falls. There [were] three missing pizza pans sheared at [an] intersection, one crosscut inby the survey station, and a visible one inch thick crack was present extending up and into the roof at a high angled slicken sided slip[.] In addition, the out[by] rib extending to the [No. 4] entry had a cutter up to 24 inches thick [running] into the [m]ine roof. A sheared roof bolt on the outside corner in the [No. 3] entry caused the distance from the bolt to the rib to be six and [one]

quarter feet and loose rock was present in the roof. [Further, t]he inby corner of the coal block at survey station 9978 had an overhanging[, loose] rock that was 9 inches to 8 inches thick [Tr. I 113]. At the intersection of survey station 9978 there were cracks that measured six foot four inches and five foot four inches in length. A [mandoor was located] between the [No. 2] entry and [the No.3] entry where the bolts were sheared.

A [major] roof fall occurred one crosscut outby survey station9978 during the day shift on November 1, 2009. Gov't Exh. 61. Inspector [Garnie] M. Deel, an MSHA roof specialist, went to the mine [that day] to investigate the fall. Deel traveled to the [fall] area[, and] in the course of investigating the fall, Deel found [the] conditions adjacent to the fall that caused [him] to issue Citation [No.] 8164762. (I note parenthetically that the conditions [are] helpfully depicted in a diagram that was prepared [Tr. 1 114] with Deel's assistance. Gov't Exh. 66.)

Tracking what he wrote in the citation, Deel explained how in the [No. 3] entry in the same [crosscut] that contained the roof fall – the "inby crosscut" – he saw three roof bolts whose heads had been sheared due to pressure [from] the roof. Also[,] in the intersection of the inby crosscut and the [No. 3] entry, Deel saw a [slicken] sided slip that was marked by a one inch thick separation in the roof. Deel believed the [slip] put pressure on [the] three [sheared] bolts[, pressure that caused] their heads to [snap off.] He feared the sheared bolts would [in turn] cause the roof to fail and fall. In addition, he interpreted the one-inch wide separation over the slip as a sign that the roof was failing in the intersection. He believed the failing roof could result in a separate fall in the intersection. [Deel concluded that] the roof in the area was not supported or otherwise controlled as required by [s]ection [75.202(a)].

Further, in the inby [crosscut] immediately adjacent to the fall a cutter ran [Tr. I 115] between the [No. 4] and [No. 3] entries. Deel estimated the cutter reached 24 inches into the mine roof. One rock had already fallen in the inby crosscut, and Deel believed this to be a sign of [excessive] pressure that was causing the roof to deteriorate. Because he thought the roof in the inby crosscut was likely to fall, Deel would not travel under it to view the [roof] fall in the intersection of the inby crosscut and the [No. 4] entry.

[Turning to] the conditions that existed one crosscut outby the inby crosscut in the [No. 3] entry, Deel noted the presence in the

intersection of the crosscut and the entry of a sheared roof bolt. [The sheared off bolt] was six and one quarter feet from the rib. Deel believed roof pressure had caused the bolt to shear. Further, outby the sheared bolt, but still in the intersection, was a loose rock. The rock was nine inches to 18 inches thick and [it] extended over the walkway [in] the intersection. In Deel's opinion, the rock could fall on miners who [Tr. I 116] traveled beneath it. In the same intersection Deel checked [a] test hole in the roof. The hole closed off at two feet [which] indicated to Deel that the roof strata [was] shift[ing.] Cracks in the outby intersection also signaled pressure on the roof. Deel believed the roof in the outby intersection could collapse at any time.

When Deel arrived on the section to view the roof fall, Mark Jackson had been there previously. (As will be discussed shortly[,] prior to Deel arriving at the mine, Jackson, the mine's superintendent[, Scott Jesse,] and the state [mine] inspector had visited the [roof] fall and the surrounding area.) Jackson hung [danger ribbons] on some roof bolts in the inby intersection and [he] hung a danger ribbon in the outby crosscut. *See* [Gov't Exh 66; *see also* Knx. Crk. Exh. 66 at 1-5]. However, according to Deel, no ribbons were hung to warn of the loose overhanging rock in the outby intersection. In addition, Knox Creek "timbered off" the fall in the [No. 4] crosscut and placed timbers across the corner [Tr. I 117] of the outby crosscut and the [No. 4] entry.

[Deel testified that the] mandoor located in the inby crosscut between the [No. 3] and [No. 2] entries was not dangered off on the[No. 2] entry side of the crosscut to warn miners [against going] through the door and [into] the [crosscut, leading to] the roof fall. Jackson did not disagree, but he pointed out] that he [had] hung a danger ribbon on the [No. 3] entry side of the mandoor.

Deel feared if miners came through the mandoor they would travel along the crosscut to the intersection and under the three sheared roof bolts [.] On cross examination, Jackson agreed it was possible the weekly examiner or other miners would go through the mandoor.

Because of rock dust on the roof bolts in the crosscut. Deel believed the sheared bolts in the [No. 3 entry] intersection had been [a danger] for at least a month[.] Further, Deel [thought] that Jackson had traveled under bad roof to hang the danger ribbons [at] the sheared roof bolt[s]. Deel [acknowledged however that] the company was not required to examine the [No. 3] entry [because the entry] was not a travel way or an escape way, and it was ventilated by neutral air.

To abate the condition the company dangered off the mandoor in the inby crosscut between the No. 2 and No. 3 entr[ies]. It also [cribbed and] timbered areas where other hazards were located so miners could not travel in the area[s].

Jackson testified that on November 1, the roof fall in the [No. 4] entry was [reported] by the pre-shift examiner. As required, Knox Creek notified state and federal authorities. The state [mine] inspector arrived at the mine before Deel. Jackson, [miner] superintendent Scott Jessee[,] and the state inspector went underground to view the fall. In addition to seeing the fall, Jackson stated that the party found a loose rock or brow on the outside intersection of the [No. 3] entry. In the same intersection there was a sheared roof bolt. The bolt was located three feet off [of] the rib. Jackson [testified] that he [Tr. I 119] hung reflectors at the overhanging rock and at the sheared roof bolt.

Jackson, Jesse and the state inspector then traveled inby up the [No. 3] entry to an intersection where they saw [the] three sheared roof bolts [that were located] on the right side of the intersection. Jackson testified that he and the others passed to the left of the bolt[s] and looked down the crosscut toward the fall. Jackson hung danger ribbons at the three damaged roof bolts. However, in his opinion, the damaged bolts did not mean [that] all of the roof in the intersection was bad. Jackson also testified that he wrote ["]danger keep out["] on a pallet and placed the pallet at the [entrance] to the inby intersection. *See* [Gov't Exh. 66, "P" in No. 3 Entry]; *see also* [Knx Crk Exh.] 66 at [6; Knx Crk Exh. 26 at 5]. Further, Jackson stated he placed danger tape on cribs set on the outside crosscut adjacent to the [No. 4] entry. The tape was to warn anyone traveling in the crosscut not to enter the entry.

According to Jackson, he, Jesse and the state inspector then left the mine. Once on the surface, the state inspector told Jackson that he, Jackson, had adequately dangered off the area. Jackson then saw Deel, who had arrived at the mine, and Jackson returned underground with Deel to [again] look at the roof fall.

Jackson and Deel disagreed about some of the things they saw. For example, Jackson disputed Deel's assessment that the [cutter] in the inby crosscut between the intersection and the roof fall was a sign of a [slicken] sided slip. Jackson did not see any [slicken] sided rock and he did not think that the cutter meant the roof in the crosscut was dangerous. Moreover, Jackson thought that when the roof fell in the [No. 4]

entry[,] it actually relieved pressure on the roof in the [No. 3] entry.

Jesse [was adamant that] he, Jackson, and the state inspector [did] not [travel] under the three sheared roof bolts in the inby crosscut. [He also stated that] because the roof fall occurred on a Sunday, no [production was taking place] inby the fall.

[T]he parties did not stipulate [that] the conditions described [in the citation] constituted a violation of [section 75.202(a).] Nonetheless, [it is] certain [the conditions] did. It is obvious that the roof was not adequately supported in the inby [inter]section where the three roof bolts were sheared. Moreover, I credit the testimony of the inspector that the inch wide crack that ran between the inby intersection and the roof [fall] extended up into a high angled [slicken] sided slip. The crack was present and although Jackson testified it did not represent a hazard because he saw no [slicken] sided rock, Deel's testimony regarding how he looked at the crack and what he concluded with regard to what he saw was more detailed and more compelling. It is common knowledge that [slicken] sided slips are especially dangerous [Tr. I 122] because they are likely to [cause the roof to] fall at any time [without warning, and] this alone establishes the violation.

[But] there is more. The parties agree that there was a sheared roof bolt in the outby intersection. This, too, signaled a lack of adequate support for the roof around the sheared bolt. Moreover, whether it is [termed a] loose rock, as Deel put it, or a loose brow, as Jesse put it, it is clear that a loose rock existed at the top of the rib of the outby corner of the outby intersection, the corner closest to the [No. 4] entry.

For these conditions to be a violation of section 75.202(a) [,] the Secretary [had] to establish that miners worked or . . . traveled [in the] areas [and] that the adverse roof conditions posed . . . a hazard . . . [to the miners.] The testimony establishes that there was no active mining inby the roof fall on the day the conditions were cited. It also establishes the [No. 3] entry was a neutral entry that did not have to be [examined]. [Tr. I 123] [Although no evidence establishes that] miners work[ed] in the cited areas while the [violative] conditions were present[,] Jackson acknowledged that an examiner traveling the [No. 2] entry and/or other miners could proceed through the mandoor, and presumably in the crosscut between the [Nos. 2] and [No. 3] entr[ies]. Indeed, he testified that he hung a danger ribbon on the [No. 3] entry side of the mandoor [and presumably, he did so] to alert any miner coming through the door to the hazards beyond. I conclude from this that at least the inby

crosscut served as an area where miners [might occasionally] travel and that the hazards created by the three sheared roof bolts in the inby intersection and [by] the cutter and . . . [slicken] sided slip in the roof fall side of the crosscut establish [a] violation of [s]ection [75.202(a)].

In addition, . . . [if miners went] through the mandoor it is reasonable to assume . . . [they would have] traveled down the [No. 3] entry, through the outby intersection, or traveled down the [No. 3] entry to the [Tr. I 124] outby intersection, turn[ed] [left] and proceed[ed] toward the mandoor in the [outby] crosscut between the [No. 4] and [No. 5] entries. This would have [put the] miners [on] a path to travel under [defective] roof in the outby intersection, [defective roof] created by the [damaged] roof bolt and [the] hanging [rock or] brow at the outby corner.

Having found the violation, the question arises whether it was properly designated S&S by the inspector, and I [find] that it was not. True, there was a discrete safety hazard to miners . . . [who on occasion might travel] in the cited area. [They were placed in danger by] defective roof created by [: (1) three] sheared roof bolts, [(2) a long] cutter that signaled a [slicken] sided slip[, (3)] another sheared roof bolt and [4], an overhanging rock or brow. However, the Secretary did not establish there was a reasonable likelihood that miners would have been injured by falling roof that resulted from the violative condition[s].

First[,] the record shows that it was unlikely rather than likely that miners would have worked or traveled in the hazardous areas. The areas where the violative [Tr. I 125] conditions existed were not [work] areas[,] and travel in or through them was at most sporadic.

[Second,] even if miners on rare occasions were in the [cited] area[s] it was not reasonably likely they would have traveled under defective roof. I credit Jackson's testimony as to the danger tape he hung, the reflectors he installed and the danger sign he placed. Each of these signaled dangerous areas of roof. To find it was reasonably likely a miner or miners would deliberately ignore these warnings and purposely place himself, herself or themselves at risk is irrational [and unlikely].

[Third,] I do not believe Jackson and Jesse and the state mining inspector placed themselves under dangerous roof on the morning of November 1. While Deel thought this was likely when Jackson hung danger ribbons in the area of the three sheared roof bolts, Jackson denied he went under the bolt[s] and Jesse, who was with Jackson and the state inspector, testified the party went up to but not under the bolt[s]. I credit Jackson's

and Jesse's [Tr. I 126] testimony in this regard. I find it highly unlikely Jackson would have purposely placed himself under shear bolts and in danger when he was in the presence of [the] state inspector [, a]nd I find it equally unlikely the state inspector would have allowed him to do so.

Two final points should be made. First, in considering the extent of the hazardous condition, I have not considered the closing of the test [hole] in the outby intersection to be a significant indication of a hazard. Although at the hearing [D]eel testified the closing [of] the [hole signified a] shift in roof strata, [he]did not include the condition in the citation, (*See* [Gov't Exh. 64,) which signals to me that when the conditions were freshest in his mind he did not [think that] the closing of the test hole [was a condition] of major importance.

Second, although Deel testified he believed the shear[ed] roof bolts in the inby intersection had existed for a month the Secretary did not show that during [October] miners [were] reasonably likely to travel under the [Tr. I 127] bolts. I again note that work was not . . . conducted in the [No. 3] entry and that [the entry] was not regularly traveled. For all of these reasons, I find that the violation was not S&S.

However, the violation was serious. In the unlikely event a miner or miners traveled under the [violative] roof areas and the roof gave way, [injuries resulting in] lost work days or restricted duties were the least that could have been expected.

With regard to Knox Creek's negligence in allowing the violation, Deel found that it was [low], and I agree[. Gov't Exh] 64. The cited areas were not [regularly traveled] and inspected by management personnel [or] by rank and file miners[.]

The Secretary proposed a civil penalty as $873[.] Taking into account my previous findings regarding Knox Creek's history of prior violation[s] as well as the parties' stipulations regarding the mine's and the company's [size], the effect of the penalty on Knox Creek's ability to continue in business, [Knox Creek's good faith abatement,] the fact that the violation was not reasonably likely to result in an injury but [that] if an injury occurred it would [have been] serious, and the fact the violation was due to Knox Creek's low negligence, I assess [a] civil penalty of $700[.]

VA 2010-94-R
VA 2010-166

CITATION NO.	DATE	30 C.F.R. §
7318304	11/03/09	75.202(a)

The citation states that near crosscut [No.] 50[,] the primary escapeway off of the 002 MMU was not maintained in a safe condition to assure passage to any miners who might [use] it because draw rock that measured 45 inches in diameter and that was up to six inches thick was loose and hanging from the roof. The citation also specifically note[s] that the loose rock was above [a] lifeline that ran along the escapeway [. Gov't Exh.] 67.

MSHA Inspector David [Woodward] testified that [he originally] cited [the] condition [as] a violation of [s]ection 75.380(d)(1), a standard [Tr. I 129] requiring [escapeways] to be kept [so as] to assure passage. However, he later modified the citation to charge a violation of section [75.202(a)] because he believed that standard [better] fit the conditions he found.

[Woodward's] testimony about the conditions reiterated what he wrote on the citation. He saw the hanging draw rock as he was traveling the escapeway with the weekly examiner, David Francis. [Woodward] described the hanging loose rock as, "very obvious." He noted that the rock was so loose it [would not] have taken much to bring it down. The rock was of such size that if it fell it would have injured seriously those traveling beneath it. [T]he weekly examiner traveled the escapeway once a week, [but Woodward] believed the miners most endangered [were those who in an emergency had] to use the primary escapeway to leave the mine, especially those following the lifeline, part of which ran beneath the loose rock[.] [Tr. 1 130]

[Woodward] agreed that the section was not being actively mined, however, equipment remained on the section, equipment that the miners would have to remove. Those miners would be the ones who might . . . use the primary escapeway. When [Woodward] issued the citation he was not aware of any miners working inby the loose rock, and he believed it would be one to two months before the equipment was recovered.

David Francis, the weekly examiner who was traveling with [Woodward], also saw the rock. In fact, Francis . . . [pulled] it down. He [did not] dispute [Woodward's] description of the size of the rock or

[Woodward's] assessment that the rock was both very loose and very obvious. Francis also agreed that the entry which was designated as a primary escapeway had to be traveled and examined by a company examiner once a week. Frances maintained that if equipment was going to be removed inby the hanging rock, the entry would have to be pre-shift examined[,] and the examiner would find the loose rock and the [condition would be corrected.] [Tr. I 131]

The parties' stipulated and the testimony [verifies] that [Woodward] correctly cited the company [for] a violation [of section 75.202(a).] *See* [Jnt. Exh. 1, Stip.] 16. [A] weekly examiner traveled the area, other miners working inby might be compelled to travel it if they needed to escape[,] and the rock was, as [Woodward] testified and as Francis agreed, large and loose[.]

Having [correctly] found [a] violation[,] the question is whether [Woodward] properly found it to be S&S[,] and I conclude that he did. Certainly, the presence of a large, loose rock hanging over a lifeline in a primary escapeway[, an esceapeway] traveled weekly by an inspector and [one] that [might have to be] used by miners [in an emergency,] subjected the examiners and miners to the dangers of being hit and seriously injured by [the falling rock].

In addition[,] I find it [was] reasonably likely such injuries would have occurred[.] [Tr. I 132] [T]he weekly examiner easily could have traveled under the rock. Miners would have been working inby as mining continued. If they had to use the escapeway to quickly exit the section it is not unlikely that they would also have use[d] the lifeline as a guide. A large rock hanging loose above them that could have come crashing down at any time presented a reasonable likelihood of injury.

In addition to being S&S, the violation was serious. The least that could have been expected was that a miner would suffer lost work days or restricted duty[. Jnt. Exh. 1, Stips.] 18 and 19.

The parties also stipulated [that] the violation was due to Knox Creek's low negligence. I accept the stipulation and note, as did the parties, that [t]he escapeway was regularly traveled only [once] a week[. Jnt. Exh.1, Stip. 17].

The Secretary proposed a civil penalty of $873[.] Taking into account my previous findings regarding Knox Creek's history of prior violations, as well as the parties' stipulations regarding the mine's and the [Tr. I 133] company's size, [Knox Creek's good faith abatement,] the effect of the penalty [on] the company's ability to continue in business,

and the fact that the violation was serious and due to Knox Creek's low negligence[,] I assess a penalty of $873 for the violation[.[5]]

VA 2010-93-R
VA 2010-166

CITATION NO.	DATE	30 C.F.R. §
8169127	10/27/09	75.503

VA 2010-132-R
VA 2010-214

CITATION NO.	DATE	30 C.F.R. §
8169155	11/20/09	75.503

VA 2010-101-R
VA 2010-166

CITATION NO.	DATE	30 C.F.R. §
8170363	10/30/09	75.503

VA 2010-89-R
VA 2010-166

CITATION NO.	DATE	30 C.F.R. §
8170375	11/04/09	75.503

Citation 8169127 states that a continuous mining machine located on the 002 MMU was not permissibly maintained because it had an opening in excess of .004 inches in its emergency stop switch [("E-stop switch")] enclosure. The citation notes that the Tiller No. 1 mine [Tr. I 134] is required to have a spot inspection every ten days due to the amount of methane the mine liberates. (The Secretary's authority [to] impose . . . more frequent inspection[s] of the mine [is] found in section 103(i) of the Act.) [(30 U.S.C. §813(i)]. The citation states that the opening created [a] source to generate an ignition [at] the face of the 002 MMU [and that such

[5] The assessment differs from that stated in the bench decision. The assessment more accurately reflects the civil penalty criteria. Tr. I 135-134.

an] ignition would seriously burn the continuous mining machine operator[. Gov. Exh. 69].

Citation Number 8169155 states that a continuous mining machine located on [the] 003 MMU was not [permissibly] maintained [because] there was an opening in excess of .004 inches [in] the [plain flange] joint provided for the lead junction box. The feared hazard [of] a methane [ignition] was the same as the hazard expressed in the previous citation, and as with the previous citation, it was [the] continuous mining machine operator who allegedly was exposed to the hazard. Further, and just as [with] the previous citation, the [s]ection 103(i) spot [Tr. I 135] inspection designation of the mine was noted [. Gov. Exh 71].

Citation Number 8170363 states that a continuous mining machine [located] on the 005 MMU was not permissibly maintained because there was an opening in excess of .004 inches in the trailing cable junction box. The citation notes that [moving] electrical components [capable of] produc[ing] a spark [were] located in the junction box, [but it states] that the cable connections were all adequately [insulated]. The citation also states that the mine liberates in excess of 900,000 cubic feet per minute of methane in a 24-hour period and that methane levels of five percent or more have been detected underground. [L]ike the other two citations, Citation 8170363 notes that the mine is subject to spot inspections every ten days because of the amount of methane it liberates.[Gov. Exh. 75].

Citation 8170375 states that on the 005 MMU a continuous mining machine had an opening exceeding .004 inches in its inspection [cover]. As with the other alleged violations [of section 75.503,] the citation notes [the s]ection 103(i) ten-day spot inspection status of the [Tr. I 136] mine[. The citation also states that the mine has a history of face [ignitions] and [of] accumulations of methane exceeding five percent[. Gov. Exh. 70].

Inspector Colley testified that the continuous mining machine [which] was the subject of Citation 8169127 was not in use when he saw it, but [that it] had been used on the previous shift and would be used again [on] the next shift. He also testified that although the [machine] had [a] methane monitor that would automatically shut down [the machine if] the [monitor's] sniffer detected methane in excess of 1.5 percent, methane could accumulate more quickly than it could be detected. [Colley testified] activation of the [machine's E-stop] switch produced an arc in the [non- permissible E-stop] switch enclosure. In addition, even if the [E-stop] switch was not activated, rock or other

material could fall on the switch enclosure, [damage] the [switch's] electrical component[s] and [this could] create an arc. [In Colley's view,] given the fact that methane [could] rapidly accumulate on the section, [an] opening in excess of .004 inches [in the E-stop switch enclosure] created a path for the methane to enter the enclosure [Tr. I 137] and ignite. The flame could then travel out of the enclosure, through the opening and [the ignition could] lead to a larger, highly dangerous [explosion]. Colley agreed, however, that aside from the non-permissible opening, he found no [other] defects [on] the continuous [mining machine]. In addition, he took methane readings while he was on the section, and he found no methane[.]

Colley could not [remember] if he looked at the [E-stop] switch [mechanism,] nor could he recall if the switch was a "closed switch," [meaning a switch that was sealed against the outside atmosphere]. He agreed that an O ring circl[ing] the [switch] enclosure was [not defective]. [He also agreed that he] found no problem[s] with the E-stop] switch connection[s,] or with the [machine's] methane detector. [He testified that although] coal dust could conceivably get into the [E-stop] switch compartment through the non-permissible opening, the scrubbers and the sprays on the [machine] were working[,] and [he] issued no citations for coal dust accumulations[.] Finally, while he emphasized that the accidental or [the] intentional activation of the [Tr. 138] E[-stop switch] would produce an arc or a spark inside the switch compartment that could ignite accumulated methane[,] he admitted that the switch mechanism was a mechanism with which he was not familiar.

[Darvin] Spencer, Knox Creek's electrical expert, [agreed that] methane could enter [the] non-permissible enclosure before a methane [monitor could] shut down [the] continuous [mining machine]. [He also testified that a]lthough methane could accumulate to an excessive range from places such as the floor or the rib[s], usually it came from the face [as] coal was cut. Spencer acknowledged that while an O ring would seal out water, it [would not] contain an explosion. Further, in Spencer's opinion the [E-stop] switch [was] not seal[ed] to [an] extent that [it would exclude] an explosive level of methane[.]

Kenneth Porter, the chief electrician for MSHA's certification division, submitted an expert report. [Gov't. Exh. 4]. Porter emphasized that the methane monitor provided an "extra precaution,"and even if the monitor [was] working [properly,] it still would [Tr. I 139] take up to ten seconds for the monitor to activate and shut down a machine. During [these] seconds methane could reach its explosive range and enter [the] non-permissible electrical compartment.

[When cross examined,] Porter agreed that if the components of the [E-stop] switch were ["hermetically sealed"] and the switch was accidentally or purposely activated, no spark or arc could enter the atmosphere inside the enclosure [and] serve as an [ignition] source. However, he maintained that the [E-stop] switch in question was not hermetically sealed and that the 120 volt switch [had] more than enough power to provide an [ignition] source.

Porter was dismissive of the [protective] nature of O rings. He . . . [stated that] they deteriorate over time and that [in any event] because of the pressure created by an ignition, [they would not] stop a flame from escaping an enclosure and causing a larger ignition or explosion. Further, their function [was to prevent] water, [not gases,] from entering an enclosure[.] [Tr. I 140]

Dennis Slate is [a] maintenance foreman [at] the [mine.] [He] was served with Citation 8169127. [Slate testified that] on the third shift on October 27, 2009, [t]he continuous mining machine was parked in the [No. 7] entry of the 002 MMU. [According to] Slate, later that evening the [machine] would have been checked for permissibility [and] the opening in the [E-stop] switch compartment would have been detected and corrected before the [machine] went back into the service on the next shift.

Slate [also] emphasized that the feeler gauge that detected the [impremissible] ga[p] could not get past the interior O ring. [He maintained] the ring was sealing the compartment. Further, the methane detector [was operating properly.] [H]ad methane [reached] 1.5 percent [of the atmosphere,] well below the [concentration] needed for an ignition and explosion, [the detector would] have completely [d]e-energized the continuous [mining machine.] Moreover, [Slate stated that] when checking for methane at he mine, he typically found none.

Mine Superintendent Steve Addison also emphasized [that] typically no methane was found when methane checks were done and that he [Tr. I 141] believe[ed] the undamaged O ring in the compartment would [have] prevent[ed] methane from getting to the enclosure's electrical compartment[s]. [Further, although] there had been an ignition [at the mine in] January[,] 2009, an [ignition] that involved a continuous mining machine, the mine's ventilation plan had been changed as a result [and no ignitions] had occurred since.

With regard to Citation [No.] 8161955, Inspector Colley testified

that he found a non-permissible opening in[the junction box of] [a] continuous mining machine. [Like] the previous continuous [mining machine,] the machine [cited in Citation No. 8161955] was not in use, but it had been used on the [prior] shift, and it would be used again. (According to Colley the junction box was similar to . . . [the box] depicted in Knox [Creek] Exhibit 33.) After Colley found the non-permissible ga[p,]the box was opened. There was rust and corrosion inside the box, and moisture also had accumulated[.] Colley testified that [under normal operating conditions] the electrical connections inside the box could [Tr. I 142] become loose and could arc or spark. In addition, the interior moisture could trigger an explosion because the moisture could cause the insulation on the cables to deteriorate. As with the prior alleged violation[,] Colley believe[d] the cited conditions exposed the [mining machine] operator to a hazard and that the shuttle car operator who worked behind the mining machine was similarly [endangered.] Colley again noted that the mine was subject to [section] 103(i) spot inspections[.] [It] had experienced [face] ignition[s] previously.

[W]hen cross examined, [Colley conceded] that no ethane was present when the citation was issued and that there was no violation of [any other] safety standard with regard to the junction box[']s interior electrical connections. He further agreed that for an accident to happen, [an electrical] defect was needed inside the box [and] there was no [such] defect. He also [stated that] an explosive accumulation of methane was [needed] as well, and there was none. Nonetheless, he emphasized that the January [ignition] indicated explosive concentrations of [Tr. I 143] methane at the face were possible.

Knox [Creek's] maintenance foreman, Mark White[,] . . . point[ed] out that when the junction box was opened, no problems were found relating to its wiring. He described the nylon sleeves that [were] put on the wires after they are taped and the various kinds of tape that [was] used to surround the [wires'] leads[.] The goal [was] to make the electrical connections as airtight as possible. White emphasized [that] all leads inside the box were in good [condition]. White knew because he was present when the box was opened.

Citation Number 8170363 states that the trailing cable junction box on [a] continuous mining machine [was not permissibly maintained because it] had an opening in excess of .004 inches. It also states that there [were] no arc-producing electrical component[s] within the junction box and that the cable connections were adequately insulated.

[Gov't Exh. 75].

Inspector Jason Hess testified that he feared as mining continued, the leads, which were bolted in place, would come loose and either contact one another or contact the sides [Tr. 144] of the metal junction box, which could result in a short circuit creating an arc or spark, which in turn, could ignite methane that accumulated in the explosive range in and outside the . . . box.

Hess originally found the condition [was] unlikely to result from an injury producing [event,] but three days later he modified [the citation] to include an S&S finding. He stated that the mine was on a ten-day spot inspection schedule for excessive methane liberation, that the mine liberated an excess of 900,000 cubic feet per minute of methane in a 24-hour period, that the mine had a history of methane face [ignitions] and that methane accumulations of more than five percent [had] been detected underground. *See* Gov't Exh. 75. [With regard to the last assertion,] Hess noted that in June, [2009,] he issued an order at the mine for [a] methane accumulation exceeding five percent. [Gov't Exh.] 77. However, he later agreed that the accumulation occurred while mining was stopped and that the section affected was not one [in which active] mining was underway. [Tr. I 145]

Hess further stated that although the methane monitor [on the continuous mining machine] cut power to the machine if methane levels reached 1.5 percent, the power to the machine['s] trailing [cable was not] cut. Therefore, even if the methane monitor worked as it should, an [ignition] could still result if the leads in the junction box were to short circuit. [However,] Hess acknowledged that continuous [mining machine] operators [were] trained to cut power at the power center if the methane monitor [was] activated. He further stated [that] on the day he issued the citation he detected no methane, [and he] agreed that the connections to the junction box were secured with [lock] washers, [which] meant they could withstand a lot of [strain.] Further, cables entering the junction box were constrained and clamped so they [could not] be pulled out of the box. Finally, electrical connections inside the box were wrapped with three different kinds of tape, [and] Hess found no problems with any of the connections. [Tr. I 146]

Knox Creek's maintenance foremen, [Tony Belcher,] reiterated much of Hess's testimony, although Belcher [placed greater emphasis on] how protected the connections and leads were inside the junction box and [on the fact] that when the box was opened, [nothing was found that] could [produce an ignition].

With regard to Citation [No.] 8170375, Inspector Hess testified that just as he stated on [the] citation, [the] cover [for] the continuous mining machine conveyor motor had an opening that exceeded [.004] inches. [Gov't Exh. 78]. Although the citation was issued on the maintenance shift, the machine had been used [on the prior shift] and would be used [again] as mining continued. When the [machine] was cutting coal, the inspection cover [was] within ten feet of the face. Of more significance to Hess was the fact that the conveyor motor was located just above the mine floor and methane emanating from the floor could enter the compartment from below before the methane [monitor] could . . . [shut down the machine]. [Hess] feared the interior lead[s inside the box] could short [and spark,] leading to an ignition. [Based on a photograph taken after the inspection,] Hess testified that one of the connections had started to show some wear[.] (*See* Gov't Exh. 80). [Knx Crk. Exh. 38]. [Hess] feared as min[ing] continued, the interior [wires] could short circuit and arc[.] However, [he admitted that] he did not open the cover and look inside [the box] to determine the status of the internal connection[s].

Hess also stated that although there was an O ring under the [inspection] cover, the . . . ring [did not serve a] purpose in preventing an [ignition] or [explosion.] On [c]ross [e]xamination, Hess [conceded] he found nothing to indicate that there was a problem [with the wiring] under the cover. He further agree[d] that the internal wires were protected with three different kinds of tape and were secured with lock washers. Finally, Hess confirmed on [Tr. I 148] November 4, [the day he found the alleged] violation, he obtained [negligible] methane reading[s] of [0% to].1 %.

Tony Belcher, [on] whom Citation 8170375 was served, testified that the O ring under the inspection cover was completely intact and that all the wires in the electrical leads under the cover were adequately insulated. There were absolutely no electrical problems with the components when the alleged violation was found.

With regard to the [four] alleged violations [of section 75.503] the parties . . . [agree] that [they] occurred as charged[. Jnt. Exh. 1, Stip 16]. [The next question is whether the violations were S&S, but] before turning to [that] issue it [is] necessary to address the framework [within which the S&S question must be decided.]

[Counsel for t]he Secretary argue[s] that when [determining] whether alleged violations of [s]ection [75.503] are [S&S,] I should assume ["] an explosion within the enclosures [housing] the electrical

components on the equipment.["] [Sec's] Pre-Hearing Mem. 2]. Counsel asserts that such an assumption is ["]the only logical [approach] in evaluating the S&S nature of violations of [s]ection [75.503." *Id.*] Counsel states that the purpose of the permissibility requirements is to have explosion-proof enclosures covering the subject equipment's electrical circuit[s.] [In that way,] if there is an arc or a spark from an electrical circuit inside the . . . enclosure and if an explosive level of methane has entered the enclosure, the explosion inside the enclosure cannot propagate outside into the mine atmosphere, thus triggering a much larger explosion. [*Id.* 3-4].

[According to counsel,] [t]he permissibility requirements of [s]ection [75.503] protect miners in the event of an explosion inside the enclosure and serve no purpose [other] than to prevent a larger explosion outside the enclosure. [Sec's Prehearing Mem. 4]. Counsel states, ["A]ccordingly, the only logical approach in evaluating the S&S nature [Tr. I 149] of [a] violation of [s]ection [75.503] is to assume that such an internal explosion has occurred." [*Id.*] [I]f the assumption is not made, "[T]here will only be arcing or sparking inside the enclosure when the equipment is operating in abnormal conditions, i.e., if the insulation inside the enclosure has internal damage or if the leads inside the enclosure are improperly installed or maintained." [*Id.* 3-4].

Counsel also maintains that [in the case of] the [E-stop] switch on the continuous [mining machine,] there will only be arcing or sparking when the switch is used as a result of an emergency or when debris hits the switch, events that are unpredictable and happen infrequently. [I]f an internal explosion or an emergency stopping of the equipment is not assumed, the Secretary will find it, "[nearly] impossible to establish the reasonable likelihood of an internal explosion." [Secretary's Prehearing Memo.] [Tr. 151]

I decline [c]ounsel's invitation to [assume] explosions have occurred in the cited enclosures or that an event has occurred causing damage to interior electrical components or causing [the] . . . [E-stop] switch to be used. The Mine Act is now past its 30th year. Almost from the beginning[,] the S&S findings of MSHA['s] inspectors have been challenged by operators and have been the subject of litigation. During this time, the Commission has found it neither necessary nor desirable to mandate the [assumptions] [c]ounsel [seeks]. In [fact,] in only one instance has the Commission adopted anything [remotely similar] a]nd [that] [is] when it held violations of the respirable dust standard, 30 C.F.R Section 70.100(a)[,][to be] presumptively S&S, a presumption upheld by the U.S. Court of Appeals for the D.C. Circuit, *Consolidation*

Coal Company [v.] [*FMSHRC*,] 824 F2 1071 (D.C. Cir. 1984). But as the D.C. Circuit approvingly noted, the Commission's decision was based on [Tr. I 152] its conclusion the medical evidence supported [finding] that [all] violation[s] of the respirable dust standard should be considered [presumptively] S&S [because] it would be meaningless to have the same [medical] findings . . . made in each individual case in which a violation of [s]ection 70.100(a) [was alleged.] 824 F.2d [at] 1084.

[Similar reasoning is not applicable] here. Indeed, the Commission as long ago as 1988, in upholding [a j]udge's finding that impermissible [gaps] in the flange joint[s of] the main control panel of [a] connection box and a [headlight] on a continuous [mining machine] were not S&S, emphasized that S&S designation[s] with regard to permissibility violations must be based on the particular facts surrounding the violations, including the nature of the mine involved. *Texas Gulf, Inc.*, 10 FMSHRC 498, 500-501 (April 1988). In so doing, the Commission recognized that the individual nature of [a] mine with regard to [its] methane liberations [and its] history of previous emissions and explosions has a bearing on the validity of an S&S finding[.] [Tr. I 153.] [B]y extrapolation, I conclude the individual nature of other factors such as the frequency of electrical malfunctions on particular cited equipment, the frequency of emergency stops of particular equipment and the exposure of miners to the alleged hazard also [must] be considered. [T]he assumption the Secretary seeks would negate the need for a specific evidentiary basis to establish an S&S finding, a basis recognized and approved by the Commission, and would effectively shift the burden of proof from the Secretary to the operator as the operator tried to rebut the assumption.

Finally, and equally important, I discern no practical need . . . [for] the assumption. Since the Commission first [announced] the [four part] S&S test [in] [*Mathies,*] the Commission and its judges [have] considered the question of whether the Secretary has established the validity of other inspector's S&S findings. The time-tested application of the [*Mathies*] formula has sometimes resulted in [S&S] findings [Tr. 154] being vacated, but more often than not, S&S findings have been upheld. Despite the assertion that [she is unable] to prevail without the argue for assumption, the Secretary [frequently *has*] [been] able to prove [that] violations of [s]ection [75.503 are] S&S, [and] I am not convinced there is a need to change [an approach] that has worked well for the parties and the Commission from the 1980s to the present.

The law is inherently conservative for a reason. [In following]

precedent, it provides stability, order and regularity to [the] affairs [it regulates.] [For this reason] restraint [should] be [the watchword of those adjudicating Mine Act cases.] Unless a [judge is] convinced the law compels him or her to act, the [j]udge should be leery of adopting new [assumptions, were] present principles [have worked] well. Here[,] because I am not [persuaded] the argued for assumption [is] legally well founded and pragmatically [sound,] I decline to adopt the approach advocated by [c]ounsel for the Secretary. Instead[,] and as with all other alleged violations at issue in these cases, I [Tr. I 155] will proceed according to *Mathies*.

Applying the principles of *Mathies* to the four alleged violations of [s]ection [75.503, I first note that] the parties agree the violations occurred[.] [Jnt. Exh. 1, Stip. 16.] I further find that each violation contributed to a safety hazard in that the testimony overwhelmingly establishes the cited openings could have allowed methane to enter the subject compartment[s,] an electrical malfunction in [the] compartment[s] could [have] ignite[ed] the methane[, t]he flame[s] could [have traveled] out of the compartment[s] into the atmosphere surrounding the cited equipment, and if the methane concentration outside the equipment were in the explosive range of 5 [%] to 15 [%], the result could [have been] an [ignition] and [perhaps] explosion, causing serious burn injuries to [the] equipment operators and to those operating equipment immediately behind[.]

[For these reasons,] I conclude that all four of the alleged violations [met tests] one, two and four of *Mathies*. In making this [finding], I have discounted the [Tr.156] prophylactic effect of the O ring[s]. Based on the record, I cannot find that even if [the rings] were in perfect [condition,] they would have prevented methane from entering the enclosures [or have prevented [flames] from [escaping.] As Kenneth Porter pointed out, the O rings were designed to exclude moisture, not gas [and flames]. Moreover, they deteriorate over time[.]

[T]he [primary] issues is whether the Secretary proved a reasonable likelihood that the hazard [would] result in an injury. [Obviously, there] can be no reasonable likelihood of an injury without a reasonable likelihood of an ignition, and there can be no reasonable likelihood of an [ignition] without an arc or spark inside the subject compartment[s].

I conclude the Secretary prove[d that] an [explosive] accumulation of methane and an arc or spark [were] reasonably likely in the [case] of the [E-stop] switch enclosure located on the continuous [mining machine] cited in [Tr. 157] Citation [No.] 8169127. [Gov't Exh.] 69. In making [this]

finding I am mindful of the fact that the [mine is gassy] and [is] subject to ten-day spot inspections pursuant to [s]ection 103(i) of the Act. I am further mindful of Inspector Colley's testimony that methane can accumulate rapidly during mining[,] and I find this is especially true in a gassy mine like Tiller No. 1. While Colley found no methane during his inspection [on October 27] and [while,] as Steve Addison credibly testified, the mine [has] experienced no face ignitions since January[, 2009] and the company's subsequent change of its ventilation plan, [this] does not mean that [sudden] methane releases [and] build up[s] are unlikely. Rather, given the gassy nature of the mine, I find as mining continue[d] [sudden] methane buildup[s] in the explosive range could reasonably be expected.

I further find that the fact the methane detector [shut] down the continuous [mining machine] when 1.5 [%] of methane was detected does not prevent a finding that an [Tr. 158] ignition or explosion was reasonably likely to occur. Inspector Colley [testified] there [is] a "lag time" between the methane [sniffer] detecting [methane] at the 1.5 [%] level or more and the power to the machine being cut[. Thus . . .] methane [can] accumulate to an explosive level before the machine shut[s] down. [Darvin] Spencer agreed with Colley, as did Kenneth Porter[,] and I [accept] Colley's testimony as factually correct.

Raymond Slate's testimony that the excessive opening would have been detected and closed before mining continued on the next production shift [is] not persuasive. A miner checking for permissibility could well have missed the opening. There was nothing [visual] calling his or her attention to it[,] and since it is not clear how long the violation existed, it [is] possible the condition[was] missed at least once before. Therefore, I find in the context of continuing mining operations the excessive opening was reasonably likely to remain.

[For these reasons I conclude as] mining [Tr.160] continue[d], it was reasonably likely the continuous mining machine would [be] operating in an explosive concentration of methane [and that methane in the explosive range would have entered the [E-stop] switch enclosure.

The critical question is whether an arc or spark [was] reasonably likely as well[,] and I conclude that it was. Had Knox Creek established the electrical components of the [E-stop] switch were hermetically sealed and methane at explosive levels could not have reached an arc or spark created by the [E-stop] switch components, I might have found differently, but it did not. Colley did not know much about the [E- stop] switch mechanism, but [both] [Davin Spencer] and Kenneth Porter were familiar with [it,] and they testified that although it was surrounded by

plastic, it was not hermitically sealed. Their testimony was compelling and credible.

Moreover, the record establishes [that] when the E[-]stop switch was activated an arc or a spark was created by the mechanism. Nothing had to go wrong with the E[-] stop switch mechanism for an [ignition] source to be created. Rather, the [Tr. 160] switch simply had to be activated by the continuous mining machine operator] in response to any number of situations that could arise in the normal course of continuing mining. Activation of the switch would produce the arc or spark that [could] ignite methane in explosive levels that entered the [E-stop] switch enclosure. Activation was reasonably likely as mining continue[d] and so was an ignition. The violation was S&S.

The violation also was serious. The parties stipulated any injury [resulting from the violation] was reasonably likely to [cause] lost [workdays or restricted duties] (Jnt. Exh. 1, Stip. 18), and while they [did] not [stipulate] as to the number of miners affected, I find that Inspector Colley properly indicated [two] [in] that [if an ignition or an explosion occurred] both the continuous [mining machine] operator and the shuttle car operator were reasonably likely to be seriously burned.

The parties also stipulated that the violation was due to Knox Creek's moderate negligence[,] and I find that this was so [. Jnt Exh. 1, Stip. 17.]

With regard to Citation [No.] 8161955, I conclude that the Secretary [Tr. 162] proved an accumulation of methane in the [explosive] range was reasonably likely in the case of the continuous [mining machine's] cutt[er motor] lead junction box [(Gov't Exh. 71),] but that [she] did not establish the likelihood of a triggering arc or spark.

I adopt my previous findings with regard to the likelihood of a methane accumulation. With regard to the likelihood of an [ignition] triggering an arc or spark emanating from inside the junction box, I first note that unlike the E[-]stop switch mechanism, the electrical components inside the junction box had to malfunction to produce an arc or spark. Colley testified that under normal mining conditions the electrical connections inside the box could loosen and could arc or spark or the internal interior moisture could cause the cables to deteriorate and they could arc or spark. However, he also agreed that no electrical problem[s] were found inside the box when it was opened, a fact that Mark White [confirmed.] In addition, White testified to the multiple taping of the wires.

I simply [Tr. 162] cannot find that the evidence establishe[s] that the violation was S&S. The Secretary's witnesses [posited] theories about what could happen, but they did not provide evidence as to what was reasonably likely[.] For example, there was no testimony as to the frequency with which wires loosened and contacted one another, [and there was no evidence] as to how often the protective sleeves and [tape] on the wires rust[ed] through, exposing the electrical wires and leads. Nor [was] there any information [offered as to] how frequently moisture inside the box causes the wires to spark or arc. The Secretary [needed] to prove more, especially in view of White's testimony regarding the extensive nature of [the] sleeving and [the] taping of the wires and the fact that when the box was opened no electrical defects were observed.

Nonetheless, the violation was serious. As the Commission has stated, the focus of the seriousness of [a] violation is not necessarily on the reasonable likelihood of serious injury[,] which is the focus of the S&S inquiry, but rather on the effect of the hazard [Tr.163] if it occurs. *Consolidation Coal Company*, 18 FMHRSC 1541[,] 1550 (September 1996.) Colley believed the violation subjected the continuous [mining machine] operator and his shuttle car operator to [the danger of suffering a] severe burn injury. The evidence and the parties stipulation[s] confirm [Colley's] belief [(Jnt . Exh. 1, Stips 18, 19)].

The parties also stipulated that the violation was due to Knox Creek's moderate negligence[,] and I find that . . . was so [. Jnt. Exh 1, Stip. 17].

With regard to Citation 8170363, I conclude that although the Secretary prove[d] an accumulation of methane was reasonably likely in the case of the continuous [mining machine's] trail cable junction box, she did not establish the likelihood of [a] triggering arc or spark.

I adopt my pervious findings with regard to the likelihood of a methane accumulation[.] With regard to the likelihood of an ignition triggering arc or spark emanat[ing] inside the junction box[, I] note again that unlike the [E-stop] switch mechanism, the electric components inside the cited junction [Tr.165] box had [to malfunction] to arc or spark [and produce] an [ignition] source. Hess feared that as mining continued the leads would come loose, would contact one another, [or they would contact] the side of the box, would short circuit and would create an arc or spark. [W]hile the Secretary proved that [such] events could happen, she [did] not established they were reasonably likely to happen, nor did she establish that any other arc or spark producing events inside the box were likely. [Rather,] the most compelling part of Hess' testimony concern[ed]

the protective measures Knox Creek had taken to prevent [such] arcing and sparking from happening, measures such as securing connections with lock washers, constraining and clamping cables when entering the box and wrapping connections with three different kinds of tape. [That] these precautions worked up to the point the box was opened, [was] confirmed by Hess' testimony that he found no problems electrical or otherwise inside the box, [and a]ll of Hess' testimony in this regard was confirmed by Anthony Belcher. [Tr.165.] The Secretary [simply] brought to the case no evidenceregarding the frequency with which the electrical malfunction[s] feared by Hess happened either at the Tiller Mine or elsewhere[, and as I have noted, t]he fact that something could happen does not establish its [reasonable] likelihood.

Nonetheless, the violation serious. [A]s with the other violations involving continuous mining machines[, had] an [ignition] occurred[,] the [continuous mining machine] operator and the shuttle car operator could have suffered severe burns.

Further, the parties [agree] that the violation was due to Knox Creek's moderate negligence[,] and I find . . . this was so[. Jnt. Exh. 1, Stip. 17].

With regard to Citation 8170375, I conclude that although the Secretary prove[d] an accumulation of methane in the explosive range was reasonably likely in the [Tr. 166] case of the continuous [mining machine's] offside conveyor motor compartment [Gov't Exh. 78], she [did] not [establish] [the] reasonable likelihood of a triggering arc or spark. I adopted my prior findings with regard to the likelihood of methane accumulat[ing] in an explosive range inside the cited enclosure. Indeed, I find [that such an accumulation was even] more likely [with regard to the conveyor motor than with the cable junction box,] because as Hess testified without dispute, the [conveyor motor's] location above the mine floor made [the compartment] particularly susceptible [to] mine floor emissions of methane.

With regard to the likelihood of an ignition triggering arc or spark emanating from inside the compartment, [Hess] feared the interior leads would short and spark. He testified that one of the leads already showed some wear, [*See* Gov't Exh. 80.] [b]ut this observation was made long after the citation was written. [At] the time he cited the company for the violation he did not [require] the compartment [lid] to be [re]moved, and he did not examine the [Tr.167] compartment's internal wires. He agreed there was no external visual indication of any problem with the [internal] wires. He also admitted the wires were taped with three different kinds of

tape and [were] held in place with lock washers. Belcher confirmed there were absolutely no problems with the internal wires when the violation was cited and that the wires and leads were taped and locked down, just as Hess described.

[While] the Secretary proved that the event feared by Hess could happen[, s]he [did] not [establish] [that it was] reasonably likely[.] [In fact, s]he [did not show] that any arc or spark-producing events inside the motor compartment were likely. [For example she,] did not [offer evidence] that arcing and sparking inside the [off]side conveyor motor compartment happened previously [at the Tiller No. 1 mine] or at [any] other mines [.] [Nor did she show that arcing and sparking inside the compartment was ever] caused [at the mine] by leads and wires whose insulation [was] worn through and/or whose restraints [had] loosened and failed. There [is] no way [from the record] to gauge the frequency [Tr. 169] with which [such] [event[s] might happen[,] and the urgency of Hess' expressed concern[s] [is] undermined by the fact that when he found the violation he did not deem it necessary [to have the lid raised] so he could look inside the compartment [for possible defects.] For these reasons, I find the Secretary did not prove an ignition was reasonably likely to occur inside the container of the offside conveyor motor. [In making this finding I again note that offering testimony that something could happen is not the same as proving that it is reasonably likely.]

However, the violation was serious. The parties [agree] that [if] an [ignition] occurred in the presence of methane [in] the explosive range [the resulting burn injuries] were likely to [cause] lost work days or restricted duty [(Jnt. Exh. 1, Stip. 19), a]nd based on Hess' testimony I find that [such] injuries would [be] sustained by the continuous [mining machine] operator and [by] the shuttle car operator who worked behind the continuous [mining machine.]

The parties also stipulated that the violation was due to Knox Creek's moderate negligence[,] and I find that this was so[. Jnt. Exh. 1, Stip. 17].

The [Tr. 169] Secretary proposed a [c]ivil [p]enalty of $2,473 for the violation of Section 75[.]503 set forth in Citation . . . 8169127, $2,282 for the violation of Section 75[.]503 set forth in Citation . . . 8161955, $2,473 for the violation of Section 75[.]503 set forth in Citation . . . 8170363, [a]nd $2,473 for the violation of Section [75.]503 set forth in Citation . . . 8170375[.]

Taking into account [m]y previous findings regarding Knox

Creek's history of prior violation, as well as the parties' stipulat[ions] about the [m]ine's and the company's [size,] the [e]ffect of the penalty on the company's ability to continue in business, [Knox Creek's good faith abatement,] the fact that all four of the violations were serious, but only one was reasonably likely to result in an injury and that all four were due to Knox Creek's moderate negligence, I assessed a civil penalty of $2,473 for the violation [of section 75.503 set forth] in Citation . . . 8169127, and $1,300 each for the violation[s] of section 75.503 set forth in Citations . . . 8169155, 8170363 and 8170375.[6 Tr. 170].

VA 2010-95-R
VA 2010-166

CITATION NO.	**DATE**	**30 C.F.R. §**
8170358	10/28/09	75.1909(a)(10)

The citation states a rubber tired mantrip [that was] used to transport miners[was not] equipped with insulation [required to] prevent spray from ruptured hydraulic and lubricating oil lines from being ignited on contact with the mantrip engine's exhaust [pipe.] [Tr.II 7] There were two places on the pipe where the insulation was damaged and the metal was exposed. [At] one place, approximately one half inch of the diameter of the pipe was exposed [for approximately ten inches.] At another place, an area of the pipe that measured] six inches by three inches [was exposed.] Hydraulic hoses passed within eight inches of the two areas. Further, the PVC breather [pipe, also referred to as the "blow by hose," had a discharge] opening [that] was [located] ten inches away from the ten-inch exposed area[.] Oil at the end of the PVC pipe indicated the engine was spewing some oil. The citation assert[s] that as mining continue[d] it was reasonably likely oil would contact the exposed exhaust pipe and . . . ignite. The [resulting] fire would endanger not only miners riding on the mantrip but also miners working [inby]. [*See* Gov't Exh. 81].

Inspector Jason Hess explained that on October 28, 2009, he was accompanied by David Rutherford, the mine's chief electrician. Rutherford was with [him] when Hess examined the [Tr. II 8] diesel powered mantrip. The mantrip was on the surface but had just been brought up from underground. [According to Hess,] normally the mantrip [took] three or four miners into the mine, moving from the surface to the end of the track.

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[6] The assessed penalties of $1,300 differ from those stated in the bench decision. The assessments more accurately reflect the civil penalty criteria. Tr. I 170.

The trip [took] three to four minutes. At the end of the shift, the mantrip [was] used again to bring miners out. [It also was occasionally used to transport miners during the course of a shift, sometimes making up to] three trips in a row[.]

Hess inspected the mantrip. He found the two areas on the exhaust pipe that he later describe[d on] the citation. In the areas, the [protective] insulation that covered the pipe was damaged or missing[.] *See* [Gov't Exhs.] 83 through 86. Hess [Tr. II 9] measured the[areas]. His measurements corresponded with what he wrote [on] the citation. According to Hess, Rutherford did not disagree with [the] measurements. [A residue of oil] at the end of the blow by hose indicated to Hess that the engine had expelled oil. Hess feared that hoses [running] near the pipe [could burst] spewing oil on the pipe or that the engine could deteriorate and spew more oil [on] the exhaust pipe. [Once on the pipe, t]he oil could catch fire [and] miners traveling on the [man]trip [could] be subject to smoke inhalation or burns. [Also,] because the mantrip traveled [an] escapeway [when it brought miners into and out of the mine,] a fire [could] block the escapeway, and force miners back into the mine[,] further away from the surface.

Hess . . . testified that this was not a new problem[.] In April, [2009,] and [again] only one month before the [October 28] inspection, [Hess] issued [other] citations because of [Tr. II 9] oil leaks and oil accumulations on personnel carriers. [*See* Gov't Exhs.] 88 and 89.

When he was [c]ross examined, Hess [further testified about] several things [to] which he had made only glancing references in his [d]irect testimony. He agreed that the [escapeway] the personnel carrier traveled [was a] secondary [not a primary escapeway.] He also agreed that the personnel carrier[']s route[, which sloped downward from the surface,] was more than 1,000 feet long. He further agreed that there was an automatic fire suppression system on the personnel carrier and that the nozzle of the system [was] pointed at the [cited] area. In addition, there were two [working] 20-pound fire extinguishers located on the carrier. [I]f a fire occurred, the automatic system would activate[.]

Hess . . . found no evidence of [engine] problems or of hydraulic hose problems at the time he found the [alleged violation.] [He agreed that] he took no [Tr.II 11] temperature readings [on] the exhaust pipe. So[,] he did not know if the pipe could obtain a temperature high enough to ignite hydraulic oil.

Robert Setren is the manager of the [MSHA's] [d]iesel [l]aboratory.

Setren was asked about a contention of Knox Creek that the areas [on the exhaust pipe] lack[ing] insulation were nonetheless coated with a [protective] ceramic substance. The coating was said by [its] supplier not only to insulate the pipe, but also [to] absorb hydraulic oil. *See* [Knx. Crk. Exh.] 40 [at 1-2]. Setren stated that tests show[ed] . . . the coating reduce[ed] the temperature on the outer surface of [an exhaust] pipe between 150 and 250 degrees Fahrenheit. But Stretrean, look[ing] at a photograph of the [subject] exhaust pipe,] [(Gov't Exh.] 84) testified that] it was hard to discern from the picture [whether] the pipe was actually coated [Tr.II 12] [and] even if [it] was, a clamp attached to the pipe did not appear to be[.] Finally, Setren [also] testified that temperatures were not uniform on an exhaust pipe[,] that they were higher near the end of the pipe[,] and he noted that the clamp was located [close to] the end of the pipe.

When he was cross examined, Setren agreed that he had not examined the personnel carrier nor had he conducted temperature tests on the particular components involved. He also agreed that the fact the personnel carrier was going downhill when it brought miners into the mine, and [that it only took] three to four-minutes to bring miners to the bottom,] affect[ed] the machine's engine temperature and, hence, the exhaust pipe['s] temperature.

Knox Creek conducted temperature tests on various parts of the personnel carrier. [Tr. II 12] *See* [Knx. Crk. Exh.] 40, [Attachment 5]. Setran agreed that [if] the [company's] temperature results were accurate, the temperatures were not sufficient to ignite engine oil. [He noted, however, that] some insulation remained on the exhaust system, which would help the system['s] parts . . . retain heat. [He further stated that in his] opinion, the [fire] suppression system on the personnel carrier [was not] a fire extinguishing system. [It might] put out a fire on a "good day," [b]ut [it][was] not [certain] to do so. [Stetren also observed that] although the engine was programmed to shut down at [a temperature of] 230 degrees Fahrenheit, the engine was water cooled and the exhaust components [were not.] [Therefore, the] exhaust parts could register temperatures well above 230 degrees Fahrenheit without the engine shutting down.

David Rutherford, [an electrician at the mine who also] worked in maintenance, testified that on October 28, 2009, the day the citation was issued, he checked the temperature of the [Tr. II 13] exhaust pipe with a heat gun [and obtained] a reading of 148 degrees Fahrenheit. He agreed, however, that the engine had been off for three to four minutes when he took the [measurement]. On March 5, 2010, he tested the temperature again. This time, he ran the engine until it reached 1,500 RPMs. He pulled the insulation back on the manifold, and he got a

temperature reading on the exhaust pipe of 126 degrees Fahrenheit. Rutherford testified that the flashpoint of motor oil and hydraulic fluid is approximately 450 degrees Fahrenheit. [N]one of the temperatures he found were near [the flashpoint.] [Like Setran,] Rutherford noted that the [personnel] carrier's engine shut down when its temperature reached 230 degrees Fahrenheit, but he agreed that heat sensors that [triggered] the shutdown were not located on the exhaust pipe.

Rutherford [also testified that he] did not think the [personnel carrier's] engine would [Tr. II 14] [emit] more than a small residue of oil. High oil emissions usually occur[ed] toward the end of [the] useful life of an engine, [which was] approximately 12,000 hours and the particular engine had been in use between 7,000 and 8,000 hours.

Davin Spencer's testimony revealed more of the details of the temperature test[s conducted by Knox Creek on the equipment.] He stated that before the tests, the engine was run for three minutes[,] and he agreed that although the engine would heat up in three minutes, [the exhaust pipe would not] reach its maximum temperature [in that] time. [Rather,] it would take up to ten minutes for the exhaust pipe to reach its [highest] temperature, which could be 900 degrees Fahrenheit[.] [Spencer also testified that] . . . Knox Creek did not test the clamp shown in [Tr. II 15] [Gov't Exh.] 84[, a]nd the clamp was not listed as one of those parts ordered with [a] ceramic coating. [A]lthough Knox Creek's March tests were conducted [on the surface], Spencer did not know what the outside [ambient] temperature was, even though he agreed that [the ambient temperature] "could make some difference" [in the test results.] Nor did Knox Creek remove the insulation that was missing on October 28 during the March tests. Spencer also agreed that the engine [had] not run for as long as . . . [normal] before the tests were conducted[.] [In addition, he could not say for sure] if [any] parts of the . . . exhaust system had a ceramic coating[.]

With regard to the alleged violation, the parties [agree] that [it] occurred[.] [Jnt. Exh. 1, Stip.] 16[.] The next [issue] is whether the violation was [S&S]. It is clear that the violation contributed to a safety hazard [in] [Tr. II 17] that if engine [oil] or hydraulic fluid accumulated on the uninsulated parts of the exhaust pipe and ignited, miners riding on the personnel carrier could [have been] subjected to possible burn injuries and/or [to] smoke inhalation. A fire also could [have] force[ed] miners off [of] the [personnel] carrier and inby, away from the mine entrance. The fact that the entry used by the personnel carrier was [a secondary,] not [a] primary [escapeway,] does not diminish the hazard. [An escape route] would [still] have been blocked [by a mantrip fire,

regardless of whether there was a primary or a secondary way to get out.]

The fundamental question is whether the Secretary established a reasonable likelihood that when the condition was cited and as mining continue[d], an ignition of engine [oil] or hydraulic fluid would have occurred, and I conclude [that] she did. I do not doubt that given the missing insulation, it would have been possible for temperatures on the exposed exhaust pipe to reach the point where accumulated oil [or fluid] would have ignited. I accept Setren's expert testimony regarding the test conducted by MSHA [to determine] the [Tr. II 17] temperature[s] produc[ed] on exhaust pipes. I find that after a series of runs in and out of the mine under a full load, a series that Rutherford agreed occasionally occurred, temperatures on the exposed parts of the pipe could [reach] an ignition point.

I [discount] as irrelevant the tests conducted by Knox Creek. [As] was pointed out during Mr. Chaykin[']s [c]ross examination of Davin Spencer[, t]he tests were conducted under so many circumstances that were inapplicable to the personnel carrier's actual use [at] the mine[, no germane conclusions can] be drawn from them.

I also discount the testimony [regarding] the effects of ceramic coating on [the] various parts of the exhaust [system]. I cannot conclude from the record that the uninsulated parts of the [system] were coated. This [is] especially true of the clamp. [Indeed,] I find it highly likely that if the parts actually [were] coated, Rutherford would have mentioned [the fact] to Hess, which he did not. Finally, [I accept Setren's testimony that because] sensors could shut [Tr. II 18] down the engine when it reached a temperature of 230 degrees [Fahrenheit,] temperatures [still could reach] an ignition point on the exhaust pipe. Therefore, I conclude the Secretary established it [was] reasonably likely temperatures on the uninsulated parts of the exhaust pipe could [reach] the point to ignite engine oil and hydraulic fluid.

The next question is whether it [was] reasonably likely [the] fluids [w]ould have accumulated on the pipe. The Secretary . . . offered more than Hess' testimony that he feared hoses running by the pipe would burst or that the engine would deteriorate and spew oil over the pipe. She. . .offered two previous instances within seven months of the date of the citation in which on the very same mantrip: [(1),] hoses [broke and spr[ayed] oil on parts of the exhaust pipe [(] *see* [Gov't Exh.] 88[);] and [(2),] oil leaked from the engine and [accumulated.] *See* [Gov't Exh.] 89. Even though at the time the violation was cited, Hess found no problem with the hoses or the engine and no evidence of leaks,

the recent previous problems with the [Tr. II 19] same equipment [convince] me that as mining continued, an ignition was reasonably likely[, and b]ecause the burns and/or smoke inhalation likely suffered by miners as a result of [an] ignition would have been serious, I [find that] the violation with S&S.

In making this finding, I reject any suggestion that the personnel carrier's fire suppression system and [its] two fire extinguishers diminished the likelihood of an ignition and fire or [lessened] the seriousness of [the injuries that] could reasonably have been expected. As Setren pointed out, the carrier's automatic fire suppression system was not a fire extinguishing system[, a]nd use of the manual extinguishers was far from assured [when] the natural inclination of miners in the [event] of a fire [blocking the escapeway] would have been to leave the machine and the area as fast as possible and retreat into the mine.

The parties stipulated that eight persons were likely to be subject to injuries resulting in lost workdays or restricted duties. [Jnt. Exh. 1, Stips.] 18 and 19. [T]he violation was serious.

The parties also [Tr. II 20] stipulated that the violation was due to Knox Creek's moderate negligence, and I find that this was so. [Jnt. Exh. 1, Stip.] 17.

The Secretary proposed [a] civil penalty of $3,996 [.] Taking into account my previous finding[s] regarding Knox Creek's history of prior violations as well as the parties' stipulation as to the mine[']s and the company's [size], the effect of the penalty on the company's ability to continue [in business,] [Knox Creek's good faith abatement,] the fact that the violation was serious, and that it was due to Knox Creek's moderate negligence, I assess a civil penalty of $3,996[.]

VA 2010-122-R
VA 2010-166

CITATION NO.	**DATE**	**30 C.F.R. §**
8170393	11/09/09	75.605

[The c]itation states that a trailing cable provided for a water pump was not properly clamped [where] it entered a cathead so as to prevent strain on the cable's electrical conductors. Specifically, the restraining clamp in the [Tr. II 21] cathead was not tightened properly on the rubber tape that surround[ed] the trailing cable's outer jacket, which, according to the citation, allowed the cable a "great deal" of slack [and could cause] a "great

deal" of stress to be applied to the cable['s] electrical conductors. [Gov't Exh] 90. The cathead was energized. [It] was plugged into a distribution box that was located along the side of the mine's [No.] 1-C conveyor belt. There were three other catheads plugged into the box. The [cathead was] waist high, that is [approximately] 30 inches off [of] the mine floor[.] The citation states [that] the cable['s] leads could be pulled accidentally if a miner's body put force on the cable or if the cable [was] pull[ed] . . . while one of the other catheads was removed. If the energized conductors were pulled [loose] from their [recepticles] inside the cathead, a miner could be seriously shocked or burned[. Gov't Exh.] 91. [Tr. II 22.]

[Jason] Hess testified that upon inspecting the trailing cable, the clamp, and the cathead, he noted that the rubber tape around the cable had pulled out of the clamp[. *See* Gov't Exh.] 92. [If] the clamp [had] been properly tightened, the cable would have been securely held in place[.] [Hess reiterated that t]he cable ran to a water pump located in an adjacent entry [, and a]s he later [wrote] on [the] citation, the [cathead] shared its distribution box with three other catheads and cables. As he also [noted] the cathead was positioned about 30 inches off [of] the mine floor and the distribution box was next to [a] conveyor belt. Inside the cathead, the two phase leads and the ground lead were inserted in opening[s] and were locked in place with copper hex bolts[. *See* Knx. Crk. Exh.] 42. [I]f the leads pulled out of the openings and contacted one another, a phase to phase failure could occur. [Hess] added that such failures had caused many serious electrical [Tr. II 23] accidents. [A]ll that had to happen for a lead to pull out of [its] opening was for undue stress to be put on the cable.

[According to] Hess, miners worked within two to three feet of [the point] where the cable entered the cathead. [Also,] [once] each shift an examiner was in the area[. Miners . . . also clean[ed] the adjacent conveyor belt, [and] miners tended to congregate in the vicinity of the distribution box because the area was lighted.

During the weekly examination, [the] examiner would unplug the cathead, check the cable and [check] the cathead's interior components. When the examiner did this, the circuit was deenergized. There was a locking device on the top of the cathead[. *See* Knx. Crk, Exh.]43 [at 5]. To release the [device] the cathead had to be tilted upward. Hess testified that a miner's natural inclination was to grab the cable when tilting the cathead. . . . [T]his put undue stress on the cable, [stress that could pull] the phase leads free[.] When the circuit was [Tr. II 24] reenergized, if the free[d] lead[s] came in contact with one another, a phase to phase electrical failure could result in an electrical explosion that, at a minimum, could cause serious burn injuries to a miner in the vicinity of the distribution box. Hess agreed,

however, that the weekly electrical examination was conducted by a certified electrician who was trained not to pull on the cable when unlocking the cathead. Rather[,] the cathead was [supposed] to be lifted from its rear. Nonetheless, Hess [mantained] that it was "extremely awkward" to lift the cathead properly.

Hess also agreed that he detected no problems inside the cathead. To abate the cited condition, Knox Creek simply [slid] the rubber tape [under] the clamp and tightened the clamp.

Foreman and certified electrician Anthony Belcher [described] how he believed the weekly examiner checked the cathead and conductors. First, power was removed from the circuit. [A]fter removing power, the examiner lifted the cathead to examine it. But he or she did not [Tr. II 25] lift the cathead by lifting the cable; rather, he or she lifted the cathead itself. According to Belcher, the only time the cathead was moved was during the weekly examination. Further, he emphasized that at the time the condition was cited, the interior leads were tightly secured and there were no problems inside the cathead. Belcher did not think it was possible the leads would come loose if they were properly held in place by [the] hex bolts. He simply did not understand how enough strain could be placed on [the leads] to ever pull them free [of the bolts]. In Belcher's opinion, an injury could not reasonably be expected[, b]ut [he] agreed that it was possible a miner would not follow the procedures he or she [was] taught and thus would lift the cathead by pulling first on the cable.

With regard to the alleged violation, the parties agreed that it occurred as charged[. Jnt. Exh. 1, Stip] 16. The primary question is whether the Secretary proved that the violation was S&S. Therefore, I turn to the [*Mathies*] criteria. I conclude that the violation contributed to a discreet [Tr.II 26] safety hazard. [The d]anger, as the inspector explained, was that enough strain would be placed on the improperly clamped cable [so] that [its] leads would be pulled from [their] receptacles inside the cathead. They would touch one another and a phase to phase arc, or as Hess termed it, a " mini explosion," would injure a miner or miners in the vicinity of the [distribution box]. None of the witnesses disagreed that such an injury would be reasonably likely to seriously burn a miner or miners. Therefore, the first, second and fourth of the [*Mathies* criteria] were met.

The question then is whether the Secretary established that the injury producing event was reasonably likely to occur[, and] I conclude [that although] the Secretary proved some of the elements required to meet the third step [of *Mathies*, she did not prove them all]. I am persuaded that even

though mine examiners were taught to lift the cathead by lifting on the cathead itself, the easier way to do it was to lift up the cable. The fact that lifting the cable near where it entered the cathead required less bending and reaching and that it [Tr. II 27] was, as Hess stated, "extremely awkward" to do the job right, confirmed Hess' observation that the "natural" thing for [an] examiner to do was to lift the cable, and I find it reasonably likely [that] this would [happen].

I also find that [when] [it] happened, added strain would [be] placed on the leads inside the cathead. Again, no one really disagreed with this. I further accept Hess' testimony that miners were reasonably likely to be in the immediate vicinity of the distribution box and hence could [be] burned by an arc or [an] electrical explosion if . . . the leads [were] pulled out of their [receptacles] and touched one another. I note in passing that the Secretary seemed to abandon the theory advanced in the citation that it was reasonably likely miners would become entangled and caught in the cables entering the box and that this would strain the leads and free them, [o]r that added strain would come from the cables becoming [otherwise] entangled[.] [N]o [Tr. II 28] significant testimony was offered by the Secretary concerning [either of] these alleged possibilities[.]

I hold, however, that the Secretary did not prove one of the critical elements of [the] third [*Mathies*] step. She did not establish that the strain caused by lifting up on the cable was reasonably likely to pull the leads free. Essentially, Hess thought [that it] would happen[, and] Belcher thought it would not. [T]he record establishes that the lead[s] themselves [were] properly locked in place by the hex nut[s]. The unanswered question[s are] how much force [was necessary] to pull [the leads] free [of the bolts] and [if] that force [could be] provided by lifting the cable[.] [T]he record does not provide [definitive] answers [to the questions].

[Further, the Secretary offered] no specific examples of leads being pulled free by improper lifting, [and she elicited no testimony as to the force necessary to pull the leads loose.] [Nor is there any] indication in the record that as mining continue[d] the hex nuts would loosen their hold on the leads. [Tr. II 29.] [N]o specific examples of [it] actually happening were offered, [nor was testimony given as to exactly how such a thing could happen]. For these reasons I conclude the violation was not S&S.

Nonetheless, the violation was serious. Knox Creek really [did not] disagree that if the feared accident occurred it could result in [major] burn injur[ies] to miner[s, a]nd [it] stipulated that those injuries [could cause] lost workdays and/or restricted [duties]. [Jnt. Exh. 1, Stips.] 18

and 19.

Knox Creek and the Secretary also stipulated that the violation was due to Knox Creek's moderate negligence, and I find that this was so[. Jnt Exh. 1, Stip.] 17.

The Secretary proposed a civil penalty of $1,203[.] Taking into account my previous findings regarding Knox Creek's history of prior violations, as well as the parties' stipulations as to the mine[']s and the company's size, the effect of the penalty [on] the company's ability to continue in business, [Knox Creek's good faith abatement,] the fact that the violation was not reasonably likely to result in an injury, although if an injury occurred it would be serious, and [the fact] that the violation was due to Knox Creek's [Tr. II 30] moderate negligence, [I] assess [a] civil penalty of $700 [.[7]]

VA 2010-88-R
VA 2010-166

CITATION NO.	DATE	30 C.F.R. §
8170374	11/04/09	75.517

The citation states that [the] trailing cable [of] a continuous mining machine [in] the 005 MMU was not adequately insulated in that 11 feet from the [machine] there was a taped place on the cable that [was] covered by a wrap boot. One end of the boot [was] pulled back and the [cable's] insulated phase [leads] were exposed. The citation goes on to state that the cable and the floor around it were "very wet." The citation . . . also [charges] that insulation on the phase leads was not durable enough to withstand the mining conditions and that because the cable was manually handled during normal mining operations, serious electrical injuries to a miner were reasonably likely[. Gov't Exh.] 93.

Jason Hess issued [the] citation, and his testimony . . . [Tr. II 31] . . . faithfully tracked [what he wrote. In addition h]e stated that during the normal course of mining the continuous mining [machine] operator or [his helper] reposition[ed] the cable by picking it up and moving it, or by kicking it and moving it, and that this happened several times while the [machine] was making a cut. In fact, Hess estimated the cable [was] moved four or

[7] The assessed penalty differs from the amount stated in the bench decision. The assessment more accurately reflects the civil penalty criteria. Tr. II 30-31.

five times during a cut and that a continuous mining machine made up to three or four cuts per shift. The cable also was manually moved during cleanup operations at the end of the shift. Further, at the start of the shift, one of the first things done was to put the cable alongside the rib, the goal of all cable movements was to keep the cable from being run over by the continuous mining machine or by the shuttle car[s].

Hess stated that the citation was written during a maintenance shift, which [might] account for the floor being wet. He noted that equipment was washed during the shift. Equipment also was serviced [during the shift, another factor that] could . . . [Tr. II 32] [result in] the cable be[ing] moved.

Hess speculated that the cable's [wrap] boot [was] pushed back as the cable was dragged along the mine floor. Although he [could not] recall any visible damage to the [cable's] inside leads, the leads were exposed and their insulation could not be counted on for protection against shock, a danger that was intensified by the wet nature of the cable[']s] surroundings.

In Hess' opinion, the shock hazard [could cause a fatal injury.] Hess acknowledged that the cable's three interior leads were surrounded by copper mesh. But he believe[d] that the shield provided by the mesh would quickly [be] rendered inoperative by [the mesh] being rubbed away [when] the cable was dragged over the mine floor. As best he could recall, the opening in the cable [measured] about one half inch, which was enough to expose the inner lead[s] to damage[.]

When he was [c]ross examined, Hess agreed [that] under the mine's [Tr. II 33] action plan, the deenergized cable would have been [the] subject [of] a "hands on" inspection before it was next used in production. The examination would have taken place at the start of the next production shift[.] Hess denied that he bent the cable at the splice to see the opening in the boot[.]

Foreman and certified electrician Anthony Belcher testified [t]here was a ground wire in the cable as well as a monitor system that detect[ed] any exposure of the phase lead[s.] He [also] emphasized that the action plan['s] "hands on" inspection would have taken place at 7:00 a.m.[,] before the next production shift. Nothing between [2:32 a.m.,] the time when the violation was cited, and the action plan inspection would have further damaged the cable. He [also] emphasized that the cut was small and not likely to promote further damage. [Tr. II 34.]

With regard to the alleged violation, the parties agree it occurred as

charged[. Jnt. Exh. 1, Stip. 16, and s]ince there was a violation [my] inquiry turns to whether the violation contributed to a discreet [hazard.] I concluded that it did. It is clear that as mining continued, the cable's interior phase leads could have been exposed as the cable was moved and the insulation was worn[.] Even an opening in the insulation as small as a pinhole could have caused a miner handling the cable to be shocked, perhaps fatally. [T]his is especially true because the cable was wet and the floor on which it lay and was dragged was wet. I therefore find it reasonably likely that if a miner was shocked by handing the damaged cable or by standing in water adjacent to it, [his or her] injury would have been reasonably serious.

Further, I conclude that such an injury was reasonably likely[.] I am persuaded that as mining continued, the [Tr. II 35] cable would have been moved by hand and that this would have happened frequently. Hess' testimony in this regard was compelling. Obviously, the more times the cable was moved the greater the likelihood [that] a person handling it could have been shocked. Moreover, as mining continue[d] and the cable was dragged, the insulation surrounding the leads was likely to deteriorate and the leads [were likely] to be exposed. The fact that the cable was protected by copper mesh enhanced the protection afforded the cable's interior wires[, b]ut that protection was not fool-safe. Far from it[;] Hess was [persuasive when he testified] that the harsh conditions of the mine could quickly wear away the copper and the insulation [and increase] the size of the tear. Further, I am not at all convinced that [Belcher was right and that] the next "hands on" inspection would have detected and corrected the violation. The exposed area of the cable was small and easy to miss. For these reasons, I find that the violation was S&S.

The violation also was serious. Had a miner suffered a shock [Tr. II 36] injury, it [is] reasonably likely that he or she would have experienced at least lost workdays and restricted duty, just as the parties stipulated[.] [Jnt. Exh. 1, Stips.] 18 and 19.

Knox Creek and the Secretary also stipulated that the violation was due to Knox Creek's moderate negligence, and I find that this was so[. Jnt. Exh. 1. Stip.] 17.

The Secretary proposed a civil penalty of $1,530[.] Taking into account my previous findings regarding Knox Creek's history of prior violations, as well as the parties' stipulations as to the mine[']s and the company's size, the effect of the penalty on the company's ability to continue in business, [Knox Creek's good faith abatement,] the fact that

the violation was serious and that it was due to Knox Creek's moderate negligence, I assess [a] civil penalty of $1,530[.]

VA 2010-106-R
VA 2010-214

CITATION NO.	DATE	30 C.F.R. §
8169149	11/16/09	75.517 [Tr. II 38.]

The citation states that on the 003 MMU, the trailing cable [of] a roof [bolting machine] was not adequately insulated and protected in that approximately 50 feet from the [machine t]here was an opening one quarter [of an] inch long [in the cable]. The opening ran around the entire circumference of the cable, exposing the cable[’s] insulated conductors. The citation also states that the floor of the section was wet with standing water in some areas and that the cable was handled on each shift by miners as the roof [bolting machine] was moved.

[Inspector Colley wrote the citation, and t]he [essentials] f [his] testimony reiterated what he wrote, [a]long with the fact[s] that the cable was stored on [the] reel [of] the roof bolting machine and that the cable was unreeled so he could inspect it. Colley stated that when he saw the opening [in the cable,] he also saw that there was no damage to the cable's interior conductors. Nonetheless, Colley maintained something as small as a pinhole opening in the conductors could lead to a serious injury or to an electrocution. Further, although the number of times the cable was handled during the shift [Tr. II 38] depended on the pace of production, [in Colley’s opinion] the roof bolting machine operator would handle the cable at least once each shift. [He added that even though] the cable was protected by a monitor, if a miner contacted an exposed conductor, he or she could be injured before the current [was] shut off[.]

Colley agreed that power was removed from the cable when it was inspected and [that] the next time it [was scheduled to] be inspected was about three hours after he wrote the citation. Colley also agreed that the opening in the cable was at a spot where the cable was spliced or taped and that he probably flexed or bent the cable to some degree when he checked the area. Finally[,] he [testififed] that [he thought] there were times during normal mining operations when the cable was pulled out [so] far the cable [was completely] off the reel[, b]ut he could not say when[.]

David Inscore [Tr. II 39] [i]s an electrician at the mine. [He] testified that the reel contained 300 feet to 400 feet of cable and that during

normal operation[s], the cable [was] never pulled out so far that the cut area [was] off [of] the reel. Inscore also testified that when Colley found the opening in the cable, Colley bent the cable so severely it formed a loop and that during normal operations, the cable never [was] bent [like] that [*See* Knx. Crk. Exh. Exhibit 51 [at 1]. Inscore insisted that the opening, which was only revealed when Colley bent the cable, was [so] small there was no chance [that] there would be further damage to the cable. Moreover, [he maintained that] as mining continued the cable [would be] returned to the reel after it was inspected, [and] it would not be unrolled again until it was examined by the roof bolter operator, at which time the power would be off.

The parties agree that the violation occurred as charged[. Jnt. Exh. 1, Stip] [Tr. II 40] 16. [The f]ailure to adequately insulate and fully protect the cable meant that with more wear, the cable's interior conductors could [be] exposed and a miner or miners who handled the cable could [be] seriously shocked or electrocuted. Thus[,] parts one, two and four of [the *Mathies*] test [were] met.

[The] Secretary failed, however, to establish part three [of the test] in that she did not show there was a reasonable likelihood that an injury would occur. I reached this conclusion because the record does not allow me to find that a miner or miners were reasonably likely to handle the cable in the vicinity of the tear when the cable was energized. Inspector Colley's testimony as to when the cable was handled and under what circumstances was very general. Colley stated that the cable was handled by the roof bolting machine operator at least once each shift and that there were times where it might be unrolled later. [Colley had no more to offer, but] David Inscore [filled in] the [gaps]. Inscore [Tr. II 41] explained, and I have no reason to doubt, that the only time during a normal shift when the cable would be pulled to the point where the cut area would go off [of] the reel was when the cable was inspected by the roof bolting machine operator at the start of the shift [a]nd that during this time all power to the roof bolting machine would [be off.] Inscore was emphatic when he testified that aside from this, the cable was never pulled so far that the open area was exposed.

Colley testified that if the cut area on the cable stayed on the reel, the area was much less likely to suffer further damage, and I agree with Colley in this regard. [Obviously too,] the defective cable was [un]likely to cause an injury if it stayed on the reel. Further, although Colley testified that [he believed] there were times when the cable [was] pulled [completely] off the reel in order to make sure the roof [bolting machine] operator had enough cable to do his or her job, [Colley did not] indicate how frequent or, for that matter, how sporadic, [such] times were, [a]nd in the face of Inscore's positive assertion that

the area [Tr. II 42] containing the opening [was] never off the reel during normal operations, I cannot find [that] the feared electrical accident was reasonably likely.

In many respects, my ruling is similar to a conclusion I reached in *Rockhouse Energy Mining Company*, 30 FMHRC 1125, 1140 - 42 (December, 2008). In *Rockhouse* the Secretary also failed to establish a reasonable likelihood of injury [w]here the record supported finding that the defective part of the cable was reasonably likely to remain on the reel during normal mining operations[.]

[N]onetheless, the violation was serious. As I noted previously, if the inner insulation on the conductors had worn away and a miner handling the cable had touched the leads, a serious shock injury or even an electrocution could [occur. *See* Jnt. Exh. 1, Stips.] 18 and 19.

The parties stipulated that the violation was due to Knox Creek's moderate negligence, and I find that this was so [. Jnt. Exh. 1, Stip.] 17.

The Secretary proposed a civil penalty of $1,530[.] [Tr. II 43] Taking into account my previous findings regarding Knox Creek's history of prior violations, as well as the parties' stipulation as to the mine[']s and the company's size, the effect of the penalty on the company's ability to continue in business, [Knox Creek's good faith abatement,] the fact that the violation was not reasonably likely to result in an injury, although if an injury occurred, it would [be] serious and the fact that the violation was due to Knox Creek's moderate negligence, I [assess a] civil penalty of $800[.[8]].

VA 2010-133-R
VA 2010-214

CITATION NO.	**DATE**	**30 C.F.R. §**
8169156	11/20/09	75.517

[The c]citation states that the trailing cable [of] a continuous mining machine was not adequately protected and insulated in that it had a one half inch opening [in] the cable. The opening exposed the insulated power conductors. The opening was located ten feet from the machine.

[8] The assessed penalty differs from the amount stated in the bench decision. The assessment more accurately reflects the civil penalty criteria. Tr. II 43-55.

The citation also states that the mine floor of [Tr. II 45] the section where the continuous miner was located was wet and that the cable was handled by miners during the course of each shift[. Gov't Exh.] 97. Once again, Inspector Colley's testimony echoed the citation. He added that not only could a pinhole in the conductors' insulation cause an electrical injury to a miner, but if water contacted the opening, the water could create a barrier to the energized cable being grounded. Colley [stated] that the continuous mining machine was energized. [He] also stated that during the course of the shift the cable had to be moved as the [continuous mining] machine made its cut[s. For] the cable's inner conductors to be exposed, [a]ll that had to happen was for the insulation on the inner conductors to be worn through. Although the insulation was in good condition when the citation was written, Colley was of the opinion [the insulation] could wear away quickly as normal mining progressed. [He] also [believed the insulation] could [deteriorate] due to exposure to water.

Colley acknowledged that [at] the time [Tr. II 45] he cited the condition, the continuous [mining machine] had not been operated for the pervious two days. [He stated] that it was being repaired and that before it returned to service, it would be inspected according to the mine's action plan. Colley described the cut in the cable as obvious and easy to find.

[Mark] White, Knox Creek's maintenance foreman, confirmed that the continuous mining machine was down for repairs for the previous two days and that it was only energized as a courtesy to the inspector. White was not sure [if] the opening in the cable was [the] result of a cut. [He speculated that] it might have been [due to] a repair. He agreed with Colley, however, that whatever caused the opening, the cable's interior conductors were properly insulated.

White stated that the circumference of the cable was six and [one] half inches. Thus[,] the opening [, which was approximately three inches long,] extended [around] almost [one half of] the cable. White, like Colley, explained that before the machine went back into service, the cable . . . would [be] inspected according to the company's action [Tr. II 46] plan. This inspection involved walking the entire cable and conducting a hands[-]on inspection. [P]ower would [be] off during [the] inspection.

The parties stipulated that the violation existed as charged[. Jnt. Exh. 1, Stip.] 1[6]. It is clear that the opening in the cable created a safety hazard in that the insulation on the inner phase conductors could have worn away or could have deteriorated from moisture so that a miner who moved the cable . . . and who had his or her hand on or in the immediate vicinity of the exposed phase conductors [could] have been seriously shocked or electrocuted.

[Therefore,] . . . the first, second and fourth parts of the [*Mathies*] test [have] been met. As with the previous violation, however, [it is] at the third part, the [requirement to prove] a reasonable likelihood that the hazard contributed to [will] result in an injury[,] that the Secretary's case [comes] a cropper.

There was no showing by the [Tr. II 47] Secretary that the miners actually moved the cable while the [tear in the cable existed. Rather, the record] fully support[s] finding [the] continuous mining machine [was] down and its power [was] off for two days before the citation was [issued.]

The tear may have been present before the cable was last moved manually or the tear may have occurred after the cable was last moved. There [is] simply no way to know. That being the case, the Secretary has not shown miners were exposed to the hazard before Colley's inspection[.]

[N]or [has] she show[n] that had [normal] mining continued, miners would have been exposed. Rather the testimony leads to the conclusion that the opening would have been noticed and corrected before the continuous [mining machine] returned to service. Colley himself stated that the cut was obvious and easy to find. And both Colley and White testified that before the continuous mining machine was returned to production, the cable would have been subject to a hands[-]on inspection along its entire length as part of Knox Creek's compliance with its action plan. [This] [Tr. II 48] inspection would have taken place while the power was off. Given the obvious and easy to find nature of the opening, it is reasonably likely [that] the opening would have been found and repaired and thus [that] no miner would have been exposed as mining continued.

Nonetheless, the violation was serious. As I noted previously, if the inner insulation on the phase conductors [wore] away or deteriorated badly and a miner handling the cable touched the conductors or [an] adjacent area[,] a serious shock injury or even an electrocution could have resulted[. *See* Jnts. Exh. 1, Stips.] 8 and 19.

The parties stipulated that the violation was due to Knox Creek's moderate negligence, and I find [that] this was so[. Jnt. Exh. 1, Stip.] 17.

The Secretary proposed [a] civil penalty of $1,530[.] Taking into account my previous findings regarding Knox Creek's history of prior violations, as well as the parties' stipulation as to the mine[']s and the company's size, the effect of the penalty on the [Tr. II 49] company's ability to continue in business, [Knox Creek's good faith abatement,] the fact that the violation was not reasonably likely to result in an injury, although if an injury occurred it would

[be] serious, and the fact that the injury was due to Knox Creek's moderate negligence, I assess the civil penalty of $800[.[9]]

VA 2010-82-R
VA 2010-166

CITATION NO.	DATE	30 C.F.R. §
8169140	11/04/09	75.512

The citation states that the cable [plug] for a water pump was not maintained in safe operating [condition] because the cable was not restrained at the plug except through the connections inside the plug. The lack of restraint meant that any strain on the cable would [stress] the cable's connection[s]. The citation also states that the cable [is] removed from the plug on a regular basis, and each time [its] . . . electrical connections are weakened. When, due to [the] strain, a phase lead [Tr. II 50] becomes disconnected and contacts another phase [lead], the result [can] be a severe burn to a miner [who is] energizing the pump [. Gov't Exh.] 99.

Colley testified about what he observed on November 4 that led him to issue the citation. [Colley wrote on] the citation that the cable for the pump "was not restrained in any way" where it entered the plug except for [the] connections inside the plug. Colley identified a photograph that showed [that] the tape around the cable [had pulled back] at the point where the cable entered the plug, leaving a gap[. Gov't Exh.] 104.

On November 4, Colley gripped the cable and pulled. [The cable] pulled easily and directly on the plug and presumably on the conductors inside the plug. Colley testified that the cable was handled often and [its] interior conductors could be pulled free [by] frequent[ly] plugging and unplugging [it]. In [Tr. II 51] addition, since the cable was hung from the roof, if it was hit by someone or something and jerked, the [resulting] stress [on the cable] would be applied directly to the interior conductors and this, too, [could] pull [the conductors] free. If the [loose] phase leads touched one another an explosion could result[.] [O]r, if one lead was pulled free and touched [the] plug['s] interior [metal wall, the plug frame] could become energized. In the first instance, an explosive electrical arc inside the cathead could seriously injure a miner working or standing near the power center. In the second situation, a miner working at the power center who touched the plug frame

[9] The assessed penalty differs from the amount stated in the bench decision. The assessment more accurately reflects the civil penalty criteria. Tr. II 49-50.

could be severely shocked. Colley was adamant that even if the pump's ground fault worked as it should, [once] the leads pulled free and touched, [an] explosive arc would occur before the pump's circuit breaker disconnect[ed] the current.

Colley testified that the pump and its electrical connections were subject to a weekly inspection. He further agreed that the daily pre-shift examiner was not required to inspect for electrical defect[s]. Although Colley did not remember if the pump cable was energized when [Tr. II 52] he inspected it, he [stated that he] would not question [an]assertion that it was not. [Colley] also agreed that the plug and the [circuit] breaker were on the off side of the power center[,] next to the rib. [However, the] date board where the inspection dates were posted was on the other side, the wide side, [and i]t was much easier for miners working and traveling in the area to . . . [use] the wide side.

[Colley] [stated] that the copper [leads] inside the plug were tightened [into their connections] by [using] hex bolts. [He maintained that the leads could be pulled free by pulling on the plug and that in addition to pulling on the plug, the] heating and cooling of the conductors caused by [the] activation and deactivation of [power to the plug] [also] could loosen [the leads from the bolts,] [although it] "could take some time."

[As noted previously, the cable's plug went into a cathead.] Colley [stated] if the cathead needed to be removed [from the power center,] lifting the cathead by lifting the pump[']s cable was not the best practice because of the strain [the movement of the cable] placed on the conductors inside the plug. Colley did not know how Knox Creek's employees were trained to lift the cathead[, but he] was sure the cathead was removed [from its power center] for the weekly electrical inspection [Tr. II 53], and [he] believe[d] that [when] the pump was not being used, the cathead [also] was removed.

Like Colley, Mark Jackson, [a] mine foreman, is a certified electrician. Jackson emphasized that although the area containing the power center [for the cathead and the cable plug] was pre-shift examined[,] there was no active mining in the area. Jackson identified three [wires] that pass[ed] from the plug into the interior of the cathead. [*See* Knx. Crk. Exh. 56 at 3]. Two of the wires were conductors and t]he middle [wire] was a ground wire. [Like Colley, Jackson noted that] the copper wire[s of the] cable were tightened into their receptacles inside the cathead with hex bolts. According to Jackson, if a wire pulled out of its receptacle, the power was disconnected.

Jackson also testified that the cathead [was] removed from the

power center several times a month for various examinations. The examinations were conducted by certified electricians who were trained by Knox Creek to [Tr. 54] [remove] the cathead by lifting it from the top [of the cathead] . . . not [to lift it] by [pulling] up on the cable. [According to Jackson,] the power was removed from the circuit before the cathead was [lifted].

The parties agree that the violation occurred[.] [Jnt. Exh. 1, Stip.] 16[;] *See also* [Govt Exh.] 136. It was Mark Jackson who best summed up the essence of the violation. The restraining clamp for the pump cable [that was] plugged into the cathead was loose. In turn, and as Colley testified, this meant that there was a danger that [the] cable's conduit[s] could be pulled [free] inside the cathead and that either the frame of the cathead could be energized or an electrical arc could occur. [If either] happened, any] miner [who touched] the cathead frame would [be] subject to serious injury in the first instance and in the second instance [any] miner working or traveling adjacent to the power center would [be] endangered[.] Clearly, and as the parties [recognized,] the pump's cable plug was not properly maintained. Moreover, the shock and the burn hazard caused by the company's failure [Tr. II 55] of maintenance [was such] that a miner [could be] seriously injured.

However, based on the evidence presented by the parties I find that [such an injury] was not a reasonable [likely]. Many factors weigh decisively in favor of finding that the likelihood of an injury was, in fact, remote. First, there was restricted access to the cathead which was located on the off side of the power center, [a] location that was not subject to inadvertent travel. Second, the only miners who periodically were in the area were electrical examiners or foremen who were trained not to lift the cathead by pulling up on the cable. [Nonetheless] given [the] relative [ease with] which the cathead could [be] removed by pulling up on the cable, I find that it [was] likely [at least] some of the examiners and [foremen] would have done so. [But, I balance this against the fact that when] the cathead was removed, [it was] Knox Creek's practice [to cut off all] power to the circuit[.] [There was no showing by] the Secretary that Knox Creek [was in the practice of failing to remove] the power. [Tr. II 56] [Moreover,] while Colley testified [that he] feared [a] miner or mine equipment [would] snag the hanging pump cable and pull [the leads] from their receptacles inside the cathead, there was no evidence offered by the Secretary to establish that such an accident was likely to happen. [Nor was there a] showing that [if miners lifted the cable or if miners or equipment snagged the cable], the force exerted [on] the properly tightened [leads] was likely to pull the conductors free [of the hex bolts.] [In addition, there was no evidence offered as to the force necessary to pull the leads free and the force likely to be exerted on the cable if a miner lifted or pulled on it.] In short, the record supports finding that [serious injuries where not reasonably likely to be] caused by the violation[.] The

evidence is insufficient to support the inspector's S&S finding.

[However,] the violation was serious. If [an] injury occurred, it could have resulted in a miner losing workdays or being restricted in the performance of his or her duties, as the parties recognize. [Jnt. Exh. 1, Stips.] 18 and 19.

Knox Creek and the Secretary also agree that the violation was due to Knox Creek's moderate negligence, and I find that this was so. [Jnt. Exh. 1, Stip.] 17. [Tr. II 57.]

The Secretary proposed a civil penalty of $2,106[.] Taking into account my previous findings regarding Knox Creek's history of prior violations, as well as the parties' stipulation as to the mine's and the company's size, the effect of the penalty on Knox Creek's ability to continue in business, [Knox Creek's good faith abatement,] the fact that the violation was not reasonably likely to result in an injury, although if an injury occurred, it would be serious, and the fact that the violation was due to Knox Creek's moderate negligence, I assess a civil penalty of $1,200 [.[10]]

VA 2010-104-R
VA 2010-214

CITATION NO.	DATE	30 C.F.R. §
8169146	11/16/09	75.370(a)(1)

The citation states that the [mines's] approved [ventilation] plan was not complied with on the 003 mechanical mining unit [9MMU)] in the [No. 6] right crosscut. The continuous mining machine was cutting coal and only 4,364 cubic feet per minute [(CFM)] of air was reaching the inby end [of the] line [curtain, not] at least 7,000 CFM, [as] required by the plan. The citation also states that the lack of required air velocity subjected [the] continuous mining machine operator and his shuttle car operator, both of whom were working in the area, to [the] hazard of face ignition[s]. The citation notes the mine's "history of face ignitions." [Gov't Exh. 105 at 1].

Inspector Colley testified that on November [16,] he entered the [No. 6] crosscut of the 003 MMU [where he] observed shuttle cars moving [Tr. II 59] in and out of the left [side of the] crosscut. [M]ining was ongoing. Colley watched for about 15 minutes [before proceeding] toward the [face] where he intended to take an air reading. [Before he could take the reading,] Colley heard

[10] The assessed penalty differs from the amount stated in the bench decision. The assessment more accurately reflects the civil penalty criteria. Tr. II 58.

the circuit breaker for the continuous mining machine "knock." He walked around the continuous mining machine. He took an air reading at the end of the line curtain[.] Colley testified that a few minutes passed between when he heard the breaker knock and [when] he took the reading. Based on the amount of coal that had been extracted, Colley believed mining had been ongoing for about 30 minutes before he [measured the air's velocity.]

[The] right [side of the crosscut] was . . . ventilated by exhaust ventilation, which [meant that] air was . . . pulled up the entry[.] [The air] passed the shuttle car at the intersection of the entry and the crosscut[.] [I]t moved to the right of the continuous mining machine toward the face, crossed [Tr. II 60] the face, and traveled to the left of the continuous mining machine toward the scrubber on the left side of the miner. [Finally, the air] was discharged [from the scrubber at] the end of the line curtain and [it traveled] out [of] crosscut. [*See* Gov't Exh. 108.] [[11]]

When Colley took the reading, the shuttle car had backed away from the face and [was in] the entry. Because the power was off, the continuous [mining machine] was not running, nor was the scrubber. Colley believed if the scrubber had been running, [the scrubber] would have increased the velocity of air and given him a "false" reading.

Colley indicated the part of Knox Creek's ventilation plan that he believed . . . [was] violated. On page three of the plan it states that "a minimum of 7,000 CFM will be maintained at the [Tr. II 61] end of the line curtain or a minimum of 60 FPM MEAV" will be maintained. [Gov't Exh.]109 at [6]. Colley explained that he understood the letters MEAV to stand for "mean entry air velocity," and that [the MEAV requirement means] that [at least] 60 feet per minute of air [must] be moving on the wide side of the line curtain. Although the paragraph in the plan in which the [CFM and MEAV] requirements [are] contained [begins] [with the words] "exhausting face ventilation with the scrubber in use," Colley maintained that the requirement[s apply] even [if] the circuit breaker [has] tripped and the continuous mining machine and [the] scrubber [are] not operating[.]

[Colley also stated that] if there was less velocity than 7,000 [CFM,] gas and dust could [become] a hazard. Colley noted that methane could be a significant problem at the mine,[which] is [classified as] [Tr. II 62] "gassy."

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[11] On Gov't Exh. 108 the green arrows represent intake air and the red arrows represent return air. The point where Colley stood when he took the air reading is indicated by an "X' on the exhibit.

Colley . . . [testified] that section foreman, Anthony Belcher, watched as [he, Colley,] took the air reading. [The] reading indicated a velocity of a little under 4,500 [CFM, f]ar short of the 7,000 cubic feet per minute [that] Colley believed was required [by the plan]. In addition, [Colley] found 47.43 feet per minute [to be] the [MEAV, which was also] short of the 60 feet per minute [required] by the plan.

Colley concluded the velocity of the air was insufficient to clear respirable dust, coal dust and methane. [He believed that] respirable dust could lead to black lung disease, [while] accumulated methane and float coal dust [could] lead to an explosion causing sever internal and external burn[s] to [a] continuous mining machine operator and/or to [his or her] shuttle car operator[.] Colley [pointed out] that the mine experienced [a face] ignition [as recently as the previous] January[.]

Finally, [Colley testified] that [foreman Tony Belcher told him when he, Belcher,] checked the ventilation at the start of the shift, Belcher found 7,344 [CFM, more air than the minimum amount the plan required.]

When he was [c]ross examined, Colley agreed that [the provision of the plan regarding] face [Tr. II 63] ventilation [begins] with the words that [it applies] "at places where coal is being cut, mined, loaded or drilled." [Gov't Exh.] 106 at [6.] He also agreed [that] after the circuit breaker "knocked," the power was off and coal was not being cut, mined[,] loaded or drilled.

As for the provision [requiring] 7,000 [CFM] at the end of the line curtain, Colley [acknowledged] that [it started] with the [phrase] "exhausting face ventilation with a scrubber in use." But [Colley] interpreted [the phrase] to [mean] that [when] test[ing air] velocity[,] the scrubber should not be operating because an operating scrubber increase[ed] the [air's] velocity and produced a "false reading." [For this reason, Colley believed] the [air reading] should be made after a scrubber was turned off.

Colley also testified that "knocking" or tripping the power to a continuous mining machine [was a] common [occurrence]. He called [the occurrence] a [Tr. II 64] " nuisance trip." When [a nuisance trip] happen[ed], Colley understood that even if the power [was] off, the plan still required [at least] 7,000 [CFM] at the end of the line curtain. [This was] the minimum velocity needed to remove dust and methane, or as Colley put it, [7,000 CFM is the] minimum velocity needed to "clean the air."

Tony Belcher, the [section] foreman, agreed with Colley that prior to the time the citation was issued, coal was being cut on the section [and] the

scrubber was working properly. Belcher testified he could see [the scrubber] pulling in [coal] dust[.]

* * *

Belcher stated that he watched Colley measure the air. According to Belcher, the power had been off seven or eight minutes[.] [Tr. II 65] Belcher [believed that] power was restored either while Colley was taking [the] reading or just after he finished. Once power was [back on,] the company intended to resume mining on the section[.] Belcher [also] stated that [the] day after the citation was written, the company took an air reading with the scrubber operating and the equipment and the line curtain in the position[s where they] had been [on] the previous day. The test [showed an air] velocity of over 8,000 [CFM.]

The first issue is whether the company violated its ventilation plan, and I find that it did. The ventilation plan is proposed by the operator and [approved] by the MSHA district manager. Once approved, the operator must implement the plan by following all of its provisions. The plan is [the] operator[']s. It is the operator who essentially chooses its language and who then is bound by the choice[s it makes.]

Here[,] Knox Creek chose to express its obligations with regard to [Tr. II 66] ventilation controls for methane and dust at the [mine's] faces by [using] the present continuous tense. The plan states "at faces where coal *is being* cut, mined, loaded, or drilled, the minimum amount of required air is [etc.]" [Gov't Exh.]109 at [6, *emphasis added*]. The present continuous tense is used to describe, not only actions happening now, but also actions happening around now, that is to say, actions that may not be happening exactly now, but that are happening just before and just after now, [a]ctions that are not permanent.

The plan's wording perfectly fits the facts under which the citation was issued. When the inspector's air reading was taken, mining was not taking place because the power was off. However, as the witnesses agreed, mining had taken place just before the air reading, and as Foreman Belcher testified, the company intended for mining to resume. This being the case, a minimum of 7,000 [CFM of air] or a minimum of 60 feet per minute [Tr. II 67] [MEAV], whichever was greater, was required to be maintained at the end of the line curtain when the scrubber was "in use."

[U]se of the present continuous tense at the start of the requirement colors and applies to all of the requirements that follow. Therefore, "in use" [as applied] to the scrubber means [that the scrubber] can be in actual use or that it has been and will be in actual use. Belcher testified the scrubber was operating earlier [during] the shift, and I imply from his statement that the company intended to resume mining, that [the company also intended for] the scrubber [soon to] be used again. Therefore, under the plan, a minimum of 7,000 [CFM of air] had to be maintained at the end of the line curtain [or] a minimum 60 feet per minute [MEAV,] whichever was greater. Colley testified that neither velocity was maintained[,] and he described how he tested the velocity to reach that conclusion. I credit his testimony[,] and [I] affirm the violation.

The violation presented a major [Tr. II 68] danger [to] safety in that, as Colley explained, the mine [was gassy and at least one face ignition] had occurred at a face in the mine less than one year before. The lack of minimum ventilation could allow methane to build up as well as coal dust to accumulate. [(I note in passing that I find no evidence to support [Colley's] allegation regarding a respirable dust hazard.)] An ignition at the face could lead to an explosion involving methane and[/or] coal dust, . . . which could seriously injure, [or] even kill, the continuous mining machine operator and[/or] the shuttle car operator. [Also,] it could endanger the other six miners who worked on the section. Therefore, when considering the propriety of Colley's S&S finding, I conclude the first, second and fourth parts of the [*Mathies*]] test have been met. I further find that the Secretary established the third part.

Among [the ways that] methane [is liberated] is when coal is cut. Active mining also generates coal dust. According to Belcher, [the] power had been off for seven or eight minutes before Colley took his reading. Prior to that time, coal had been cut. It is not clear how long the [air] velocity was deficient[,] but it was at least [Tr. II 69] since the scrubber ceased to operate. Therefore, during the seven or eight [minute] interval between the time the power ["]knocked["] and [the time that] Colley tested the air velocity, methane had the opportunity to accumulate in the vicinity of the miner and previously produced coal dust had the opportunity to settle. I note again that the likelihood of methane accumulat[ing] was increased by the gassy nature of the mine and by the lack of [the] minimum required [air] velocity. The lack of minimum air velocity also increased the likelihood the coal dust would fail to be swept from the section and would instead settle near the miner.

The likelihood of these hazards occurring [was] further increased by the good chance the lack of minimum air velocity would cause the air to recirculate in the vicinity of the continuous [mining machine]. I fully credit Colley's testimony in this regard[,] and I discount the importance of Belcher's testimony that there was no visual evidence of recirculation. After all, methane is invisible

and coal dust can be so fine it [Tr. II 70] is difficult to perceive. Given all of this and the fact that at least one face ignition occurred at the mine in the relatively recent past, I find that as mining continued, an injury producing [explosion was] reasonably likely to occur. [F]or these reasons, I conclude the violation was S&S.

The violation also was serious. As I noted previously, if an ignition or [an] explosion occurred it would have subjected not only the continuous [mining machine] operator and shuttle car operator to serious [injury] or death as Colley found, but [it] also [would have seriously jeopardize the well being of] all others work[ing] on the section[.]

Colley found that the violation was a result of Knox Creek's low negligence, and I agree. Prior to mining starting, Belcher found more than the minimum velocity of air [that was required] in the [cited] area. Further, [and] as Belcher testified, there was no obvious visual evidence hinting at [a] lack of minimum [air] velocity. Finally, as Colley observed in his contemporaneous notes, the condition existed for less than an hour[. Gov't Exh. [Tr. II 71]] 106. [T]he violation was [corrected] by Knox Creek adjusting the section's ventilation system[,] from which I infer that [that the violation occurred because] Knox Creek failed to meet the standard of care required, all be it [that its failure] was [of a] low [degree.]

The Secretary proposed a civil penalty of $1,412[.] Taking into account my previous findings regarding Knox Creek's history of prior violations, as well as the parties' stipulations as to the mine[']s and the company's sizes, the effect of the penalty on Knox Creek's ability to continue in business, [Knox Creek's good faith abatement,] the fact that the violation was serious and the fact that the violation was due to Knox Creek's low negligence, I [assess a] civil penalty of $1,412[.]

VA 2010-100-R
VA 2010-166

CITATION NO.	**DATE**	**30 C.F.R. §**
8170364	10/30/09	75.1725(a)

The citation states that a roof bolting machine located on [Tr. II 73] the 005 MMU was not maintained in safe operating condition [in] that the operator's side drilling station boom lift jack had a crack around the top seam of the jack. The crack was about two inches long. When the jack was activated, oil was expelled from the crack at very high pressure. The cracked part of the

jack was covered [by] a small bit bucket. The citation [asserts] that this was done to divert oil away from the roof bolting machine operator when he or she was at the machine's [drill] station. There were two stations on the machine, each used by miners to drill and place roof bolts. The citation charge[s] that both miners [would have been] exposed to contact with the hydraulic oil [when it was] expelled [through] the [crack] under high pressure. The citation also assert[s] the [miner] at the operator's side drill station would [have been in danger of suffering a] serious injury if [the cracked] jack blew out completely caus[ing] the boom to move in an unplanned, unexpected way. The condition was cited during a maintenance shift, but the citation [charges] that oil, [which] had accumulated on the jack and [on] other [Tr. II 74] parts of the machine made it clear the machine had operated while the crack and leak existed. [*See* Gov't Exh.] 110.

The citation was issued by Jason Hess. In addition to the subject citation, Hess issued Citation [No.] 8170365,[which] was based on the same conditions but [which] charged Knox Creek with violating section 75[.]400 by allowing accumulations in the form of oil and oil soaked coal to exist on the metal surfaces of the machine's left side drill boom and [on] the [machine's] foot jack. [Gov't Exh.]112. Knox Creek chose to pay the proposed penalty [of $807] for the violation of section 75[.]400. [T]he Secretary asserts the citation therefore is final and the existence of the accumulations [is] established [as] charge[d]. I agree.

Testifying as to Citation [No.] 8170364, Hess stated that during the course of the inspection of the roof bolting machine, he discovered the two-inch crack in the jack. [According to Hess, s]omeone placed a small plastic bit [Tr. II 75] bucket over the top of the jack. Hess explained that the boom jack lifts and lowers the [boom], which in turn raises and lowers the drill [pot]. The drill [pot] holds the roof bolts that are inserted and tightened into holes that have been drilled into the roof. [T]he jack [is] depicted in photographs marked as Knox Creek Exhibit 62, at [1] and [2]. A blue pen in the photographs [points] to the crack[.]

When the plastic [bucket] was removed from the top of the jack, Hess could see [that] the jack was covered with oil. [T]he crack occurred at what appeared to be a weld in the jack. [According to Hess], the crack compromised the jack's integrity. This in turn meant that one of the roof bolters, who had to stand close to the jack as he or she worked, was in danger of being hit by flying parts [of] the jack [if it] disintegrated due to the crack. [T]he only thing keeping hydraulic oil off the miners who worked on or near the machine was the plastic bit bucket. [Tr. II 76]

In his notes, Hess [wrote] that although his inspection occurred on a maintenance shift, the presence of oil on the boom made it clear to him that the machine had been operated with [the] leak[. Gov't Exh.] 111. Hess also explained that the jack would be in use numerous times during the course of [a] production shift [as] the roof [bolter] drilled the roof and inserted and tightened [roof] bolt[s]. The [roof bolter] had to stand close to the drill to do this work. Hess feared hot hydraulic oil escaping through the crack under pressure would spray or splash on the roof bolter causing burns. Moreover, [a] sudden failure of the jack at the crack could cause the boom to drop suddenly and[/or] swing unpredictably and strike the [machine] operator.

Hess acknowledged that before he found the [condition], the foreman, Anthony Belcher, told him that the jack was leaking and that Knox Creek planned to replace the jack. Hess asked Belcher to energize the machine. Belcher did, and although Belcher did not put as much [Tr. II 77] pressure on the jack as there would have been if the roof [was] being drilled, Hess could see a stream of oil coming from the crack. The crack [did] not extend all [of] the way around the jack, which it would have to do for the jack to fail, [and] Hess agreed that there was no way of knowing how long it would take for the crack to extend completely around the jack [and therefore] how long it would take for the jack to fail.

Hess [also] agreed there was a thick piece of conveyor belt on top of the jack. [N]ormally, roof bolting machine operators also [keep] pizza pans there. Hess did not recall the direction in which the crack was pointing, and he did not know the temperature of [the] hydraulic oil when the machine was operating. Hess wrote in his notes that Belcher said that he, [Belcher], had been told the jack [was] leak[ing oil] and that Knox Creek was going to replace the jack. [Hess] also wrote that Belcher said he did not know a bucket had been placed over the leak and that Belcher [did not] say when the jack would be replaced[. Gov't Exh.111.] [Tr. II 78] Hess emphasized that the roof bolting machine was not locked or tagged out[.] [T]here was no indication [that the machine] was out of service.

David Ball, a miner who operated the machine on the shift before Hess' inspection, testified the first thing he noticed with regard to the leak was the smell of oil. Early in the shift he could see a [fine] mist of oil coming out of the jack. To see the mist, he had to lift the belt piece and [a] pizza pan that [was] . . on top of the jack. Ball stated he asked that another jack be installed to replace the cracked jack. He also testified that he placed the bit bucket over the top of the drill so the oil coming from the crack [would not] shoot in his face when he started the machine.

Ball did not believe the condition created a hazard because the crack pointed away from where he usually stood when [he] operated the machine. Also, although he had seen a lot of jacks "squirt a lot of oil," he had never seen a jack completely fail. In any event, the jack was [Tr. II 79] going to be replaced on the next [shift, which was a] maintenance shift[.]

Anthony Belcher [agreed that] the replacement of the jack was scheduled [to take place on] his shift. The work [was] indicated on a written form. Belcher [believed that] the bit bucket had been placed over the top of the jack by the last operator of the machine in order to mark the crack. Like Ball, Belcher never had seen a jack fail. He also stated he never had seen the top of [a] jack disintegrate. In any event, because the jack was going to be repaired, the roof bolting machine would not have been used again before the repair was completed.

The parties . . . stipulated that the violation existed (Jnt. Exh. 1, Stip. 16), and [the facts support the stipulation]. The two-inch crack at the top of the jack meant that the jack was not only spewing hydraulic oil, the jack itself was structurally deficient. The jack was not maintained in the "safe operating condition" that [s]ection 75.1725(a) requires. Nor does the record reveal that once the crack developed [Tr. II 80] the roof bolting machine was "removed from service immediately" as the standard also requires. Ball did not indicate that he immediately took the machine out of service[, a]nd while I do not doubt that . . . a new jack had been ordered and would have been installed [on Belcher's shift,] there was no [visible] indication [placed] on the machine [indicating] that [the machine could not be used.]

I further find that the violation created discreet safety hazards of a reasonably serious nature and that the Secretary established one, two and four of the [*Mathies*] test[.] Hydraulic oil spraying from the crack could [have] injur[ed] a miner. Although Hess did not know the temperature of the oil when it was under pressure and when the machine was operating, it [Tr. II 81] is common knowledge that hydraulic oil gets very hot under such circumstances.

Further, although Ball testified the crack faced away from where he usually stood when operating the machine, he also stated he placed a bit bucket over the top of the jack so the leaking oil [would not] splash him in the face when he started the machine. Even if [the] oil was not hot enough to burn [Ball when the machine was started] and even if Ball was wearing safety glasses, hydraulic oil ingested through the nose or mouth could have resulted in a serious injury.

Also[,] I accept Hess' testimony and [the] observation in his notes

that the crack compromised the integrity of the jack and could have caused the jack to suddenly fail and the boom to move unexpectedly [and] unpredictably. The resulting hazard to a roof bolter was both being hit by flying pieces of the jack [if] it [disintegrated] under pressure, and/or being hit by the boom when, upon the failure of the jack, it suddenly and unexpectedly moved. [That either event] could have led to a serious injury is obvious.

What is not obvious is [whether] the Secretary [Tr. II 82] proved [that] either hazard was reasonably likely to occur and, in fact, I conclude that she did not. Hess could not recall which way the crack was pointing, but Ball could. I accept his testimony that it pointed away from where he usually stood. The only time the record supports finding the spewing oil would have been reasonably likely to contact a miner was when the roof bolting machine was started, and Ball testified without dispute that he placed a bit bucket over the top of the jack to prevent such contact.

Further, I conclude from Belcher's testimony that as normal mining operations continued, the jack would have been repaired before the roof bolting machine was next used. Ball testified that the replacement jack had been ordered and [that the machine was scheduled for] repair. Belcher [also] testified that the roof bolting machine was to be repaired on what was a maintenance shift. All of this leads to the conclusion that as normal mining operations continued, the jack would have been fixed[, a]nd even though the roof bolting machine was not tagged out of service [Tr. II 83], there [is] no evidence that it was likely to be used [again] before it was repaired [on the maintenance shift].

This leaves the question of whether the jack was reasonably likely to disintegrate and fail before it was repair[ed.] Given Belcher's testimony that the jack would have been fixed during the shift on which Hess issued the citation, the answer is, no. [E]ven without Belcher's testimony, I would find that the Secretary [did] not [meet] her burden of proof. Hess was afraid the jack would fail because of the [crack,] but neither he nor any other government witness . . . explain[ed] why. Also, no testimony was offered on the effect of internal pressure on the jack, and [it seems] as likely that the pressure would have increased [the jack's loss of oil and lead to a slow and controlled loss of its ability to function] as it is that it would have caused the jack to [suddenly and unexpectedly] disintegrate. Also, no testimony was offered as to whether the loss of hydraulic oil could have caused a sudden collapse of the boom. Ball [who] testified that he had seen jacks that squirted "a lot of oil" had never seen [a boom collapse] and neither had Belcher. Tellingly, the Secretary offered no testimony regarding comparable instances in which such [an] accident had occurred. [Tr. II 84] Therefore, I find that [although] the Secretary established

serious hazards that could result from the cited conditions, she did not show that [any of them were] reasonably likely to occur.

I have found that the violation was serious [in] that it subjected at least one miner to the danger of being hit in the face by squirting hydraulic oil. I further find that it also subjected two miners [– *i.e.*,] those working on the roof bolting machine [–] to the danger of being struck by the machine's boom [in the unlikely event it] move[d] suddenly and unexpectedly. The [injuries] that the miner or miners were likely to sustain would at least [have] result[ed] in lost workdays or restrictive duty. [*See* Jnt Exh. 1, Stip.] 18.

Further, the parties agree that the violation was a result of Knox Creek's moderate negligence, and I accept [the] stipulation [Jnt. Exh. 1, Stip.] 17.

The Secretary proposed a civil penalty of $1,530[.] Taking into account my previous findings regarding Knox Creek's history of prior violations as well as the parties' stipulations as to the [Tr. II 85] mine's and company's sizes, the effect of the penalty on Knox Creek's ability to continue in business, [Knox Creek's good faith abatement,] the fact that the violation was not reasonably likely to result in an injury, but if an accident occurred, the result could [have] seriously injure[d] up to two miners and the fact that the violation was due to Knox Creek's moderate negligence, I assess [a] civil penalty of $800[.[12]]

VA 2010-113-R
VA 2010-166

CITATION NO.	**DATE**	**30 C.F.R. §**
8170394	11/09/09	75.400 [Tr. II 86.]

The citation states that accumulations of combustible material consisting of coal fines, float coal dust and coal were present on and around the 1A conveyor belt. [The citation specifically charges] that: [(1) A]ccumulations were four inches to eight inches deep [for] the width of the belt at the secondary scraper where the belt was running against [the accumulations]; [(2) A]ccumulations were in two piles, 10 inches and 12 inches deep under the belt[’s tamdum] rollers where the rollers and [belt] were turning in the accumulation[s; (3)] [A]ccumulations [were up to]12 inches deep [and] were stacked on the frame and metal braces of the belt structure; [(4)] Accumulations [were] four inches to six inches deep and [were] extending the width of the belt

[12] The assessed penalty differs from the amount stated in the bench decision. The assessment more accurately reflects the civil penalty criteria. Tr. II 84-85.

under the take up roller [where] the belt was turning in [the accumulations][; and (5) [O]ther not previously mentioned parts of the metal frame and the belt drive were covered with float coal dust. The citation charges that two [Tr. II 86] miners [who] worked in the shop area downwind from the accumulations would have been immediately affected [if] a belt fire result[ed.]

The citation [also] acknowledge[s] that the accumulation[s were] indicated on a pre-shift report as being in need of cleaning, [b]ut when the inspection occurred, the belt was operating, [no] cleaning had begun . . . and no one had stopped the belt. [Gov't Exh.] 114.

Jason Hess testified that the accumulations existed as . . . described [on] the citation. [A]fter he saw the accumulations he had the belt turned off, and he photographed [them. *See* Gov't Exhs.] 116-120.] As he indicated on the [citation,] the accumulations consisted of coal fines, float coal dust[,] and coal. He testified that the accumulations were dry. He reiterated [his] concern that the friction points he noted created the danger of an ignition and that an ignition and fire would endanger [the] two miners who worked "downwind" [from the accumulations]. He feared the miners would suffer [serious] smoke inhalation[.] [Tr. II 87].

The citation was issued at 7:09 a.m. on November [9,] a Monday. Hess entered the mine with the owl shift on the night [of] Sunday, [November[, 8.] No coal [was] produced on November [8,] and none [was] produced on Saturday, November[, 7.] By 7:09 a.m., on [November 9,] the dayshift miners had left the bottom [for] the section. Hess stated that production would have started around 7:30 a.m. had he not [ordered] the belt shut down so the accumulations could be [abated.] If the belt had not been stopped, he believed [the belt] would have run throughout the dayshift. Hess agreed that the accumulations had been noted by the pre-shift belt examiner . . . . . He testified that it took three miners 40 to 45 minutes to clean up the [accumulations].

When he was [c]ross examined, Hess stated that he did not have the opportunity to look at the pre-shift book before he started his inspection. [Tr. II 88] [H]e saw [the book] after he wrote the citation and after he returned to the surface. He agreed that the book contained a report by the pre-shift examiner, Mr. Diehl[,] that the 1A belt and belt drive needed to be rock dusted and cleaned[. *See* Knx. Crk. Exh.] 63 [at 2]. The pre-shift examination of the belt conveyor was completed, [called] out and [signed] by 6:30 a.m. on November [9.] The examination report stated regarding the need to rock dust and clean the 1 A belt " reported/men working on it." [*Id.*] Hess testified that he did not doubt that Knox Creek intended to send miners to clean the accumulation[s].

The only present ignition sources found by Hess were those points where rollers and the belt were turning in the accumulation[s]. Hess agreed that there were no stuck rollers, no places where the belt was rubbing against the [belt] structure and that the fire suppression system above the belt was working. He smelled and saw no smoke. Nonetheless, he feared that if the [Tr. II 89] accumulations [were not] cleaned up and mining continued, [at least one] of the areas of accumulations was reasonably likely to ignite.

Foreman Anthony Belcher, who traveled with Hess on November [9,] stated that after he and Hess saw the accumulation[s], Belcher called to the surface [to report] the condition[s.] The person Belcher called stated he already knew about [them] and that miners were on the way to clean the area. Belcher agreed with Hess that the belt was running when he saw the condition[s]. But Belcher emphasized that had there been a problem, the fire suppression system would have activated.

Diehl testified that the 1A belt [was] turned on [during] the November [8] owl shift, [a] maintenance shift, because Inspector Hess wanted . . . it run[ning]. [Without Hess' request, . . .] the belt would . . . have been activated [for] the dayshift on November 9.

The parties agree that the violation occurred as charged. [Jnt. Exh. 1, Stip.] 16. While Knox Creek devoted a good deal of time questioning whether the accumulations actually looked as Hess described [Tr. II 90] and whether they were as dry as Hess indicated, the company's questions raised no doubts in my mind. Hess' testimony was compelling and specific [concerning the] makeup, quantity and location [of the accumulations, as was his testimony] as to their consistency and moisture content[.] I find that [the] accumulations [existed] as Hess described [them].

I further find, based on Hess' unrefuted testimony, that turning rollers [of] the belt were in contact with the accumulation[s just] as described [in] the citation. Given the nature of the accumulations, it is obvious to me that the . . . friction points [noted] by the inspector were potential ignition sources[, a]nd [that] he was right to fear that if an ignition occurred, two miners, whom the record establishes worked "downwind" from the accumulations, would have suffered from smoke inhalation, a situation that could [have] cause[d] serious injury, [or] even death by asphyxiation. Thus, in addition to the fact of violation, the record supports finding that the second and fourth parts of the [*Mathies*] test were established by the Secretary.

[Tr. II 91].

[T]he third part [is] another story. The issue of whether the accumulations were reasonably likely to ignite depends on how long the moving part[s of the belt] ran and turned in the accumulation[s]. There being no evidence to the contrary, I accept Belcher's testimony that no coal was produced on Saturday and Sunday, November 7 and 8. Thus, there were no ignition sources on those dates. It is not possible to tell from the record when the accumulations reached the point where moving parts [of the] belt were turning in them, which is no doubt why Hess' testimony regarding the reasonable likelihood of a fire was directed solely at [the likelihood of an ignition and fire] . . . as mining continue[d.]

The problem for the Secretary is that something else [would have] happen[ed] as mining continued. The accumulations had been reported and miners were on their way to clean [them]. Hess stated he [did not] doubt it, and I find that it [is] true. While the belt and [its] cited rollers had been running in the accumulation[s] since Hess asked that the belt be [activated] sometime during the owl shift, Hess [Tr. II 92] stated he smelled and saw no smoke when he saw the accumulation[s] around 7:09 a.m. Nor did he testify the accumulations felt hot to [his] touch. Given the fact that miners were on the way to [eliminate] the accumulations and that there [was] no [indication] an ignition was near, I conclude that as mining continue[d] the accumulations would have been cleaned up very shortly [after Hess observed them] and that the cited conditions were not reasonably [likely] to [result in] an ignition and fire.

Nonetheless, the violation was serious. Had an ignition [and] fire occurred, two miners were reasonably likely to suffer lost workdays or restricted duty, just as the parties stipulated[. *See* Jnt. Exh. 1, Stips.] 18 and 19.

Further, the parties agree that the violation was a result of Knox Creek's moderate negligence, and I accept the stipulation. [Jnt. Exh. 1, Stip.] 17.

The Secretary proposed [a] civil penalty of $3,996 for the violation. Taking into account my previous finding[s] regarding Knox Creek's history of prior [Tr. II 93] violations, as well as the parties' stipulations as to the mine[']s, [and] the company['s] size, the effect of the penalty on Knox Creek's ability to continue in business, [Knox Creek's good faith abatement,] the fact that the violation was not reasonably likely to result in an injury, but if one occurred it could have [a] seriously detrimental effect on two miners, and the fact that the violation was due to Knox Creek's moderate negligence, I [assess a] civil

penalty of $2,000[.[13]]

VA 2010-84-R
VA 2010-166

CITATION NO.	DATE	30 C.F.R. §
8170372	11/02/09	75.1403

The citation states that a self-propelled mantrip used to transport the weekly examiner [in] the [outby] portion[s] of the mine was not provided with a well maintained parking brake. [T]he part used to lock the mantrip['s] service break in place and achieve the effect of a parking brake was damaged. Nut[s were] required to be threaded on [to] a tension rod on each side of [a] metal tab to hold the [Tr. II 94] break linkage in place, [and one] of the required nuts, the nut on the outside [of the tab], was missing[.] [The] rod [was] unable to hold the brake in a locked position.

The citation [further] states [that] the mantrip was operated on hills and grades in the mine and [that] the examiner had to get on and off the mantrip to conduct examinations and check air flows. The citation charges that had the condition continued, the mantrip [could] have rolled from a parked position and seriously injured the weekly examiner or miners traveling or working on foot around where the mantrip was parked. When the condition was cited, the mantrip was parked at the bottom of the slope[, and it] was fully available for use. [Gov't Exh.] 121.

The citation alleges a violation of [the] safeguard standard, 30 C.F.R. [§] 75[.]1403. [The] specific safeguard violated is contained in Citation [No.] 6636286, which was issued on February[4,] 2008. [This] notice to provide safeguard[s] require[s] that ["]all rubber tired, self-propelled equipment used to transport miners be equipped with well maintained parking brakes." The safeguard notice also state[s] [Tr. II 95] that ["]the mine ha[s] rolling conditions in the seam causing inclines that rubber tired, self-propelled haulage equipment must be operated and parked on."

Prior to the hearing, Knox Creek moved to [vacate] the [inspector's] S&S finding. However, based on the Commission's public discussion after it heard oral agrument in *Wolf Run Mining Company*, 30 FMHRC 1198 (December 2008,) I issued an order on March [10,] denying the motion. In

[13] The assessed penalty differs from the amount stated in the bench decision. The assessment more accurately reflects the civil penalty criteria. Tr. II 93-94.

[deciding] *Wolf Run* a [Commission] majority affirmed [Commission Administrative Law Judge] Judge [Jerold] Feldman and stated the view that an S&S finding could properly be made when an inspector issue[d] a citation for a violation of section 75[.]1403. Although Commission [Administrative Law] Judge Michael Zielinski and previously had taken . . . a contrary position, I explained in the March [10]order that I was bound by the result of the Commission's [decisional] meeting.[14]]

At the hearing Inspector Jason Hess explained . . . [Tr. II 96] [that] a missing retaining nut rendered inoperable the device serving as a parking brake on the [self-propelled] mantrip. Hess reiterated that the particular mantrip was used by the mine's weekly examiner and that the mantrip was parked frequently where miners worked and traveled on foot. Hess added that when he inspected the mantrip, it had not been tagged out or otherwise taken out of service. Hess also stated that although at the time of the inspection the mantrip was parked at the bottom of the slope, the mine had many elevation changes.

David Francis a weekly examiner who [frequently rode on] the mantrip[,] testified that when [it] was not in use, [the mantrip] was parked in [a] flat area underground. He also testified that the parking brake worked when he last used the [equipment] and that before using it again, he would have checked the mantrip and fixed anything [that was] wrong[.] In this case, fixing the mantrip would have been especially easy because only a nut was required. Francis did not think [an] injury was likely to result from the violation [Tr. II 97] because the mantrip would not have been moved until it was repaired. However, when he was [c]ross examined, Francis agreed someone else could have used the mantrip after he last used it and before the parking brake [was] fixed.

I [find] that the violation occurred as charged. Knox Creek did not dispute [that] the missing nut rendered inoperable the device that served as [the mantrip's] parking break. Under the cited safeguard, the mantrip was required to have an operable parking brake, and it did not. [*See* Jnt. Exh.1, Stip.]16.

I further find that the violation created a discreet safety hazard of a reasonably serious nature. The lack of a working parking brake endangered Francis and other operators of the mantrip as they went about

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[14] The Commission's written decision was issued on October 21, 2010. *Wolf Run Mining Company*, 32 FMSHRC_(October, 2010). The decision was subsequently appealed to the United States Court of Appeals for the District of Columbia Circuit. *Appeal docketed*, No. 10-1396 (November 22, 2010).

their weekly examination duties. The examiners did not stay in the mantrip, as the testimony revealed. [A]t times they [stopped,] parked, [and got out]. Although Francis testified that when the mantrip was parked, it was left in a flat area[, g]iven the fact that [the] safeguard specifically mention[s] that the [Tr. II 98] coal [seam] at the mine produces inclines that the mantrip and [other] large [haulage] equipment [must] operate and park on, I find it unlikely that the mantrip always was parked on a level area. Moreover, Francis did not testify that all operators of the mantrip always parked on [a] level area or that company policy required them to do so[.] I find that the weight of the evidence leads to the conclusion that, at times, the mantrip was parked on a slope.

Knox Creek did not dispute the fact that miners who used the mantrip to conduct weekly examinations had to occasionally leave [it] to perform their duties. Nor did [Knox Creek] dispute Hess' assertion that other miners worked and traveled in the area[s] where the mantrip was and would be parked. When parked on even a slight slope, the mantrip could suddenly have moved or rolled and seriously injured an examiner or other miners [who worked or traveled] in its path. For these reasons, I conclude the Secretary established the first, second and [fourth] parts of the [*Mathies*] test.

She also [Tr. II 99] established the third. Given my finding that the mantrip would at times be parked on a slope and that the weekly examiner, as well as other miners, worked and traveled in the vicinity of the mantrip after it was parked, I find it reasonably likely that the violation would have caused a weekly examiner or other miner or miners to be seriously injured. [This is especially so] because the examiners [and/]or others would not have expected the mantrip to move[,] and it would have done so suddenly and without warning.

I give little weight to Francis' testimony that he would have fixed the brake before the mantrip was again used. The equipment was not tagged out when Hess found the violation. It was readily available to any miner who [wanted] to use it. Indeed, Francis himself agreed it could have been used between the time he last operated the mantrip and when Hess cited the violation.

Based on all the testimony, I find that as mining continued it was reasonably likely the violation would have caused a serious injury to [at least] one miner and that Hess properly found the violation to be [Tr II 100] [S&S].

I also [find that] the violation was serious because at least one miner could have sustained serious crushing injuries from being struck and/or run over by the moving mantrip. [*See* Jnt. Exh. 1, Stips.] 18 and 19.

Further, the parties agree that the violation was a result of Knox Creek's [low] negligence, and I accept their stipulation. [Jnt. Exh. 1, Stip.] 17.

The Secretary proposed a civil penalty of $1,026[.] Taking into account my previous findings regarding Knox Creek's history of prior violations as well as the parties' stipulation as to the mine's and the company's size, [Knox Creek's good faith abatement,] the effect of the penalty on Knox Creek's ability to continue in business, the fact that the violation was reasonably likely to seriously injure at least one miner and the fact that the violation was due to Knox Creek's low negligence, I assess the civil penalty of $1,026[.] [Tr. II 101]

SETTLED VIOLATIONS

VA 2010-90-R
VA 2010-166

CITATION NO.	DATE	30 CFR §	ASSESSMENT	SETTLEMENT
8170376	11/04/09	75. 571	$887	$515

Tr. I 67.

VA 2010-130-R
VA 2010-166

CITATION NO.	DATE	30 CFR §	ASSESSMENT	SETTLEMENT
8169132	10/28/09	75.512	$2,106	$1,579

Tr. I 67-68.

VA 2010-110-R
VA 2010-166

CITATION NO.	DATE	30 CFR §	ASSESSMENT	SETTLEMENT
8169143	11/09/09	75.400	$3,689	$2,766

Tr. I 68.

VA 2010-85-R
VA 2010-166

CITATION NO.	DATE	30 CFR §	ASSESSMENT	SETTLEMENT
8170368	11/02/09	75.202(a)	$1,944	$1,458

Tr. I 68.

VA 2010-81-R
VA 2010-166

ORDER NO.	DATE	30 CFR §	ASSESSMENT	SETTLEMENT
8169137	11/04/09	75.1403	$946	$473

Tr. I 68.

In explaining the settlements, counsel for the Secretary stated that the Citations No. 8170676, 8169132, 8169143 and 8170368 would remain as issued without modifications but that the parties agreed to the reduced civil penalties due to "a legitimate dispute as to the level of negligence attributable to [Knox Creek.]" Tr. I 65. With regard to Citation No. 6169137, counsel stated that the penalty agreed upon to settle the matter was based upon the Secretary's recognition that the evidence did not support the inspector's S&S finding, and her commitment to delete the finding. *Id.* Finally, the parties agreed that except for proceedings under the Mine Act, nothing in the settlement agreement would constitute an admission of a violation of the Act or regulations promulgated under the Act or an admission of civil liability. Tr. I 65-66. I approved the settlements on the record (Tr. I 68.), and I affirm the approval here.

In addition, after I read into the record the oral decision on the contested citations, and on the settled citations and order the parties settled all of the remaining penalty aspects of Dockets. Nos. VA 2010-166 and VA 2010-214. Counsel for the Secretary submitted written motion to approve the additional settlements. The motions indicate the following:

VA 2010-166

CITATION NO.	DATE	30 CFR §	ASSESSMENT	SETTLEMENT
8169128	10/27/09	75.1107-4(c))	$243	$243
8169129	10/27/09	75.503	$460	*$460[15]
8170355	10/27/09	75.400	$745	$372
8170381	11/5/09	75.333(b)(3)	$425	$425
8170387	11/9/09	75.816(a)(1)	$2,976	$1,337
8170388	11/9/09	75.400	$745	$555
8170396	11/10/09	75.400	$946	$705
8169144	11/13/09	75.1100-2(a)	$425	$425

VA 2010-214

CITATION NO.	DATE	30 CFR §	ASSESSMENT	SETTLEMENT
8164927	11/20/09	75.1505(a)(3)	$243	$43
8163781	12/1/10	75.400	$2,106	$807
8163782	12/1/09	75.370(a)(1)	$5,503	$3,850
8163783	12/1/09	75.1507	$2,282	$807
8160784	12/1/09	75.1506(h)(2)	$2,282	$1,140
8166076	12/1/09	75.1507	$807	$807
8166053	12/1/09	75.1103-1(6)	$946	$343

[15] In moving to approve the settlement, counsel for the Secretary inadvertently stated an incorrect amount. Counsel has subsequently orally stated that the correct settlement amount is $460.

8166076	12/109	75.1507	$807	$807

The Secretary's motions to approve the settlements fully set forth the reasons justifying the settlements, reasons I have considered and approve.

Accordingly, the motions **ARE GRANTED.**

ORDER

In view of the above findings, conclusions, and the settlement approvals, within 30 days of the date of this decision, Knox Creek **IS ORDERED** to pay civil penalties of $51,590 for the violations found above and $20,117 for the settled violations. The Secretary **IS ORDERED** to modify Citation No. 8169141 by deleting the finding of moderate negligence and by indicating the violation was due to no negligence. The Secretary also **IS ORDERED** to modify Citations No. 8164762, 8169155, 8170363, 8170375, 8170393, 8169149, 8165156, 8169140, 8170364, 81780394, and 8169137 by deleting the S&S findings. In addition, the Secretary **IS ORDERED** to appropriately modify all citations she has agreed to modify as indicated in her written settlement motions. Upon a total penalty payment of $71,707 and modification of the citations, these proceedings **ARE DISMISSED**.

David F. Barbour
Administrative law Judge

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/sa