FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

December 3, 2009

KNOX CREEK COAL CORPORATION, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. VA 2007-15-R
	:	Citation No. 7317341; 11/07/2006
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. VA 2007-16-R
	:	Order No. 7317342; 11/07/2006
	:	Tiller No. 1
	:	Mine ID 44-06804
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 2007-55
	:	A.C. No. 44-06804-119560
v.	:	
KNOX CREEK COAL CORPORATION, Respondent	:	Tiller No. 1
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 2008-215
	:	A.C. No. 44-06804-141359A
v.	:	
ERNEST B. MATNEY, Employed by KNOX CREEK COAL CORP., Respondent	:	Tiller No. 1

DECISION

Appearances: Lucy C. Chiu, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Timothy W. Gresham, Esq., Penn, Stuart & Eskridge, Abingdon, Virginia, for the Respondents.

Before: Judge Feldman

These consolidated civil penalty and contest proceedings concern a Petition for the Assessment of Civil Penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, as amended ("the Act"), 30 U.S.C. § 820(a), by the Secretary of Labor ("the Secretary") against the respondent, Knox Creek Coal Company ("Knox Creek"). The petition seeks to impose a total civil penalty against Knox Creek of $8,300.00 for two violations of Part 75, 30 C.F.R. Part 75, of the Secretary's mandatory safety regulations governing underground coal mines that the Secretary asserts are attributable to an unwarrantable failure.[1] The violations were cited as a result of a November 7, 2006, mine inspection.

The proceedings also concern a personal liability action brought by the Secretary under section 110(c) of the Act, 30 U.S.C. § 820(c), against Ernest B. Matney. The Secretary seeks to hold Matney personally liable for payment of a total civil penalty of $2,700.00 for the two violations in issue. Section 110(c) of the Act provides that a corporate agent "who knowingly authorized, ordered or carried out . . . [a] violation" committed by a corporate operator may be subject to individual liability.

These matters were heard on June 2 through June 3, 2009, in Abingdon, Virginia. The parties' post-hearing briefs and replies are of record.

I. Statement of the Case

These consolidated matters concern two citations issued as a consequence of Mine Safety and Health Administration ("MSHA") Inspector Donald K. Phillips' November 7, 2006, inspection of Knox Creek's Tiller No. 1 underground mine facility. The citations are 104(d)(1) Citation No. 7317341 for failure to conduct an adequate preshift examination in violation of 30 C.F.R. § 75.360(a)(1), and, 104(d)(1) Order No. 7317342 for failure to protect personnel from roof and/or rib falls in contravention of 30 C.F.R. § 75.202(a). The violations were designated as significant and substantial (S&S)[2] and, as previously noted, the Secretary alleges the violations were the result of Knox Creek's unwarrantable failure. At the hearing, Knox Creek stipulated to the fact of the occurrence of the violations and to the fact that the violations are properly characterized as S&S in nature. (Tr. 81-82, 86-87, 284-85).

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

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

Thus, the only remaining issue concerning Knox Creek is whether the subject violations are attributable to an unwarrantable failure. As discussed below, the Secretary has demonstrated, by a preponderance of the evidence, that the violations are unwarrantable because: the cited roof conditions posed a significant hazard as they included a sheared roof bolt located in an intersection in close proximity to an area of bad roof; the adverse roof conditions existed for at least several shifts; the cited dangerous roof sloughage was extensive and obvious in nature; Knox Creek had made no efforts to address the dangerous roof conditions; and Knox Creek was on notice that more thorough preshift examinations were required by its examiners by virtue of a previous citation that had been recently issued for an inadequate preshift examination.

With respect to the 110(c) personal liability action brought against Ernest B. Matney, to prevail, the Secretary must show that Matney, as a foreman in a position to protect employee safety, failed to act on the basis of information that gave him knowledge or reason to know of the existence of a hazardous violation. *Sec'y of Labor* v. *Richardson,* 3 FMSHRC 8, 16 (Jan. 1981), *aff'd*, 689 F.2d 632 (6th Cir. 1982). Although Matney's preshift examination was inadequate, in essence, the Secretary's 110(c) case against Matney is circumstantial in nature. Although denied by Knox Creek, the Secretary alleges that a crib had been installed to support the sheared roof bolt that was located in an intersection in close proximity to an area of bad roof. The Secretary asserts that the crib was either intentionally removed, or, accidentally knocked down. In any event, the Secretary maintains that the crib was not replaced intentionally because it interfered with the paths of scoops as they traveled through the subject intersection from their battery recharging stations to and from the face. Consequently, the Secretary believes that Matney knew, or should have known, that a crib was required, and, that his failure to note the missing crib during his preshift examination is an aggravating factor that gives rise to Matney's personal 110(c) liability.

As noted below, the inferences sought to be drawn by the Secretary do not demonstrate that it is more probable than not that a crib had been installed under the subject sheared roof bolt. Thus, the Secretary's evidence is inadequate to establish that Matney deliberately failed to note a hazardous roof condition that was known to him, or, that should have been known to him, during his preshift examination.[3] As discussed herein, while Matney's preshift examination was inadequate, and a contributing factor in establishing Knox Creek's unwarrantable failure, the level of Matney's negligence does not give rise to 110(c) liability. Consequently, the Secretary has failed to show that Matney is liable because he "knowingly authorized, ordered or carried out " the subject violations. Accordingly, the case brought by the Secretary against Matney shall be dismissed.

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[3] Personal liability under section 110(c) requires more than the typical "knew or should have known" standard that evidences ordinary negligence. As discussed *infra*, the "should have known standard" for personal liability is analogous to ignoring available facts that disclose the existence of a hazardous condition. *See Roy Glen,* 6 FMSHRC 1583, 1586 (July 1984). Here, the evidence is inadequate to demonstrate that Matney knew that a crib had been installed.

II. Findings of Fact

Knox Creek, a subsidiary of Massey Energy Company, operates the Tiller No. 1 underground coal mine located in Tazewell County, Virginia. Coal is extracted during two production shifts, and there is one maintenance shift. (Joint Stip. 6; Tr. 265-267).[4] The area of the mine that is the subject of these proceedings is the 005 MMU as it existed on November 7, 2006. The 005 MMU is also referred to as the No. 3 section. The area consists of the No. 3 and the No. 4 entries, and the crosscut between these entries in the general vicinity of the area located in an inby direction from survey stations 8050 to 8045. (App. I).[5] In this area, Knox Creek utilized the room and pillar method. The relevant provisions of the roof control plan limited the entry widths to 20 feet. Roof bolts were required, four across between the ribs, on four foot centers. Each roof bolt is driven into the roof through a six inch washer-like bearing plate that compresses a larger 10 to 12 inch "pizza pan" plate that supports the draw rock in the surrounding area of the bolt. The pillar dimensions were 40 to 45 feet square , mined on 60 to 65 feet centers. Thus, consistent with the approved roof control plan, the widths of the entries and crosscuts in the 005 MMU were 18 to 20 feet. The height of the crosscuts and entries was approximately six feet.

a. Initial Development in the Vicinity of Survey Stations 8045 and 8050

Knox Creek originally mined the area in the vicinity of survey stations 8045 and 8050 approximately three to four months prior to the November 7, 2006, inspection in issue. (Gov. Ex. 7; Tr. 235, 279-280, 397). When this area was initially mined, there was a rock fall in the No. 3 entry that required the area to be dangered-off with two rows of cribs. (*See* App. I). In addition, there was a sheared roof bolt at the inby edge of the intersection of the crosscut inby survey station 8045 and the No. 3 entry. (*See* App. I). The sheared bolt was the second bolt from the left rib.[6] Consequently, the sheared bolt was 8 feet from the left rib and 12 feet from the right rib. The damaged bolt was missing both the bearing plate and the "pizza pan" plate. Thus, the stripped bolt was not a source of any roof support. The area around the damaged roof bolt was rock dusted. Thus, the roof bolt apparently was damaged during the initial development of the area inby survey station 8045. After this area was mined and rock dusted, it remained idle for several months until November 2006, when battery chargers for scoops were moved into the area in preparation for further development inby.

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[4] The parties' agreed upon stipulations include general joint stipulations and stipulations of fact. The joint stipulations are cited by number. The factual stipulations are cited by page number. (Joint Ex. 1).

[5] Government Exhibit 7 has been appended to this Decision as "Appendix I."

[6] The crosscut ribs are identified herein as "left" and"right" from the perspective of viewing the crosscut in an inby direction. (*See* App. I).

b. Prior Notice Regarding Inadequate Preshift Exams

The parties have stipulated that a citation was issued to Knox Creek on October 31, 2006, for an alleged inadequate preshift examination at the 002 MMU. (Joint Stip. p. 6; Tr. 428). To terminate this citation, all of Knox Creek's examiners, including Ernest Matney, Christopher Stiltner, and Charles Riordan, the three 005 MMU section foreman who testified in these proceedings, were retrained on preshift examinations. The retraining occurred shortly after October 31, 2006, less than one week prior to the issuance of the November 7, 2006, citations in issue. (Tr. 428).

c. Planning and Placement of Battery Chargers

Approximately four days after the issuance of the October 31, 2006, citation for an alleged inadequate preshift examination in the 002 MMU, the three 005 MMU section foremen began inspecting the intersection at the 8045 survey station in preparation for advancement inby. Night shift foreman Riordan testified that on Saturday, November 4, 2006, he, day shift foreman Stiltner, and maintenance shift foreman Matney, determined that the best locations to place two scoop battery chargers were in the crosscut between the No. 3 entry and the No. 4 track entry, and, in the No. 3 entry to the right of the intersection at survey station 8045. (App. I; Tr. 222-23, 226). Riordan stated the three foreman traveled the area several times before deciding on the placement of the chargers because placement of the chargers was limited by the lost space in the vicinity of the rock fall in the No. 3 entry that had occurred when the area was initially mined. (App. I; Tr. 224, 227-28). All three foreman testified that they did not notice the sheared bolt in the intersection although they traversed the area several times before selecting the battery charger locations. (Tr. 252, 269, 321, 387). The two battery chargers were situated in the No. 3 entry and in the crosscut outby the 8050 survey station on Sunday evening, November 5, 2006, and/or Monday morning, November 6, 2006. (Joint Stip. p. 7; Tr. 223). The scoops operating from these battery chargers are approximately 10 feet wide and 25 feet long. For the purposes of this decision the scoop and charging station in the No. 3 entry has been designated as No. 1, and the scoop and charging station in the crosscut has been designated as No. 2. (*See* App. I).

d. Preshift and Onshift Examinations Prior to November 7, 2006

After the battery chargers were placed in the No. 3 entry and crosscut, at least four preshift and onshift examinations of the 005 MMU were conducted. Matney conducted an onshift and preshift examination at 4:13 a.m. on Monday, November 6, 2006. Stiltner conducted an onshift and preshift examination during the November 6th day shift following Matney's maintenance shift. Riordan conducted an onshift and preshift examination on the evening of November 6, 2006. Finally, in the early morning hours of November 7, 2006, at 4:15 a.m., approximately five hours before Phillips issued the subject citations, Matney conducted his November 7, 2006, combined onshift and preshift examination that was completed 36 minutes

later at 4:51 a.m. None of the preshift or onshift examinations noted any of the hazardous roof conditions cited by Phillips in 104(d)(1) Order No. 7317342.

e. Matney's Preshift Examination

Matney testified that during the early morning hours of November 7, 2006, his crew was performing maintenance on a continuous miner at the intersection at survey station 8630, which was approximately seven crosscuts inby the No. 1 entry. Matney stated that approximately 38 loose crib blocks were used to prop up the mining machine. Specifically, approximately 20 blocks were placed under the miner, and approximately 18 blocks were used to support the head of the miner. Matney testified he instructed his crew to place the loose cribs blocks between the cribs in the rock fall area in the No. 3 entry after they finished repairing the continuous miner. However, Matney testified that he did not know where the loose cribs blocks were ultimately placed. (Tr. 338-39).

Matney began his preshift examination at 4:15 a.m. Matney checked approximately eight headers. After returning to his crew at the continuous miner, Matney traveled down to the power center, then to the belt drive, and ultimately to the No. 1 charger in the No. 3 entry were he initialed the date board at 4:39 a.m. Matney stated that he observed the intersection in the vicinity of survey station 8045 from the back of the No. 1 scoop that was parked next to the No. 1 charger. However, he did not walk through the intersection in the vicinity of survey station 8045, or to the rock fall area. The date board at the No. 1 charger was approximately 45 feet away from the survey station at 8045. Matney did not note sloughage and compacted material in the intersection of the crosscut and No. 3 entry observed by Phillips during his inspection several hours later. Day shift foreman Stiltner testified that his crew did not take scoop No. 1 off the charger in the No. 3 entry before Phillips inspected the area during the morning of November 7, 2006. Consequently, there is reason to believe that the compacted material on the mine floor immediately underneath the corner of the right rib existed prior to Matney's November 7, 2006, preshift examination because it apparently was caused by contact with the No. 1 scoop.

After signing the date board in the No. 3 entry Matney traveled down a crosscut parallel to the crosscut were the No. 2 scoop was located. Matney traveled to the belt drive, walked the track entry, and used a mantrip to travel down to the crosscut to the vicinity of the No. 2 battery charger. Matney signed the date board located in the crosscut inby survey station 8050 at 4:40 a.m., reflecting that the date board was signed one minute after the date board in the No. 3 entry was signed.[7] Matney testified that he observed the intersection at survey station 8045

[7] The accuracy of the times noted by Matney is suspect because it is difficult to imagine how Matney could traverse the area from the date board in the No. 3 entry to the date board in the crosscut in one minute. (App. I). In any event, Matney's preshift examination took 36 minutes, from 4:15 a.m. until 4:51 a.m., to complete.

from the date board at the No. 2 battery charger. The No. 2 scoop was not parked next to the charger during Matney's preshift examination. Rather, it was located near the disabled continuous miner in the intersection at survey station 8630.

Similar to his inspection of the roof conditions with cap light from the first date board in the No. 3 entry, Matney testified that he relied on cap light to view the 8045 intersection from the second date board located in the crosscut. The only reference to roof conditions in Matney's written November 7, 2006, preshift examination report was the remark "top shaggy." (Gov. Ex. 10 -10). Matney testified that he did not observe any of the adverse roof conditions that were subsequently observed by Phillips five hours later at 10:00 a.m.

f. Phillip's November 7, 2006, Inspection

i. Conditions at Track Entry Near Survey Station 8050

On the morning of November 7, 2006, at approximately 10:00 a.m., Phillips traveled the track entry where he noted an area of approximately 6 to 12 inches that had sloughed off of the inby rib at the intersection of the crosscut and track entry. (App. I, "Area F"). Phillips determined that the distances from the rib of the first two roof bolts adjacent to this sloughed off area were 60 inches and 54 inches, respectively. The approved roof control plan required the first row of roof bolts to be no more than 48 inches from the rib. Phillips also observed roof cracks and loose roof material in this area. Phillips' concern was heightened because this was an area where personnel exited from the mantrip.

ii. Conditions at the No. 3 Entry Near Survey Station 8045

After inspecting the sloughed rib near survey station No. 8050, Phillips traveled the crosscut inby to survey station No. 8045 where he observed roof cracks containing rock dust. Phillips checked a test hole in the vicinity of 8045 and found separation of approximately 49 inches. (App. I, "Area D"). In addition to separations in the roof, Phillips observed an old rock fall area in the No. 3 entry outby its intersection with the crosscut that was dangered-off and supported by two rows of cribs. Phillips observed that, in the first row of cribs, the three lowest timbers in the crib nearest the inby rib were dislodged, apparently as a result of having been struck by the No. 1 scoop as it turned right inby into the crosscut from the No. 3 entry. (App. I, "Area A"). The dislodged corner crib was particularly hazardous in view of its location, in a dangered-off area, near the intersection of the crosscut and the No. 3 entry.

iii. Sheared Roof Bolt in Inby Intersection of Crosscut and No. 3 Entry

At the inby end of the intersection of the crosscut and No. 3 entry Phillips observed that the second roof bolt, located 8 feet from the left rib and 12 feet from the right rib, had been sheared off. (App. I, "Area B"). The severed bolt was covered with rock dust. The bearing plate and "pizza pan" used to support the draw rock were missing. Phillips testified that he observed marks that were brownish in color near the sheared bolt. (Tr. 119). Phillips believed the brown marks were beyond the area where the "pizza pan" would have been located. (Tr. 166). Phillips surmised the marks were made by a wooden wedge that was used to tighten a crib to the roof that had been installed as a substitute for the damaged roof bolt. Throughout these proceedings, Knox Creek has maintained that a crib had never been installed under this damaged roof bolt. (Tr. 293-96).

Phillips also noted approximately 30 loose crib blocks lying on the mine floor along the crosscut's left rib inby its intersection with the No. 3 entry. (App. I, "Area B"). The dimensions of a crib block are 6 inches in depth and 3 feet in width. (Tr. 120). The stacking of four crib blocks creates approximately one foot of crib height crib. (Tr. 121). Consequently, it would require approximately 24 crib blocks to construct a crib that was six feet high. Because of the brown roof marks he had observed, Phillips concluded that the loose crib blocks lying along the crosscut rib were the dismantled remains of a crib that had been installed to support the roof area surrounding the sheared bolt. (Tr. 122, 167).

As previously noted, the sheared bolt was located 8 feet from the left rib of the crosscut. If a crib that was 3 feet wide had been installed, it would result in approximately 10½ feet of clearance between the right rib and the end of the crib. The presence of the crib would preclude the scoops, that are 10 feet wide, from traveling through the intersection of the crosscut and the No. 3 entry to the face. Moreover, the scoops' access to the charging stations from the face could only be accomplished through the crosscut between the No. 2 and No. 3 entries. Access through the No. 4 entry was blocked because of the track. Access to the face through the No. 3 entry was blocked. Specifically, the inby portion of the No. 3 entry was blocked by No. 1 charger, and the outby portion of the No. 3 entry was dangered-off and blocked by cribs. Consequently, Phillips recognized Knox Creek had a motive to dismantle the crib, if it had been installed, to allow the scoops to travel from the face to and from their battery chargers. (Tr. 122, 127).

As noted, throughout these proceedings, Knox Creek has maintained that a crib had never been installed under this damaged roof bolt. (Tr. 293-96). In this regard, Matney testified that there was no crib installed under the damaged bolt at the time of his preshift examination during the early morning hours of November 7th. (Tr. 467). Consistent with Matney's testimony, night shift foreman Riordan, day shift foreman Stiltner, and maintenance superintendent Steve Addison testified they had never seen a crib supporting the roof in the area of the

damaged bolt. (Tr. 252, 306-307, 321, 520). Moreover, as previously noted, the existence of the damaged roof bolt was repeatedly overlooked during at least four preshift and onshift examinations conducted by Matney, Riordan and Stiltner that preceded Phillips' November 7, 2006, inspection.

To contradict Phillips' speculation that the loose crib blocks were the remnants of a dismantled crib, as previously discussed, Matney testified that the crib blocks located along the left rib were used to prop-up and repair a continuous mining machine that was located near survey station 8630 during the November 7, 2006, maintenance shift. (Tr. 339). After maintenance of the continuous miner was preformed, Matney stated he directed miners Dave Bullion and Aaron Pennington to place the crib blocks in the dangered-off area of the No. 3 entry so that they would not be run over by the scoops as they traveled to and from the battery chargers. Matney testified that despite his instructions, the crib blocks apparently were placed along the left rib of the crosscut inby the No. 3 entry. With respect to roof marks, although Addision did not recall seeing any marks, he speculated that the missing "pizza pan" could have caused the roof marks described by Phillips. (Tr. 504).

iv. Sloughed-Off and Compacted Material at the Right Rib of the Crosscut

Phillips observed the inby corner of the right rib of the crosscut in the intersection of the No. 3 entry had sloughed off causing the first row of roof bolts to be 61, 58, and 64 inches from the rib in violation of the approved roof control plan that required the distance from rib to bolts to be no more than 48 inches. (App. 1, "Area C"). Phillips also observed that the sloughed material had been compacted on the floor reflecting that the material had been run over by the No. 1 scoop as it turned the corner from the No. 3 entry into the crosscut. Since there were four by four pallets of cinder blocks on the floor adjacent to the outby rib in the No. 3 entry, Phillips concluded that the No. 1 scoop would have had to hug the inby rib as the scoop approached the battery charger. (App. 1, "Area D"). This would expose the operator compartment of the scoop, which is located on the right hand side, to the corner of the rib that was compromised. As noted, day shift foreman Stiltner testified that his crew did not remove the No. 1 scoop from its charger prior to Phillips' inspection. Consequently, as previously discussed, the damaged rib and compacted material on the mine floor apparently existed at the time of Matney's preshift examination that occurred before Stiltner's day shift operations. (Tr. 480-483).

v. Sheared Bolt Near the No. 2 Battery Charger

Standing at the date board in the crosscut inby survey station 8050, Phillips observed a sheared roof bolt that was located over an outby corner of the No. 2 battery charger. The sheared bolt was four feet from the right rib. (App. 1, "Area E"). The charger receptacle was lying on the charger and had not yet been plugged into the No. 2 battery. Phillips was concerned that a miner would be exposed to the sheared bolt area when he attempted to attach the No. 2 battery to the scoop.

vi. Sloughed Right Rib Area Adjacent to No. 2 Charger

Phillips also observed sloughage of the right rib in the area that was adjacent to the No. 2 charger. He determined the distance from the sheared bolt to the deteriorated rib was seven feet, indicating that three feet had fallen off of the rib. Riordan and Stiltner testified that they never observed this deteriorated rib condition during their preshift and onshift examinations. (Tr. 232-34, 319).

g. Citations Issued to Knox Creek

As a result of Phillips' observations of the roof conditions noted above, and the fact that these conditions were not disclosed during the preshift examination as hazardous conditions requiring remedial action, Phillips issued 104(d)(1) Citation No. 7317341 for failure to conduct an adequate preshift examination in violation of 30 C.F.R. § 75.360(a)(1), and, 104(d)(1) Order No. 7317342 for failure to protect personnel from roof and/or rib falls in contravention of 30 C.F.R. § 75.202(a). The violations were designated as S&S and they were attributable to Knox Creek's unwarrantable failure. The Secretary seeks to impose a total civil penalty of $8,300.00 for these alleged violations.

h. Personal 110(c) Liability of Matney

The Secretary also seeks to impose personal liability of $2,700.00 against Ernest B. Matney under section 110(c) of the Act for the two violations in issue. Section 110(c) provides that a corporate agent "who knowingly authorized, ordered or carried out . . . [a] violation" committed by a mine operator may be subject to individual liability.

III. Further Findings and Conclusions

a. Knox Creek

The mandatory safety standards in issue are 30 C.F.R. §§ 75.202(a) and 75.360(a)(1). 104(d)(1) Order No. 7317342 cites a violation of Section 75.202(a). This mandatory safety regulation provides:

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

104(d)(1) Citation No. 7317341 cites a violation of Section 75.360(a)(1). This mandatory safety regulation provides, in pertinent part:

> ... a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

As noted, at the hearing, Knox Creek stipulated to the fact of the occurrence of the violations, and, to the fact that the violations are properly characterized as S&S in nature. (Tr. 81-82, 86-87, 284-85). Thus, the remaining issue with respect to Knox Creek is whether the violations are attributable to an unwarrantable failure.

The elements of unwarrantable conduct are well settled. The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining,* 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.,* 13 FMSHRC 189, 193-194 (Feb. 1991); *see also Buck Creek Coal,* 52 F.3d at 135-36 (approving the Commission's unwarrantable failure test).

The Commission examines various factors in determining whether a violation is unwarrantable, including the magnitude of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the violation poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.,* 19 FMSHRC at 11-12, 17; *Mullins & Sons Coal Co.,* 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.,* 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.,* 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.,* 6 FMSHRC 1596, 1603 (July 1984).

It is clear that virtually all of the elements of an unwarrantable failure are manifest in this case. With respect to the magnitude of the violations, the hazardous roof conditions, which were repeatedly overlooked by preshift and onshift examiners, included: two sheared roof bolts, one of which was located in an intersection near a dangered-off area; several areas of rib sloughage that resulted in exceeding the maximum 48 inch distance allowed between ribs and roof bolts; and a dislodged crib located near an intersection in an area of bad roof. There is no evidence that these hazardous roof conditions did not exist during Matney's November 7, 2006, preshift examination as these conditions were observed by Phillips shortly thereafter.

Regarding the length of time the subject violations existed, the area in the vicinity of survey stations 8050 and 8045 was initially mined during the summer of 2006. The sheared roof bolt in the intersection of the crosscut and the No. 3 entry apparently occurred during the initial mining cycle by virtue of the fact that the severed shaft of the roof bolt was covered with rock dust. Knox Creek has admitted that a crib had not been installed to supplement this damaged roof bolt between the time it was initially damaged and the time it was observed by Phillips in November 2006, a period of approximately four months. (Tr. 293-96). In addition, there was another unsupported sheared roof bolt located almost directly over the No. 2 battery charger inby survey station 8050. This damaged roof bolt apparently also existed since the area was initially mined.

The evidence also reflects that the sloughed material located along the corner of the right rib at the inby intersection of the crosscut in the No. 3 entry, compacted by the No. 1 scoop, existed for more than one shift because the No. 1 scoop remained on the battery charger during the shift preceding Matney's maintenance shift. Consequently, it is apparent that the hazardous roof conditions went unattended for a considerable period of time, and they were repeatedly overlooked during the course of numerous preshift and onshift examinations.

Moreover, the cited roof conditions, repeatedly overlooked by Knox Creek examiners, were readily apparent. The roof sloughage lengthened the permissible distance between the first row of roof bolts and the rib. The sheared roof bolt in the intersection of the crosscut in the No. 3 entry was in a heavily traveled area. In addition, it was in the vicinity of a dangered-off area that required supplemental crib support. Finally, the No. 2 battery charger was positioned almost directly under another sheared roof bolt exposing miners to a hazardous roof condition.

The degree of danger is the most damaging aspect of this unwarrantable failure analysis. The location of the unremedied severed bolt, in the intersection in the No. 3 entry and crosscut, in proximity to a roof fall area, alone, warrants an unwarrantable failure finding. The sheared bolt was located in the crosscut at the inby edge of the intersection, eight feet from the corner of the left rib. This roof bolt served no purpose given the missing retention plate and "pizza pan" plate. Consequently, there was only one functioning roof bolt between the left rib and the third roof bolt located 12 feet from the left rib, in an intersection that was adjacent to a dangered-off area where a roof fall had already occurred. In addition, miners using the No. 2 battery charger were also exposed to another damaged roof bolt that was located above.

With respect to whether Knox Creek was on notice that greater compliance efforts were necessary, it is significant that Knox Creek was cited for inadequate preshift examinations in its 002 MMU on October 31, 2006, only one week before Phillips issued the citations in issue. Moreover, to abate the October 31st citations, Knox Creek examiners Matney, Stiltner and Riordan, the examiners that were responsible for examining the 005 MMU area in issue, were retrained in the proper methods of conducting preshift examinations. In this regard, repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a safety standard. *Peabody,* 14 FMSHRC at 1263-64.

Finally, there is no evidence that Knox Creek took any action to remedy the hazardous roof conditions prior to Phillips' November 7, 2006, inspection. The long standing nature of these readily apparent hazardous roof conditions, that were repeatedly overlooked during the numerous onshift and preshift examinations preceding Phillips' inspection provide an adequate basis for concluding that the roof condition and preshift examination violations of sections 75.202(a) and 75.360(a)(1), respectively, are attributable to Knox Creek's unwarrantable failure.[8] Accordingly, 104(d)(1) Order No. 7317342 and 104(d)(1) Citation No. 7317341 shall be affirmed.

b. Knox Creek's Civil Liability

The statutory civil penalty criteria are set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). In determining the appropriate civil penalty to be assessed, section 110(i) provides, in pertinent part:

> . . . the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

As noted, the Secretary seeks to impose a total civil penalty of $8,300.00 consisting of $4,600.00 for Order No. 7317342 and $3,700.00 for Citation No. 7317341. The parties have stipulated that the continuing mining operations of Knox Creek Coal Company, a subsidiary of Massey Energy Company, will not be affected by the civil penalty proposed by the Secretary. As charged by the Secretary, the violations are attributable to at least a high degree of negligence. The violations were abated in a timely manner, and, there are no other aggravating or mitigating circumstances that warrant disturbing the total $8,300.00 civil penalty proposed by the Secretary for the two violations in issue. Consequently, the civil penalty initially proposed by the Secretary shall be assessed.

[8] It is unclear whether 104(d)(1) Citation No. 7317341 that states that "an adequate pre-shift examination has not been conducted for the active 005 MMU" refers to a single pre-shift examination, or, a series of pre-shift examinations. I construe this citation to be applicable to a series of inadequate pre-shift examinations because all foreman/examiners were required to complete training on proper examination procedures to terminate the citation. (Gov. Ex 3).

c. Personal Liability of Matney

The Secretary seeks to assign personal liability to Matney for the two violations in issue. Section 110(c) of the Mine Act provides:

> Whenever a corporate operator violates a mandatory health or safety standard ... any . . . agent of such corporation who knowingly authorized, ordered or carried out such violation . . . shall be subject to the same civil penalties [as the corporate operator] . . . .

The preshift examination "is of fundamental importance in assuring a safe working environment underground." *Enlow Fork,* 19 FMSHRC 5, 15 (Jan. 1997) (quoting *Buck Creek Coal Co.,* 17 FMSHRC 8, 15 (Jan. 1995)). Thus, a mine operator is required to perform preshift examinations to identify hazardous conditions. *Id.* at 14. (citing 30 C.F.R. § 75.360(b)). However, not every inadequate preshift examination that is attributable to a mine operator's unwarrantable failure provides a basis for personal liability of the preshift examiner under section 110(c). In other words, a mine operator's culpability for an unwarrantable failure based on an inadequate preshift examination evidencing more than ordinary negligence may be insufficient to demonstrate that its agent "knowingly" violated the cited regulation requiring adequate preshift exams.

The indicia necessary to support a finding that a corporate agent acted "knowingly" under section 110(c) is difficult to articulate. As a general proposition, a "knowing" violation under section 110(c) involves aggravated conduct rather than ordinary negligence. *Bethenergy Mines, Inc.,* 14 FMSHRC 1232, 1245 (Aug. 1992). However, the analysis does not stop there. While it is true that an unwarrantable failure also involves more than ordinary negligence, there are significant conceptual differences between unwarrantable conduct and "knowingly" violating a mandatory safety standard. Individuals charged with 110(c) liability should be judged based on their individual knowledge and actions not on the collective actions or inferred knowledge of the mine operator. Thus, an agent of a corporate mine operator is subject to 110(c) liability if he has knowledge of a hazardous condition but he *deliberately* fails to act. *Id.*

The operative term "knowingly" has been extensively discussed by the Commission and the Court. The Commission discussed the criteria for determining if there is personal liability under section 110(c) of the Mine Act in *Lefarge Construction Materials,* 20 FMSHRC 1140 (Oct. 1998). The Commission stated:

> The proper inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson,* 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds,* 689 F.2d (6th Cir. 1982), *cert. denied,* 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC,* 108 F.3d 358,362-64 (D.C. Cir. 1997). To establish

> section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law. *Warren Steen Constr. Inc.,* 14 FMSHRC 1125, 1131 (July 1992) (citing *United States* v. *Int'l Minerals & Chem. Corp.,* 402 U.S. 558 (1971)). An individual acts knowingly where he is "in a position to protect employee safety and health [and] fails to act *on the basis of information* that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson,* FMSHRC at 16

20 FMSHRC at 1148 (emphasis added). Similarly, in *Roy Glen,* the Commission stated:

> Accordingly, we hold that a corporate agent in a position to protect employee safety and health has acted "knowingly" in violation of section 110(c) when, *based upon facts available to him***,** he either knew or had reason to know that a violative condition or conduct would occur, but failed to take appropriate preventative steps.

6 FMSHRC at 1586 (emphasis added).

In *Freeman United Coal Mining Co.* v. *FMSHRC,* 108 F.3d. (D.C. Cir. 1997), the Court addressed the issue of individual knowledge:

> ... the meaning of "knowledge" depends upon context and that a continuum of meaning that stretches from "constructive knowledge" to "actual knowledge" with various gradations between .... under the Commodity Exchange Act, [an] individual "knowingly" induced a violation if he had "*actual or constructive knowledge of the core activities that constitute the violation* at issue and allowed them to continue."

108 F.3d at 363 (emphasis added) *citing JCC v. CFTC,* 63 F.3d 1557, 1567-68 (11th Cir. 1995).

As noted, preshift examiners Matney, Stiltner and Riordan repeatedly failed to note the cited hazardous roof conditions during at least four shifts preceding Phillips' November 7, 2006, inspection. While these failures to perform adequate examinations, collectively, provide the basis for an unwarrantable failure, Matney must be judged on his individual conduct. Thus, the Secretary must prove Matney knew or should have known of a hazardous condition and failed to act. In other words, the Secretary must show that Matney knowingly ignored the hazard. *Roy Glen,* 6 FMSHRC at 1586 (ignoring a known hazard is a see-no-evil approach to mine safety that violates section 110(c)). In this regard, the Secretary seeks to prove, through circumstantial evidence, that Matney knew, or should have known, that Knox Creek had installed, and intentionally removed, a crib that was supporting the sheared bolt in the intersection of the crosscut and the No. 3 entry.

The Secretary has established that Knox Creek had a motive to remove the crib if it had been installed because there would only have been approximately ten feet and six inches clearance between the crib and the right rib of the crosscut. Such a crib would have impeded the passage of the No. 1 and No. 2 scoops, that are ten feet wide, as they traveled to and from the battery chargers to the face. However, the Secretary's assertion that a crib had, in fact, been installed is not based on direct evidence. Rather, it is based on several inferences the Secretary seeks to draw from several collateral facts.

The Secretary relies on approximately 30 six inch deep by three feet wide crib blocks that Phillips observed lying on the mine floor along left rib of the crosscut inby its intersection with the No. 3 entry to infer that a crib recently had been disassembled. Matney testified that the crib blocks had been used as a ramp to repair a continuous miner.

The Secretary also relies on marks that were brownish in color that Phillips reportedly observed in close proximity to the sheared bolt to infer that a crib had been installed. Phillips has speculated that the marks are wedge marks that had been left by a crib. Although not conceding that marks existed, Knox Creek speculates that the roof marks could have been made when the "pizza pan" was secured to the roof by the bearing plate. The Secretary has not proffered any photographs in support of her belief that the marks were made by a crib.

In determining the sufficiency of evidence, the Commission has held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Res., Inc.,* 6 FMSHRC 1132, 1138 (May 1984). Inferences based on indirect evidence are "inherently reasonable" if there is a "logical and rational connection between the evidentiary facts and the ultimate fact to be inferred." *Id.* However, in the instant case the alternative explanations offered by Knox Creek for the collateral facts concerning the roof marks and the presence of loose crib blocks are as reasonable as the Secretary's speculation.

Significantly, the Secretary, in the citation and order in issue, attributes the exposure to hazardous roof conditions, and the inadequate preshift examination, to high negligence rather than to a reckless or a conscious disregard of the need to reinstall a dismantled crib. Consistent with the Secretary's high negligence designation, although Matney's preshift examination, like the examinations of his colleagues, was inadequate and evidenced a high degree of negligence by virtue of the hazardous conditions that were overlooked, it does not constitute a "knowing" violation of the cited mandatory safety standards.

While a crib may have been removed for the sake of expediency, in the final analysis, the Secretary bears the burden of proving, by a preponderance of the evidence, that a crib had, in fact, been installed. The Commission has noted that the preponderance of the evidence standard requires the trier of fact to believe the existence of a fact "is more probable than its nonexistence." *RAG Cumberland Resources Corp.,* 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted). On balance, the Secretary has failed to satisfy her burden of demonstrating that it was more probable than not that a crib had been installed. Consequently, the Secretary has

failed in her attempt to establish that Matney acted "knowingly" because he failed to act on the basis of information that gave him knowledge, or reason to know, of the existence of hazardous roof conditions. Although Matney's 36 minute preshift examination was inadequate, in that hazardous roof conditions were overlooked, the evidence does not reflect that it was illusory, or otherwise so precursory, to support the conclusion that Matney "knowingly" violated the subject mandatory safety standards. Accordingly, the citation and order issued against Matney shall be vacated.

ORDER

In view of the above, **IT IS ORDERED** that Knox Creek Coal Corporation's contests in Docket Nos. VA 2007-15-R and VA 2007-16-R **ARE DISMISSED.**

IT IS FURTHER ORDERED that 104(d)(l) Citation No. 7317341 and 104(d)(1) Order No. 7317342 in Docket No. VA 2007-55 **ARE AFFIRMED.**

IT IS FURTHER ORDERED that Knox Creek Coal Corporation shall pay, within 45 days of the date of this Decision, a total civil penalty of $8,300.00 in satisfaction of 104(d)(1) Citation No. 7317341 and 104(d)(1) Order No. 7317342.

Consistent with this Decision, the Secretary has failed to demonstrate that Ernest B. Matney knowingly authorized, ordered or carried out violations of sections 75.360(a)(1) and 75.202(a) of the mandatory safety standards. Consequently, **IT IS ORDERED** that the personal liability case in Docket No. VA 2008-215 **IS DISMISSED.**

Jerold Feldman
Administrative Law Judge

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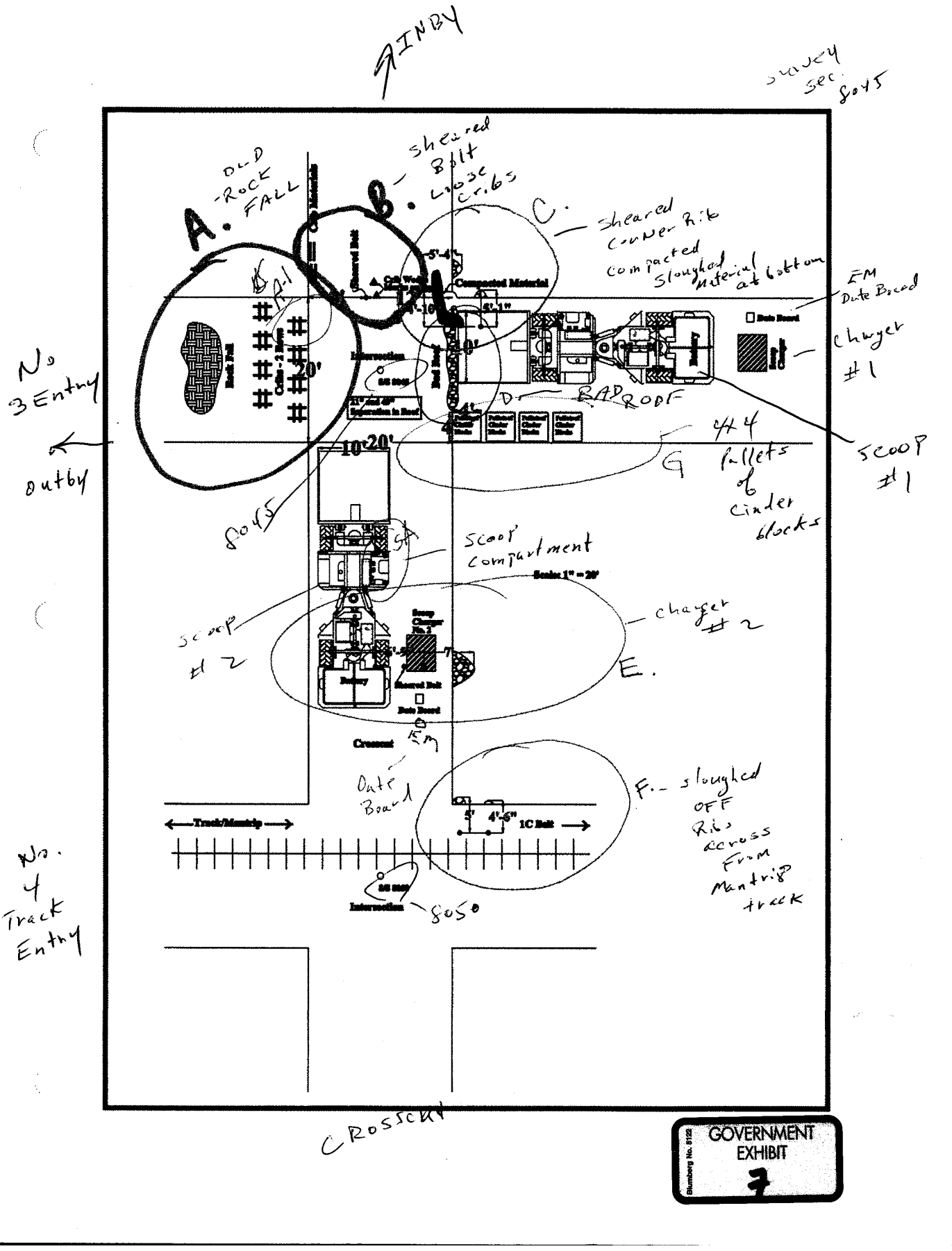
INBY
survey sec. 8045
A. OLD -ROCK FALL
B. sheared Bolt Loose Cribs
C. Sheared Corner Rib compacted Sloughed Material at bottom
FM Date Board
charger #1
No 3 Entry
Outby
BAD ROOF
4 4 Pallets of Cinder blocks
scoop #1
8045
Scoop compartment
charger #2
scoop #2
E.
Date Board
F. - sloughed OFF Rib across From Mantrip track
No. 4 Track Entry
8050
CROSSCUT
GOVERNMENT EXHIBIT 7

APPENDIX 1