FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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February 16, 2011

DICKENSON-RUSSELL COAL CO., LLC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. VA 2009-44-R
	:	Order No. 8157629; 10/06/2008
v.	:	
	:	Docket No. VA 2009-45-R
SECRETARY OF LABOR,	:	Citation No. 8157630; 10/06/2008
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Cherokee Mine
Respondent	:	Mine ID 44-06864
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. VA 2009-137
Petitioner	:	A.C. No. 44-06864-170772
v.	:	
	:	
DICKENSON-RUSSELL COAL CO., LLC.,	:	Mine: Cherokee Mine
Respondent	:	

DECISION

Appearances: Benjamin D. Chaykin, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of the Secretary of Labor;
Cameron S. Bell, Esq., Penn, Stuart & Eskridge, Abingdon, Virginia, for Dickenson-Russell Coal Company, LLC.

Before: Judge Zielinski

These cases are before me on Notices of Contest and a Petition for Assessment of Civil Penalties filed pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The Petition alleges that Dickenson-Russell Coal Company, LLC, is liable for three violations of the Secretary's Mandatory Safety Standards for Underground Coal Mines[1] and proposes the imposition of civil penalties in the amount of $8,038.00. Two of the alleged violations were settled, and a Decision Approving Partial Settlement was entered on November 8, 2010. Remaining at issue are Dickenson-Russell's contest of Order No. 8157629, an imminent danger order issued pursuant to section 107(a) of the Act, and one citation in the penalty case. A hearing was held in Abingdon, Virginia, and the parties filed briefs following receipt of the hearing transcript. For the reasons set forth below, the imminent danger order is affirmed. I also find that

[1] 30 C.F.R. Part 75.

Dickenson-Russell committed the violation alleged in the citation and impose a civil penalty in the amount of $1,200.00.

Findings of Fact - Conclusions of Law

The facts are largely undisputed. Dickenson-Russell operates the Cherokee Mine, an underground coal mine located in Dickenson County, Virginia. On October 6, 2008, Johnny L. Asbury, an MSHA inspector and roof control specialist, went to the mine to continue a regular quarterly inspection. He had issued a citation for a roof control violation in the travelway to the 2 Left section, and was going to check on abatement efforts and terminate the citation. He traveled into the mine with Franklin Calo, a union representative, and Michael Stacy, a certified mine foreman who conducted weekly airway examinations for Dickenson-Russell. They rode into the mine on the main track and disembarked at a stub track serving the 2 Left section. Supply cars and other tracked conveyances serving the 2 Left section were switched onto the stub track. Rubber-tired vehicles were used to travel from the stub track to the section. The main track continued on to the East Main section, where a 12-person day-shift crew was working. Stacy crawled through a low spot to get a rubber-tired vehicle. Asbury and Calo waited for Stacy at the end of the stub track, near the intersection of the entry to the left of the track entry and the crosscut just inby where the stub track branched off the main track.

While Asbury was waiting for Stacy, he heard popping and cracking sounds and observed cracks developing in the crosscut roof. The cracks were one-half to three-quarters of an inch wide and ran diagonally toward the track entry. Asbury was concerned, because if two or three of them came together, then a block of rock between them could easily fall. He then noticed a large slab of rock hanging over the track that was starting to ease down. The rock was about three feet wide by four feet long and was thin on one side, tapering up to about 6 to 12 inches thick. There were "cutters," or crack runs, along the ribs of both pillars that ran all the way out to the track entry. Timbers had been set in the crosscut alongside the pillar on the right as one faced the track entry. The wedges on the tops of the timbers were "mashed flat," and the timbers were starting to crack. Small pieces of rock were "dripping" around the edge of the pillars. Asbury drew a diagram of the area as it existed prior to the installation of additional supplemental roof support. Tr. 27-28; Ex. G-4.

As depicted in Asbury's drawing, a rough version of which was recorded in his notes, there were indicators of roof control problems in the vicinity of the affected area. Pillaring had been done two breaks to the right of the track entry, which increased pressure on nearby pillars. The roof in the intersection at the end of the stub track, where Asbury and Calo waited for Stacy, had begun to sag, and had been supported with steel H-beams, cribs, steel jacks and cable bolts. Asbury explained that rock continuously moves, and where support such as pillars have been removed, pressure will develop on adjoining pillars. As a roof control specialist, he generally attempts to ascertain where pressure will develop, or has developed, and tries to assure that appropriate roof support is provided. He had traveled through the intersection on his way to the 2 Left section four days earlier, and had not noticed any problems with roof support in the area. He had not traveled through the track entry in the area where the rock settled down, because that intersection was just inby the stub track for the 2 Left section.

When Stacy returned at approximately 10:05 a.m., Asbury issued an oral imminent danger order pursuant to section 107(a) of the Act, and told Stacy that the area had to be dangered-off and the track blocked to keep people out. The area subject to the order, essentially from 60 feet outby the hanging rock to 60 feet inby the rock, is depicted on Asbury's diagram. Ex. G-4. In addition to the imminent danger order, Asbury issued a citation charging Dickenson-Russell with failure to properly support the mine roof.

Calo had seen the conditions developing while he was with Asbury. He departed to secure warning tape to danger the area off. After warning tape had been hung at the approaches to the area, Stacy called Michael Ohlson, the mine superintendent, and requested supplies to install supplemental roof support. Stacy also called the belt examiner, who was working outby, and told him about the rock hanging in the main track entry to make sure that he didn't attempt to travel in that area. Supplemental roof support, consisting of cribs and steel jacks, was installed in the track entry. A flat car was then backed under the hanging rock. It was pried down and landed to one side of the car, almost flipping it over.[2] The rock was loaded onto the car and removed from the area. The order was terminated and the citation was abated about 1:30 p.m.

Dickenson-Russell timely contested the imminent danger order and the civil penalty assessed for the roof control violation.

The Imminent Danger Order

Order No. 8157629 was issued pursuant to Section 107(a) of the Act, and required the immediate withdrawal of miners from the area where the dangerous roof conditions existed, and prohibited entry into that area until the conditions were abated. The "Condition and Practice" section of the Order described the grounds for its issuance as follows:

> At the mouth of the No. 2 Left Section, an imminent danger was present at survey station No. 5348. An oral imminent danger order was issued at 10:05 AM. The top was working at survey station No. 5348, that is located in the track and belt entry, and had cracked and was flaking and the post and metal jacks that were placed approx. 60 feet inby were broken and popping and cracking. Three cracks were running across the entry, one approx. 1/4 inch wide and the others were approx. 1/2 to 3/4 of an inch wide. A large slab of rock was observed, approx. 3 feet wide by 4 and 1/2 feet long, and the rock was very slowly coming down from the roof. The track way and belt line have to travel under this area, to get to the East Mains, and a crew of approx. 11 men are located inby the area. All

[2] Dickenson-Russell contends that the rock was only partially, not directly, over the track. The Secretary takes issue with Respondent's position, and argues that adverse inferences should be drawn from Respondent's failure to preserve photographs and a sketch of the conditions. There is no need to resolve that issue because the validity of the order and citation, and the special findings of the citation, are unaffected by whether the rock was directly, or partially over the track. The condition was extremely hazardous in either event.

approaches were dangered off to prevent entry into the area.

Ex. G-1.

Section 3(j) of the Act defines "imminent danger" as the "existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). Section 107(a) of the Act provides, in pertinent part:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

30 U.S.C. § 817(a).

"Imminent danger orders permit an inspector to remove miners immediately from a dangerous situation, without affording the operator the right of prior review, even where the mine operator did not create the danger and where the danger does not violate the Mine Act or the Secretary's regulations. This is an extraordinary power that is available only when the 'seriousness of the situation demands such immediate action.'" *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991) ("*Utah*") (quoting from the legislative history of the Federal Coal Mine Health and Safety Act of 1969, the predecessor to the 1977 Act). An imminent danger exists "when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (quoting from *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) ("*R&P*")). While the concept of imminent danger is not limited to hazards that pose an immediate danger, "an inspector must 'find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time.'" *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 555 (Aug. 2006) (quoting from *Utah*, 13 FMSHRC at 1622). Inspectors must determine whether a hazard presents an imminent danger without delay, and a finding of an imminent danger must be supported "unless there is evidence that [the inspector] had abused his discretion or authority." *R&P*, 11 FMSHRC at 2164.

While an inspector has considerable discretion in determining whether an imminent danger exists, that discretion is not without limits. An inspector must make a reasonable investigation of the facts, under the circumstances, and must make his determination on the basis of the facts known, or reasonably available to him. As the Commission explained in *Island Creek Coal Co.*, 15 FMSHRC 339, 346-347 (Mar. 1993):

> While the crucial question in imminent danger cases is whether the inspector abused his discretion or authority, the judge is not required to accept an inspector's subjective "perception" that an imminent danger existed. Rather, the judge must evaluate whether, given the particular circumstances, it was reasonable for the inspector to conclude that an imminent danger existed. The Secretary still bears the burden of proving [her] case by a preponderance of the evidence. Although an inspector is granted wide discretion because he must act quickly to remove miners from a situation that he believes to be hazardous, the reasonableness of an inspector's imminent danger finding is subject to subsequent examination at the evidentiary hearing.

An inspector "abuses his discretion . . . when he orders the immediate withdrawal of miners under section 107(a) in circumstances where there is not an imminent threat to miners." *Utah*, 13 FMSHRC at 1622-23.

The Secretary argues that the imminent danger order was properly issued because there was an area of mine roof that was not adequately supported, including a large rock that was loose and hanging over the track that miners routinely traveled. It appeared that the roof and/or rock would fall at any moment and that multiple miners could be expected to travel through the area and be exposed to the dangerous condition before it could be corrected. Asbury estimated that it would take approximately one and one-half hours to abate the condition, and that miners could suffer serious injuries before the condition was corrected.

Dickenson Russell argues that there was no imminent danger because normal mining operations were not permitted to proceed, i.e., that Stacy had the area dangered-off and warned miners not to travel through it. It argues that Asbury issued the order based upon a series of assumptions that were not likely to occur and, in fact did not occur, including, that the condition had not been observed, that the area had not been dangered-off, that employees would travel through the area, and that employees would not observe the obvious conditions and avoid them. Resp. Br. at 6. It further contends that, since Asbury couldn't say when, if ever, the rock would have fallen, that the Secretary did not prove that an injury could have occurred within a short period of time.

Respondent's arguments are misplaced. Asbury's determination that an imminent danger existed was based upon facts, not assumptions. He personally observed an extremely hazardous condition, a significantly compromised mine roof and a large loose rock hanging over the main track entry to the East Main section of the mine. Miners were permitted to travel through the area and, in fact, routinely did so. While Asbury could not specify exactly when the rock, or any other portion of the roof, would fall, it clearly could have fallen at any time. Miners could have encountered the condition prior to its being corrected. Asbury had inspected the Cherokee mine on four prior occasions. He was aware that a maintenance crew usually worked in the East Main section until about 10:00 a.m., and that he hadn't encountered them departing. Twelve miners worked the day shift in the East Main section and would have departed at approximately 2:30 p.m. In the interim, there was nothing to prevent a miner from traveling through the area to or from the section. A belt man, a two-person supply crew, and a pump man could also have

traveled through the area while the condition existed. Brookfield mantrips, which do not have overhead protection, were used on the track entry. Miners traveling through the area could have been struck by falling rock, could have collided with a fallen rock, or could have encountered track damaged by a falling rock.

Respondent argues that miners were trained to observe obvious defects and would have avoided any such problems. While that is possible, such an assumption cannot be made where miners safety is at stake. The argument is not relevant to the fact of violation, and is not a defense to an S&S designation. As the Commission observed in *Eagle Nest, Inc.*, 14 FMSHRC 1119 (July 1992), in holding that the exercise of caution is not an element in determining whether a violation rises to the level of S&S: "While miners should, of course, work cautiously, that admonition does not lessen the responsibility of operators, under the Mine Act, to prevent unsafe work conditions." 14 FMSHRC at 1123. The Commission has also consistently emphasized that, in evaluating the risk of injury, the vagaries of human conduct cannot be ignored. *See, e.g., Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984).

Respondent's argument that the dangering-off of the area precluded the possibility of the condition causing an injury to a miner is unavailing. Even if Stacy had observed the conditions first, and dangered the area off before Asbury saw it, an imminent danger order could have been properly issued. In *Cyprus Emerald Corp.*, 12 FMSHRC 911 (May 1990), the Commission upheld the validity of an imminent danger order that had been issued four days after the operator had dangered-off an area of adverse roof conditions and installed supplement roof support.[3] Cyprus argued, as does Dickenson Russell, "that no persons were exposed to the hazardous roof conditions since it prohibited access to the area and that the nature of the cited roof conditions could not reasonably have been expected to cause death or serious harm before they were abated." *Id*. at 918. The Commission observed that "the operator acted appropriately in dangering-off the area of bad roof and that no miners worked, traveled or were required to enter into the area at issue." 12 FMSHRC at 917. Nevertheless, the Commission upheld the validity of the order, noting:

> Under section 107(a) of the Act, the Secretary is responsible not only for determining the area of the mine affected by the danger and removing miners from such area but also determining when miners may safely re-enter the affected area because conditions or practices that caused the danger no longer exist. We cannot conclude that the inspector abused his discretion in issuing an order prohibiting re-entry into the area until the hazard was eliminated.

Here, it was Asbury, not Stacy, that first observed the hazardous roof conditions. He issued a verbal imminent danger order to Stacy, who then implemented necessary measures to

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[3] In *Cyprus Emerald*, mine foremen observed hazardous roof conditions adjacent to the last shield on a longwall face. They dangered the area off, and subsequently installed supplemental roof support. Because the area remained hazardous, the danger tape was left in place, while mining continued. Four days later, while the yellow "danger tape" was still in place, an MSHA inspector observed the adverse roof conditions, and issued an imminent danger order.

bar entry to the area, and abate the condition. The order not only required that any miners be removed, it prohibited re-entry into the area until Asbury was satisfied that the hazardous conditions were completely abated. MSHA inspectors are afforded wide discretion in making decisions to issue imminent danger orders, and their determinations will be reversed only if the Secretary fails to prove that an inspector did not abuse his discretion. Asbury, an experienced inspector and roof control specialist, clearly did not abuse his discretion in issuing the order.

Citation No. 8157630

Citation No. 8157630 alleges a violation of 30 C.F.R. § 75.202(a), which requires that "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 outbursts." The violation was described in the "Condition and Practice" section of the Citation as follows:

> The main track way used by the East Mains crew, at the mouth of the 2 Left Section, had bad roof and an imminent danger order was issued to prevent travel through the area. Cracks were present and timbers were breaking and the metal jacks were taking weight in the area. The bad top conditions were observed and rock was breaking loose over the area the mantrip must travel under. The conditions were rapidly getting worse and could be observed, as the rock dripped and loose pieces fell out. A large piece of rock was hanging over the track and it kept dropping down, a gap of 3 to 4 inches was in the large rock. The area is the main travel way for the crew, the belt men and the repair crews. All travelways where men regularly travel must be maintained in safe condition.

Ex. G-2.

Asbury determined that it was highly likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. The citation was subsequently modified to allege that the operator's negligence was low. A civil penalty in the amount of $2,976.00 was proposed for this violation.

The Violation

Cyprus Emerald is instructive in disposing of Respondent's challenge to this violation. There the Commission vacated the roof control citation that had been issued in conjunction with the imminent danger order, because the area had been effectively dangered off, such that it was not an area where persons worked or traveled. 12 FMSHRC at 917-18, Had Stacy observed the conditions first and dangered them off prior to Asbury's observing them, as in *Cyprus Emerald*, persons would not have been allowed to work or travel in the area and the standard would not have been violated. However, those are not the facts of this case. Asbury, not Stacy, first observed the condition. At that time there was nothing to prevent miners from traveling into the area and encountering the dangerous condition. It was not until after the verbal imminent danger order

and the citation had been issued that measures to bar entry to the area and abate the condition were implemented.

Respondent argues that, judged by the familiar "reasonably prudent person familiar with the mining industry and the protective purpose of the standard" test, that its efforts to support the roof would not be found wanting. Resp. Br. at 7-8. The argument misses the mark. Respondent's efforts to address the adverse roof conditions were entirely reasonable. Respondent had also fully complied with its roof control plan, and had adequately supported the roof, prior to the development of the adverse conditions. However, once the adverse conditions developed, any "reasonably prudent person" would have had to conclude that the roof was not adequately supported.

The roof in the track entry, a place where persons traveled, was not adequately supported when Asbury observed it. The area had not yet been dangered-off, and miners could have traveled through the area. As such, the standard was violated. The Mine Act is a strict liability statute, and an operator is liable for a violation of a mandatory safety standard regardless of its level of fault. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd,* 868 F.2d 1195 (10th Cir. 1989). In *Asarco*, the Commission concluded that "the operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty." *Id.* at 1636. Because the mine roof in the travelway was not adequately supported at a time when work or travel had not been effectively precluded, it follows that the operator violated the standard. That Asbury eventually determined that Respondent's negligence with respect to the violation was low, that Stacy promptly dangered the area off after the imminent danger order was entered, and that the violation was abated shortly after the citation was issued, do not alter that conclusion.

Significant and Substantial

An S&S violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal,*

Inc. v. MSHA, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). 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. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

Consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986); *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The fact of the violation has been established. A measure of danger to safety was contributed to by the inadequate roof support in the affected area. There is little question that a miner being struck by a rock falling from the mine roof, or colliding with a fallen rock while traveling through the area, could reasonably have been expected to suffer a serious injury. As is often the case, the primary issue in the S&S analysis is whether the violation was reasonably likely to result in an injury causing event.

Asbury witnessed the development of the condition. The roof "started working" while he was waiting for Stacy to come back. Tr. 24, 58. Consequently, the violative condition did not exist for any appreciable length of time prior to the issuance of the order and citation. Whether the violation was S&S turns on whether an injury causing event was reasonably likely to occur under continued normal mining operations, i.e., "absent intervention by a federal enforcement official." *U.S. Steel*, 6 FMSHRC at 1574 (Commissioner Lawson, concurring). While Stacy and Calo most likely would have taken action to abate the conditions in the absence of the imminent danger order, their presence was due to the intervention of the MSHA inspector. If Asbury had not visited the mine to continue his inspection by going to the 2 Left section to check on abatement efforts for a previously issued citation, neither Stacy nor Calo would have been in a position to observe the deterioration of the roof and taken corrective action. The dangerous condition would have been discovered by some other traveler on the track, very possibly with disastrous results.

The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995). Asbury, who had extensive mining experience and had worked for MSHA for over ten years, was an experienced inspector. Given the number of persons that used the track, and the hazardous nature of the condition, his conclusion that the violation was S&S was reasonable. The large rock was hanging down in a precarious position. It could have been contacted by a miner riding in a man trip, causing the rock to fall. Or, if it fell prior to a miner passing, it could have been struck by a man trip. In either case, a reasonably serious injury would have been reasonably likely.[4] As noted above, the fact that miners may exercise caution is not an element that can be taken into account in determining whether a violation rises to the level of S&S.

Negligence

Asbury modified the citation to reflect that Respondent's negligence was low, because "the operator did not have knowledge of the condition." Ex. G-2. The Secretary argues that Respondent's negligence was "at least" low. Sec'y. Br. at 14. She contends, based on Asbury's testimony that the previous deterioration of the roof in the intersection at the end of the stub track, the fact that there had been a roof fall seven months earlier about 180 feet away, and the general conditions, such as the pillaring that had occurred on the other side of the track entry, should have given Respondent "some inkling" that there were problems in the area. Tr. 66. She also points out that Respondent's violation history reflects numerous violations of the roof control standard in the 15 months preceding the issuance of the citation, which should have put it on notice that greater compliance efforts were necessary.[5]

The Secretary's penalty calculation regulations define low negligence as: "The operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." 30 C.F.R. § 100.3(d). Respondent obviously did not know about the violative condition. The area was subject to as many as three preshift examinations per day, and Asbury confirmed that the reports of those examinations did not include any problems with the roof. Tr. 58. Moreover, Asbury agreed that the roof in the subject intersection had been supported

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[4] The Secretary attempted to establish that as many as nine persons were affected by the violation, because the East Main crew would have departed at the end of their shift and may have had as many a nine members on a man trip. Sec'y. Br. at 14. I find that it was substantially more likely that one person would have been affected, e.g., the belt man or the pump man, because one of them would most likely have traveled through the area before the East Main crew departed and, in any event, the number of miners that would have been riding on the first man trip taking the 12-person crew out of the mine is unknown. I find, as Asbury originally determined, that one person was affected by the violation.

[5] The Secretary argues that Respondent had 42 previous violations of the standard. However, the assessment control form reflects 20 such violations, as does the violations history report submitted by the Secretary. Ex. G-6.

consistent with Respondent's roof control plan, and that he had not observed any deficiencies when he traveled to the 2 Left section four days earlier. Tr. 29-30, 53-55. While Respondent should have had, as Asbury stated, "some inkling" that further roof deterioration might occur, there was no way to predict that the violation would occur in that location, only that something might be expected at some time in the general area. Tr. 64-66. I find that Respondent should not have known of the violative condition and that it was not negligent.

The Appropriate Civil Penalty

The parties stipulated that the Cherokee Mine is a large mine; that its controlling entity is also large; and that the maximum penalty that could be assessed for the violation would not affect Dickenson-Russell's ability to continue in business. The assessment data reflects that it averaged slightly over one violation per inspection day during the relevant period, a moderate incidence of violations. Respondent had 20 repeat violations within the pertinent time period, which enhanced the regularly assessed proposed penalty. The violation was promptly abated.

Citation No. 8157630 is affirmed. However, Respondent was not negligent with respect to the violation. A civil penalty of $2,976.00 was proposed by the Secretary. The lowering of the level of negligence justifies a reduction in the proposed penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and guided by the Secretary's penalty calculation regulations,[6] I impose a penalty in the amount of $1,200.00.

[6] 30 C.F.R. Subchapter P, Part 100.

ORDER

WHEREFORE, Order No. 8157629 is **AFFIRMED**, Citation No. 8157630 is **AFFIRMED as modified**, and Respondent is **ORDERED** to pay a civil penalty in the amount of $1,200.00, within 45 days.

Michael E. Zielinski
Senior Administrative Law Judge

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