FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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February 28, 2014

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2011-940
Petitioner,	:	A.C. No. 46-01968-000243606
	:	
v.	:	Mine: Blacksville No. 2
	:	
CONSOLIDATION COAL, CO.	:	
Respondent.	:	

DECISION

Appearances: Bryan C. Shieh, Esq.; James, McClammer, Esq., Department of Labor, Philadelphia, PA for Petitioner;
R. Henry Moore, Esq.; Patrick W. Dennison, Esq., Jackson Kelly, PLLC for Respondent

Before: Judge Barbour

This civil penalty proceeding comes before the Court pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act" or "Act"). 30 U.S.C. §§ 815, 820. The Secretary of Labor ("Secretary") on behalf of his Mine Safety and Health Administration ("MSHA") petitions for the assessment of $54,500 in civil penalties for one alleged violation of mandatory safety standard 30 C.F.R. §75.202(a) and two alleged violations of mandatory safety standard 30 C.F.R. § 75.220(a)(1). Section 75.202(a) requires in pertinent part that the roof and ribs of areas where persons work or travel be supported to protect miners from roof and rib falls.[1] Section 75.220(a)(1) requires mine operators to develop and follow a suitable roof and rib control plan approved by the MSHA District Manager.[2] The Secretary

[1] Section 75.202(a) states:

> 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.

[2] Section 75.220(a)(1) states in pertinent part:

> Each mine operator shall develop and follow a

charges that the alleged violations occurred at the Blacksville No. 2 Mine, an underground bituminous coal mine owned and operated by Consolidation Coal Company ("Consol" or "the company"). The alleged violation of section 75.202(a) is cited in an order issued pursuant to section 104(d)(2) of the Act.[3] The Secretary proposes a civil penalty of $50,700 for the alleged violation. The two alleged violations of section 75.220(a)(1) are charged in citations issued pursuant to section 104(a) of the Act.[4] The Secretary proposes a civil penalty of $1,900 for each alleged violation. The Secretary further asserts that the alleged violation of section 75.202(a) was a significant and substantial contribution to a mine safety hazard (an "S&S" violation) and that it was caused by the company's unwarrantable failure to comply with the standard and by the company's high negligence. As for the two alleged violations of section 75.220(a)(1), the Secretary asserts that although they were unlikely to result in lost work days or restrictive injuries, they were the result of the company's "high" negligence.

In answering the Secretary's petition, Consol denied that it violated the standards and challenged the inspector's S&S, unwarrantable and negligence findings. After the answer was received, the case was assigned to the Court, which ordered the parties to consult to determine if

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> roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions and the mining system to be used at the mine.

It has long been recognized that violations of an approved plan are equivalent to violations of section 75.220(a).

[3] Section 104(d)(2) states in part:

> If a withdrawal order with respect to any area in a . . . mine has been issued pursuant to . . . [section 104(d)(1) of the Act] a withdrawal order shall promptly be issued by an . . . [inspector] who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations.

30 U.S.C. §814(d)(2).

[4] Section 104(a) states in part:

> If, upon inspection . . . [an inspector] believes that an operator of a coal . . . mine . . . has violated . . . any mandatory . . . safety standard[,] . . . he shall, with reasonable promptness, issue a citation to the operator.

30 U.S.C. §814(a).

they could resolve their differences. When it became clear that they could not, a trial on the merits was scheduled.

At the hearing numerous stipulations were read into the record by the Secretary's counsel. Tr. 14-17. A written copy of the stipulations was also entered into evidence as a joint exhibit. Tr. 14-17; Jnt. Exh. 1.

STIPULATIONS

> 1. At all relevant times . . . ("Consol") was the "operator" of the . . . Blacksville No. 2 Mine[,] . . . within the meaning of the . . . [Mine Act,] specifically Section 3(d), 30 U.S.C. Section 802(d).
>
> 2. At all relevant times, [the mine] was a "coal or other mine" within the meaning of the Mine Act, specifically Section 3(h)), 30 U.S.C. Section 802(h).
>
> 3. At all relevant times, the products of . . . [the mine] entered commerce, or the operations or products of [the mine] affected commerce within the meaning of the Mine Act, specifically Sections 3(b) and 4 of the Mine Act. 30 U.S.C. Sections 802(b) and 803.
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> 4. Consol is subject to the jurisdiction of the Mine Act.
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> 5. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission [(the "Commission")] and its designated Administrative Law Judge pursuant to Sections 104, 105, 110 and 113 of the Mine Act.
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> 6. The citations and order contained in Exhibit "A" attached to the Secretary's Petition are authentic copies of the citations and order at issue in this proceeding.
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> 7. The citations and order at issue, as well as any modifications thereto, were properly served by a duly authorized representative of the Secretary of Labor . . . upon an agent [of Consol] at the [mine] on the dates and [at the places] stated therein.
>
> 8. Consol demonstrated good faith in abatement of the alleged violations.
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> 9. The Assessed Violation History Reports are authentic, and accurately reflect the history of violations at [the mine] during the

time period that Consol operated . . . [the mine.]

10. Payment of the total proposed civil penalty in this matter will not affect Consol's ability to remain in business.

11. The parties stipulate to the authenticity of the exhibits referenced in the parties['] Prehearing Statements (with all amendments thereto) but not to the relevancy or the truth of the matters asserted therein. The following [proposed] exhibits are exempted from this stipulation:

> a. Exhibits 29, 31, 41, 42, 70 and 73 of [the Secretary's] Prehearing Statement, and Second Amended Prehearing Statement; and
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> b. Exhibit 1 of Respondent's First Amended Prehearing Statement.

12. Any formal . . . [MSHA] computer printout from MSHA's Mine Data Retrieval System is an authentic copy and may be admitted as a business record of . . . [MSHA.]

13. With respect to Citation No. 8025562, a solid side rib of 45 block, #3 entry of the 17 W section, MMU 068-0, was not rib bolted or flagged for a measured distance of 19 feet.

14. With respect to Citation No. 8025562, a violation of section 75.220(a)(1) occurred.

15. With respect to Citation No. 8025562, the citation was properly designated as "Unlikely."

16. With respect to Citation No. 8025562, the citation was properly designated as "Lost Workdays or Restricted Duty."

17. With respect to Citation No. 8025562, the citation was properly designated as "1 Person Affected."

18. The cited area referenced in Citation No. 8025562 was mined on July 16, 2010.

19. With respect to Citation No. 8025516, two sections of rib approximately 17 feet long and 15 feet long were not bolted nor flagged on the left inby and outby corners of the #2 entry, 8 block intersection on the 14 W, MMU 064-0.

> 20. If Respondent violated 30 C.F.R. Section 75.220(a)(1), then . . . Citation [No. 8025516] was properly designated as "Unlikely," "Lost Workdays or Restricted Duty and "1 Person Affected."

Jnt. Exh. 1; *see* Tr. 14-17.

As explained by the Secretary's counsel, it is the Secretary's belief that all three of the alleged violations resulted from Consol's "continued failure to take the basic steps necessary to protect . . . [miners] from the hazards of ribs." Tr. 19. Coal extracted at the mine is from the Pittsburgh Coal Seam, and the company knew that the coal was soft and prone to slough.[5] In addition, two miners had been injured by rib falls, one miner in February 2010 and another in May 2010. Further, before he found the conditions that led him to issue the order in question, MSHA Inspector John Grimm lectured at the mine pursuant to MSHA's Prevention of Roof and Ribs Outreach Program (the "PROP Initiative").[6]

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[5] The word "slough" is used as a verb and as a noun. When used as a verb the word means the process of rib rock flaking, crumbling and falling away from a rib. When used as a noun the word and its synonym "sloughage" describe, "Fragmentary rock material that has crumbled and fallen away from the side of a . . . mine working." American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms, second edition* (1977) at 515 ("*DMMRT*").

[6] Inspector Grimm testified that the PROP Initiative was started in 1999 or 2000 and that its purpose was to get the industry to "pay particular attention to the roof and ribs to reduce the [accident] and fatality rate." Tr. 126. According to Grimm, lectures given pursuant to the Initiative are yearly events which usually take place during the early summer because that is "when most of the roof and rib falls happen . . . due to humid weather." *Id.* The Secretary introduced a document announcing implementation of the PROP Initiative for the summer of 2010. Gov. Exh. 63. The document is dated June 2, 2010. It was made available to mine operators and to the public on the Department of Labor's website. Tr. 127. The document states in part:

> Statistics show that more accidents and injuries occur during the summer months than at any other time of the year. As temperatures rise, humidity and moisture increase underground making it easier for a mine roof or rib to . . . fall.

Gov't Exh. G-63; Tr. 128.

Implementation of the 2010 initiative involved a series of summer safety talks to heighten the awareness of management and of rank and file miners of the need to scale and adequately support the ribs. Management and miners were reminded to stay clear of the ribs as the miners worked and traveled in the mine. They were also instructed how to safely bring down loose and unstable ribs. Tr. 128-129. Grimm testified that he gave talks covering these subjects at the mine. Tr. 130. He specifically recalled giving such a talk to approximately 305 miners on June 2, 2010. Mine management officials were present. Tr. 137-139 141-142; *See* Tr. 445. Three days later he gave the same talk to approximately 80 miners Tr. 139-140. He gave

MSHA also alerted Consol and all of its miners to the hazards of rib falls through MSHA's Rules to Live By Program.[7] A primary goal of the Rules to Live By Program is to make miners and operators aware of the importance of compliance with section 75.202(a) and section 75.220(a). Tr. 20-22, 24.

Counsel for the Secretary acknowledged that Consol made some efforts toward heightened compliance with the standards. For example, after the May 2010 rib fall accident the mine's roof and rib control plan was amended to require additional rib bolting. However, according to counsel, the company exhibited a failure to follow the rib bolting part of its approved roof control plan. Tr. 20. In the Secretary's view, the PROP Initiative and the Rules to Live By Program should have caused Consol to be more diligent in preventing or correcting the type of conditions that led to the alleged violations. Tr. 21-22, 25-26, 28. The Secretary's counsel stated that MSHA therefore believed it was important to assess enhanced penalties to spur compliance with sections 75.202(a) and 75.220 (a)(1), which are among the "top five" most cited safety standards in the nation's underground coal mines. Tr. 30.

INSPECTOR GRIMM AND THE BLACKSVILLE NO. 2 MINE

Inspector Grimm began working in underground coal mining in 1976. He became a shift foreman in 1992. Grimm retired from mining in 2002, but in 2005 he was rehired and spent approximately 13 months as a section foreman at Consol's No. 84 Mine. Like the Blacksville No. 2 Mine, the No. 84 Mine extracts coal from the Pittsburgh Seam. Tr. 37. In fact, Grimm

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additional talks on June 7, June 8, June 9, June 14, June 15 and June 21. Tr. 141; Gov't Exh. 54. Between June 2, 2010, and July 2, 2010, Grimm estimated that out of a total of 27 PROP Initiative talks given at the mine, he delivered approximately 15. Tr. 242.

When William Devault, a counsel safety supervisor, was asked about the company's response to the PROP Initiative talks, DeVault responded that during daily meetings with employees on the working sections, company managers talked about roof and rib control "as part of the law." Tr. 446. He also stated that the company had and continues to have, a program of instruction, the Safe Work Instruction ("SWI") program, covering the roof and rib control. DeVault did not provide details of the program. Tr. 447-448.

[7] Inspector Grimm testified that in late 2009 or early 2010, MSHA's Administrator identified standards whose disregard was most likely to contribute to a fatal accident. Tr. 122. Because roof and rib falls are a leading cause of injury and death in the nation's mines, the Administrator believed that all in the industry should be alert to the need to comply with the Secretary's mandatory roof and rib control standards. *Id.* The Administrator's Rules To Live By Program highlighting the need for roof and rib control was launched in February 2010. The first phase of the program emphasized education and outreach. After about a month of the first phase, MSHA launched the second phase, which included enhanced enforcement of the roof and rib control standards. According to Grimm, among other things, enhanced enforcement meant that when a violation of a Rules To Live By standard was found, the agency looked more closely at the operator's negligence. Tr. 124.

testified that all of his private underground mining experience took place in Pittsburgh Seam mines. Tr. 39.

Grimm joined MSHA in October 2006. He became an authorized mine inspector in July or August 2007. Tr. 39. In May 2011 he was promoted to an MSHA supervisory position. Tr. 41. At times, Grimm supervised up to 9 inspectors. *Id.* In addition to assuming supervisory duties, Grimm continued to inspect mines. Grimm estimated that approximately 90% of his inspections were in Pittsburgh Seam mines. Tr. 41. Grimm testified that he has been to the Blacksville No. 2 Mine a "[c]ouple hundred" times and that he is very "familiar with the rib and the roof " at the mine. Tr. 42.

Grimm explained that at the Blacksville No. 2 Mine coal is extracted on both longwall and conventional mining sections. Tr. 43. The average height of the mine's entries is seven to eight feet. *Id.* Grimm stated that the depth of the mine's overburden is significant in that the overburden impacts the size of the pillars that left are after the entries are driven. The overburden helps to dictate the type of roof support used at the mine. *Id.* In addition, according to Grimm, pressure from the overburden can cause the mine's ribs to deteriorate and slough. Grimm explained that "the more overburden, the more pressure on the coal seams" which in turn causes the ribs to "eat out [and] deteriorate."[8] Tr. 44.

Grimm identified an agency Program Information Bulletin ("PIB") entitled "Protecting Miners from Hazards Related to Roof Falls." Govt. Exh. 62; Tr. 48. The PIB, which was issued after the order and citations in question, contains information about rib fall hazards including the agency's determination that 96 percent of rib fall fatalities occur where the floor to ceiling height is at least seven feet. Tr. 48; Gov't Exh. 62-at 1-2. The PIB further states that at least 78 percent of rib fall fatalities occur where the overburden is at least 700 feet. *Id*. Grimm noted that at the Blacksville No. 2 Mine, the seam height averages between 7 feet and 8 feet, and the overburden varies from 800 feet to 1,400 feet.[9] Tr. 40

Grimm believed, and Consol did not dispute, that because the coal in the Pittsburgh Seam is soft, ribs in the mine are prone to sloughing. Tr. 53; *see also* Tr. 680. Grimm testified that the rate at which the ribs deteriorate is unpredictable. They can deteriorate "right away," or they can stand for some time before they begin to slough. Tr. 54. Grimm stated, "[Y]ou [can't] really predict when [a rib will] fall." *Id.* Grimm noted that to protect miners assigned to bolt the ribs

[8] Counsel Foreman Kenneth Weiss essentially agreed with Grimm. Weiss explained that after the coal is removed at the mine, it is not long before the ribs start to slough. In Weiss's opinion, the cause of the sloughage is pressure from "the weight [that] is slowly coming down . . . onto the rib[s]." Tr. 553. In Weiss's view, the ribs need to be supported because they "can't take that kind of pressure." *Id.*

[9] Grimm maintained that in the area where the subject order was issued the overburden was "close to 1,300 feet" (Tr. 50) and the entry height (also referred to as the seam height) averaged from 6 feet 8 inches to 7 feet. Tr. 49, *see also* Tr. 679. Consol did not dispute the accuracy of Grimm's testimony regarding the entry height, but De Vault testified that the overburden in the cited area was 870 feet, not 1,300 feet. Tr. 487. The Court observes that under either scenario the overburden was above 700 feet.

(the "rib bolters"), Consol installed "rib protectors" on its continuous mining machines ("continuous miners"). Tr. 55. The protectors are three fourths of an inch thick pieces of metal that are attached to hydraulic jacks. The metal plates are positioned against the ribs to shield the rib bolters from rib falls. Tr. 55-56.

THE JUNE 22, 2010, INSPECTION

On June 22, 2010, Grimm went to the mine. He arrived around 7:15 a.m.. Before proceeding underground he reviewed the pre-shift/on-shift examination book for the area he was going to inspect. Tr. 58, 169. He then went underground accompanied by the miners' representative, Keith Craig[10], and the company's representative, James Wolfe.[11] Tr. 59. Later in the inspection Weiss, the shift foreman, also joined the inspection. Tr. 355-356.

Grimm, Craig and Wolfe headed for the Six North Parallel construction area of the mine. Tr. 169. Weiss explained that in this part of the mine, the company was sealing off certain previously mined areas. Tr. 535. The project started in March 2010. *Id.* As Weiss recalled, two to five miners a shift worked on the project. *Id*.

Upon entering the construction area, Grimm observed what he described as a "convergence problem." Geologic pressures were forcing the mine roof down and the mine floor up. As a result, there was a "deterioration of the top and the ribs." Tr. 215. Grimm believed that "the entire area . . . was becoming unsafe to travel." *Id.*; Tr. 215. Grimm understood that sealing off some of the area would alleviate the problem because miners no longer would need to travel through the area. Tr. 215. While sealing some of the area was good mining practice, Weiss testified that because the project was complex, "a lot of people were a little bit queasy about [it]." Tr. 558.

Prior to reaching the area where the sealing was taking place, the inspection party traveled to the area's dinner hole. The hole served as an entrance to the construction area.[12] Tr.

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[10] Keith Craig, a general inside laborer, has worked at the mine since February 2006. Tr. 350, 352. Craig estimated the June 22 inspection was the second or third inspection in which he acted as the union's "walkaround" and the first or second time he accompanied Grimm. Tr. 353-354.

[11] James Wolfe has worked for Consol for 12 years, always at the Blacksville No. 2 Mine. Prior to working for Consol, Wolfe had 26 years of experience working for other coal mining companies. Tr. 595-596. He holds mine foreman papers from Maryland and West Virginia. Tr. 596. At the time he testified, Wolfe worked as the mine's safety mentor, a job that requires him to "go around and watch the men work [and] correct them for anything that they may be doing wrong or that possibility of them getting hurt[.]" Tr. 597. However, on June 22, 2010, his job was that of safety escort, which meant that he accompanied MSHA's inspectors on a daily basis and represented the company to the inspectors. Tr. 597.

[12] Grimm circled in black the Sixth North Parallel construction area on a mine map. *See* Gov't Exh. 18. The dinner hole was within the area. *Id.* Grimm stated that June 22 was the first time he had been to the dinner hole. Indeed, it was the first time he was anywhere in the Six North Parallel construction area. Tr. 68

169. The dinner hole had been mined several years before the inspection (Tr. 215), and Weiss explained that when the company decided to seal the previously mined areas, the dinner hole and parts of the construction area were rehabilitated so they could be used during the project. Rehabilitation included scooping up debris and spot bolting the roof.[13] Tr. 540.

Grimm was not the first MSHA inspector to visit the area. Weiss testified that on May 4, 2010, approximately seven weeks before Grimm's inspection, MSHA Inspector Jan Lyall conducted an inspection that included the area adjacent to the entrance to the dinner hole. Robert Tozzi, then a safety escort at the mine, accompanied Lyall to the area.[14] Tr. 650. According to Trozzi, Lyall did not issue any citations based on the condition of the roof and ribs in the vicinity of the dinner hole, rather he suggested that posts be installed next to the cribs that were already in place at the corners of the dinner hole entry. Tr. 653. Trozzi admitted, however, that on May 4, neither he nor Lyall entered the dinner hole. Tr. 671. Indeed, Tozzi could not say for sure whether Lyall even looked into the dinner hole. Tr. 671-673.

In contrast, on June 22, Grimm and the rest of the inspection party went into the dinner hole, which Grimm described as a "gathering place for the miners." Tr. 66. He understood that miners used the area to eat lunch and to conduct meetings. *Id.*, Tr. 173. There was a picnic table in the center of the entry. In addition, mining supplies were stored in the entry.[15] Tr. 66.

The condition of the ribs on both sides of the dinner hole troubled Grimm. He believed that the ribs had "deteriorated" badly. Tr. 68. He described each rib as "ate out in the middle and sloughed off, leaving an overhanging brow."[16] Tr. 68-69; *see also* Tr. 373. In Grimm's opinion,

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[13] The roof was originally supported with straps and cable roof bolts. When the area was rehabilitated, one-hole boards and more roof bolts were added. Tr. 542, Tr. 200.

[14] At the time he testified, Robert Trozzi, who holds a business degree from Washington and Jefferson College, had worked for Consol for seven years as a safety escort and as a section foreman. Tr. 649-650. On May 4, 2010, Trozzi was a safety escort at the Blacksville No. 2 Mine. He also was "responsible for conferencing violations, [for] respirable dust [sampling, for] training employees, [and for] just making sure that [there] were safe work practices going on within the coal mine." Tr. 650-651.

[15] Weiss testified that the supplies were located "just beyond the picnic table . . . at the bottom of the rib on either side." Tr. 554. The supplies consisted , *inter alia*, of "wedges, boxes of glue . . . [one-hole] boards." *Id.* In notes he made on the day of the inspection, Wolfe wrote that the supplies included a "mud tub, a pallet, a stack of one hole boards and 5 or 6 short straps." Tr. 632; Consol. Exh. R-10. In addition, there were "[two] separate pieces of curtain laid out along the ribs." Tr. 632,

[16] Grimm described a brow as:

> [O]verhanging material along the rib. [I]t's been undercut underneath. The middle of the rib . . . [has] been eaten away, sloughed off, . . . and left with . . . material still hanging. [There is n]othing to support [the overhanging material.]

the ribs were loose and dangerously defective. *Id.*, 747. Grimm noted that although the usual width of mine's entries is 16 feet, in the dinner hole the entry was 22 feet wide. Because of the added width Grimm thought that "a lot more" pressure was being put on the ribs, causing them to "deteriorate further." Tr. 213. They were, he testified, very likely to fall. Tr. 93.

Grimm maintained that miners traveled and worked "in close proximity" to the hazardous ribs (Tr. 747), and shift foreman Weiss did not dispute Grimm's assessment. Weiss recalled that some of the supplies were "sitting . . . on top of the [sloughage]" (Tr. 555), and Wolfe remembered that other supplies were lying "at the sloughage area," close to the ribs. Tr. 633. Wolfe agreed that miners retrieving supplies could be close to the sloughed ribs. *Id.*

Grimm measured the defective ribs. One side had deteriorated for a length of 29 feet and the other for 31 feet. Tr. 69. The 29 feet long section of rib was undercut[17] to a depth of 18 inches, and from the roof to the start of the undercut was a hanging rib (a brow) that measured 15 inches to 27 inches high.[18] *Id.* On the other side, the rib was similarly undercut creating a similar brow.[19] Tr. 70. Grimm stated that because the ribs were defective along "practically the entire area of the dinner hole," the condition was "very obvious." Tr. 100.

According to Grimm, the sloughage was lying at the base of the ribs. Tr. 71. Like the Pittsburgh Seam in general, Grimm remembered the ribs in the dinner hole as "soft." Tr. 71. He also remembed "some cracks in [the ribs]." Tr. 71. Although the cracks were small, they indicated to Grimm that the ribs were not solid and that they would "continue to deteriorate." Tr. 76, *see also* Tr. 166. Equally troublesome, sloughing of the middle part of the ribs meant that there was nothing left to support the "unsloughed" top of the ribs– the brows.[20] *Id.*

While Craig agreed with Grimm's description of both ribs. (Tr. 357), Grimm's view of the hazardous nature of the ribs was not shared by the company safety escort, James Wolfe. Wolfe described the dinner hole as "just a typical area." Tr. 601. Wolfe recalled that the roof in the dinner hole was bolted and strapped and that additional bolts had been placed between the straps and each rib. In addition, there were several one-hole boards that were located between

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Tr. 71.

[17] Grimm used the word "undercut" to describe the indentation in the rib line. Although strictly speaking the word connotes an indentation that is "cut" mechanically, the parties and the Court understood Grimm to be referring to an indentation caused by sloughing.

[18] Grimm described the undercut rib as "ate out in the middle and left [with] the overhanging material. There was nothing underneath [the overhanging material.]" Tr. 70

[19] Grimm, with Craig's assistance, measured the deepest penetration of the undercuts and the distance from the ceiling to the point in the rib where the undercut started. Tr. 79-80, 81-82, 359. Grimm used a steel tape measure. Tr. 82. Grimm stated that he stood three or four feet from the brows and under the roof bolts closest to the ribs when he took the measurements. He added that in so doing, he made certain he was always under supported roof. Tr. 186-187.

[20] Grimm did not test the ribs by "sounding" them. (When a rib is "sounded," it is hit with a metal object, often a pry bar or a hammer. A resulting "hollow" sound may indicate that the rib is unstable and loose.) Grimm explained, "I don't sound the ribs when [the ribs are] bad" and the ribs in the dinner hole were "visually bad." Tr. 167.

the straps and next to the top of each rib. Tr. 601-602, 610. The purpose of the one-hole boards was to provide "extra support." Tr. 602, 610. He described the ribs as "sloughed out from the coal seam a little bit on each side and [there] was sloughage on the bottom," but he did not believe there was anything unusual about the condition of the ribs.[21] Tr. 602.

Wolfe kept handwritten notes of what he observed during the inspection. Tr. 603-605. Later in the day, he typed more detailed notes. Although one such note stated, "The ribs are sloughed out . . . on both sides . . . in the middle of the rib[s]" (Resp. Ex. R-10), Wolfe did not believe the sloughing ribs posed a hazard because the ribs almost always slough, usually at a slow rate. Tr. 604-605. However, he acknowledged that sloughage can happen quickly (*Id.*) and that after a rib sloughs from the middle, the top of the rib is no longer supported by the coal that was in the middle of the rib. Tr. 618.

Wolfe measured the sloughed ribs, but whereas Grimm measured from the deepest points in the sloughed out ribs to determine how much the ribs had been undercut, Wolfe measured from the rib lines because "[T]hat's where the coal rib was." Tr. 606. Wolfe stated that he told Grimm that he, Wolfe, disagreed with measuring from the inside of the sloughed area when the original rib still existed at both the top and the bottom of the rib line. Tr. 608. Wolfe drew the original rib line on a photograph of the dinner hole area. Resp. Exh. R-1 at 4; Tr. 624-625. In Wolfe's view, a potentially dangerous "brow" could be created only if the bottom of the rib also sloughed leaving nothing between the top of the rib and the mine floor. Tr. 615. ("A coal brow would exist if there was nothing under that brow." *Id.* Wolfe added, "If you can set a post under the brow, that's a coal brow." Tr. 616.) Wolfe did not think coal brows existed in the dinner hole because there were remnants of the original ribs at the tops and bottoms of the rib lines. *Id.*

Counsel's Safety Supervisor, William DeVault, acknowledged that he was not in the dinner hole during the inspection.[22] Rather, he visited the area approximately one week later. Tr.

[21] In general, Wolfe and Trozzi viewed the ribs in the Pittsburgh Seam as far less hazardous than did MSHA's witnesses. While Trozzi agreed that a sloughed rib could present a danger, he added that it "would depend on how [the rib] sloughs out." Tr. 675. Asked to elucidate, he added that in the Pittsburgh Seam and at the Blacksville No. 2 Mine:

> Typically . . . the way the ribs slough out, they sort of slough out in an arc to where there's not really an overhanging piece of coal. It's just kind of a gradual arc that comes down. . . . There's no real brow that would be . . . a loose piece that's hanging or unsupported.
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> Tr. 675.

[22] At the time he testified, William DeVault had worked at the mine for 37 years. Tr. 470. He started as a general laborer and advanced through the ranks to become a section foreman and then, in 2008, a safety supervisor. *Id.* As a safety supervisor, he supervises a department of six people, five of whom are safety escorts who accompany MSHA's inspectors. Tr. 471.

406, 472. While he agreed ribs "tend to be unpredictable," DeVault contended that he did not see any coal brows. Tr. 406-407. He stated he thought that the ribs exhibited the result of "normal spalding." Tr. 473. DeVault described "normal spalding" as "just flakes of material that had flaked off from the rib and hit the floor." *Id.* DeVault did not know if the ribs were scaled[23] as part of abating the alleged violation, but Weiss thought that the ribs were too crumbly to be scaled. Tr. 565-566. He described them as "very soft . . . like graham cracker crust." Tr. 566. Wolfe, who was in the dinner hole when the alleged violation was abated, testified that no scaling was done. Tr. 611-612. Rather, to abate the cited conditions the company chose to do nothing to the brows. Tr. 217. It set 15 floor to roof posts and jacks, seven on one side of the entry and eight on the other. Tr. 144; *see also* Tr. 361. All were set four to five feet apart, along the original rib line. *Id.*, *see also* Tr. 565, 583. In addition, mining supplies were removed from the entry. *Id.,* Tr. 209. Weiss stated the supplies had to be moved because they were lying at the base of the rib line where the posts and jacks were set. Tr. 584. According to Grimm, the posts and jacks, which were wedged at the top, supported the ribs well and prevented people from going under the ribs. Tr. 145, 147. Grimm considered setting the posts and jacks and removing the supplies to be "a very good solution." Tr. 147. He did not know if the area continued to be used as a dinner hole after the condition was abated, but in his opinion it could have been, provided any supplies were stored at least 12 inches from the ribs so that miners would not have to go between the posts, jacks and the ribs to retrieve the supplies. Tr. 216.

Shift foreman Kenneth Weiss, who arrived at the dinner hole about 10 minutes after Grimm, testified that the ribs had "flaked off" or "sloughed off" in mostly softball size pieces starting about 18 inches above the floor. Tr. 542-544. Weiss described the ribs as indented "about two feet" and projecting toward the entry at their tops and bottoms. Tr. 543. In Weiss's opinion, the ribs "were in no threat or danger of falling." *Id.* He maintained that there was "nothing out of the ordinary" about the ribs (Tr. 544), nor were there any brows. Tr. 551. Weiss "couldn't believe [Grimm] was going to write [a] violation." Tr. 543.

However, Grimm believed that because of the sloughed-out ribs, the areas on top of the ribs, which Grimm referred to as the "brows," were inadequately supported on both sides of the entry. Tr. 86-87. ("[O]nce [the rib] was eaten out, it was all unsupported material." Tr. 87.) Grimm explained that because the middle of the ribs had fallen out, the brows above the indentation were "left loose" and that the "hanging material [(*i.e.* the brows)] . . . [was] going to come down." Tr. 95. He added that when a rib has "cracks and it's soft . . . . it's going to fall. And that's why we keep people out from underneath it."[24] Tr. 95. Geologic forces were causing pressure to be applied to the roof, the floor and the ribs. Tr. 168. Because of the forces applied to the ribs and because gravity was pulling on the brows, "There [was] nothing . . . to support [the brows]." Tr. 207. Grimm acknowledged that there were several one-hole boards in the roof. Tr. 88, 89. However, he did not think they supported the coal brows and ribs. Tr. 207-208. Moreover, it was June and humidity in the mine was rising. Tr. 92. According to Grimm, when humidity seeps into the roof and ribs, they "fail a lot quicker because of the moisture," which is

[23] A rib is "scaled" when loose coal and/or rock is removed from the rib. *See DMMRT* at 482.

[24] Grimm's belief that the brows were loose was based solely on visual observation. As previously stated, he considered it too dangerous to sound the ribs. Tr. 167.

why the number of roof and rib accidents "greatly increases" in the summer.[25] Tr. 92. For all these reasons, Grimm believed that the cited brows were "very likely" to fall. Tr. 94, *see also* Tr. 91.

Grimm found that the hazard caused by the violation was reasonably likely to result in a serious or even a fatal injury or injuries. In his opinion, miners were likely to be struck on the head or neck by falling pieces of the ribs. Tr. 93-94. Grimm explained, "[M]iners were spending time in close proximity [to the ribs] and underneath those ribs. . . [M]ining supplies [were] there. [Miners] were traveling there. They were spending a lot of time there. They were actually storing the supplies underneath that unsupported area."[26] Tr. 91.

In Grimm's opinion, the sloughed out ribs presented an obvious hazard. In addition, and as previously noted, mining supplies were stored in the area – things such as canvas, mining straps, a roll of flexible mesh, one-hole boards, caps and wedges, boxes of resin and pieces of cardboard. Tr. 77-78. Grimm remembered a majority of the supplies lying "right up against the rib, [lying] on the sloughage and underneath the coal brow[s]." Tr. 77-78, *see also* Tr. 171. Laborer Craig's testimony regarding the supplies tended to corroborate Grimm's. Craig recalled that sloughage from the ribs resulted in "chunks of coal and stuff [lying] on the [roof] bolts and [other supplies.]" Tr. 356. He remembered roof bolting supplies stored along the left rib of the dinner hole and some mesh and cardboard stored along the right rib and at the corner of the dinner hole entry. Tr. 358. In addition, he stated that some of the roof bolting supplies were underneath the coal brows.[27] Tr. 358.

The presence of cardboard pieces or pads on the floor of the dinner hole signaled to Grimm that the miners were placing themselves in very hazardous positions by lying or sitting on the cardboard. Grimm called the cardboard pads "beds." Tr. 78. Although Grimm did not see miners actually lying or sitting on the beds (no miners were in the dinner hole during Grimm's inspection), Grimm could tell that miners had rested on some of the pads because of the imprint of their bodies on the cardboard.[28] Tr. 78, 174. In addition, some of the cardboard

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[25] Consol's view of the effect of moisture on the ribs was decidedly less alarming. DeVault agreed that moisture increased during the summer, but he believed the increased moisture at most caused the ribs to "flake" or to shed coal in "little pops," a process that could be successfully countered by rockdusting, thereby sealing the ribs. Tr. 488, 505.

[26] DeVault agreed that in general, "All coal brows left unattended could be hazardous if not supported correctly." Tr. 421. He also agreed that roof bolters, mechanics, shuttle car operators and foremen regularly used the dinner hole at lunchtime, at the end of the shift and sometimes for meetings,. He further agreed that the exposure of miners to the dinner hole was "very high." Tr. 424.

[27] Later, Craig testified that the mesh and cardboard pads were lying along both ribs (Tr.360) and, while not as specific as Craig, Wolfe testified that cardboard pads were lying on both sides of the entry. Tr. 633.

[28] Grimm explained that he thought the ribs were so hazardous that if he had seen a miner sitting on cardboad under a brow, he would have issued an imminent danger order under section 107(a) of the Act. Tr. 174. Section 107(a) provides that an inspector, upon finding an imminent danger, must issue an order requiring the operator to cause all persons to be withdrawn

pieces had been used to form what Grimm described as "pads and seats and chairs." Tr. 174. Grimm testified that he saw approximately four "beds" and that they were "in close proximity" to the coal brows or directly underneath them. Tr. 79. Weiss thought that whether the cardboard "rest areas" were "beds" was "a subjective question," but he was sure that "nobody on [Weiss's] shift laid down or sat down on anything that was called a bed or a cardboard box." Tr. 555. He noted that miners usually sat at the picnic table. Tr. 555.

Wolfe agreed with Grimm that the cardboard pads were present. Wolfe speculated that although the cardboard might have served as seats for miners, the pads would not have been used as beds because the company does not condone sleeping underground. Tr. 634. DeVault also noted that it is against mine policy for miners to make beds and to place the beds against the ribs. Tr. 426. He was sure that miners would not sleep on the cardboard because if they did and they were discovered, the miners would be discharged. Tr. 486. Nor did DeVault think miners would sit on the cardboard while they ate lunch. Like Weiss, DeVault noted the presence of the picnic table in the entry. Tr. 487. Nonetheless, DeVault acknowledged that cardboard pads continued to "pop up" in the mine, especially in break areas like the dinner hole. Tr. 426-427.

In Grimm's view, the deterioration of the ribs should have been a visual "warning" to the company that the ribs were dangerous (Tr. 94), and he found that the condition of the ribs in the dinner hole was due to the company's "high negligence." Gov't Exh. 13. The finding was based on "a lot of facts." Tr. 95. He especially noted that there had been two "very serious" rib fall accidents at the mine prior to June 22, 2010. The accidents were within months of one another and as of the date of the hearing, the miner hurt in the last such accident had not yet returned to work. Tr. 95-96. Although none of the accidents produced a fatal injury (Tr. 201), Grimm believed the very fact the accidents happened "alone should have put [Consol] on a high degree of awareness."[29] Tr. 96. Grimm also believed the company should have been on heightened alert because it had been reminded of summer rib hazards by MSHA's PROP Initiative. *Id.* Further, the dinner hole had to be examined daily by the pre-shift and on-shift examiner. Therefore, the condition of the ribs should have been noted and corrected. *Id.* Grimm thought that the ribs had been defective for at least a month (Tr. 97) and that there were "no . . . signs . . . [the company] tried to take care of [the] condition."[30] Tr. 96., 98, 210. In his opinion nothing mitigated the company's disregard of its duty of care. Tr. 99. Despite two fairly recent rib fall accidents at the mine, prior citations issued for loose ribs at the mine, the PROP Initiative and MSHA's Rules

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from the area in which the imminent danger exists. 30 U.S.C. §817(a).

[29] The first accident occurred on February 13, 2010. A stage loader operator, one Mr. Wise, suffered multiple injuries, including a broken pelvis, when he was covered by a brow that fell. Tr. 113-114, 117, 118. On May 7, 2010, another miner, one Mr. Shaffer, a roof bolter, was injured when a rib fell on him without warning. Tr. 120. He suffered a broken collarbone and a bruised rib. *Id.* Grimm described the ribs that fell as being "in good shape" and as "normal ribs that were solid." Tr. 115. Grimm testified that "They . . . gave no sign of falling." *Id.*

[30] Grimm claimed that a section foreman told him, "They had been in there for a month," which meant to Grimm that the dangerous ribs had existed for one month. Tr. 97; *see also* Tr. 177. Assuming the statement was made, the Court notes that the statement is ambiguous and that Grimm's interpretation is but one thing that the foreman might have meant.

to Live By, the company still failed to take measures to prevent or correct the conditions.[31] Tr. 99-100, 148. In Grimm's view, the company clearly had a "problem" with compliance. Tr. 148

THE MISSING PHOTOGRAPHS & THE TROZZI PHOTOGRAPHS

According to Grimm, during the inspection safety escort Wolfe took photographs of the ribs, the brows and the mining supplies in the dinner hole. Tr. 149. The miners' representative, Keith Craig, who was present in the dinner hole, agreed that Wolfe "took a lot of pictures." Tr. 362. Craig stated that it was the first and last time he saw a company representative photograph underground cited conditions. *Id.* Grimm testified while he saw Wolfe use his camera, he never saw the resulting photographs.[32] Tr. 149. Nor did Craig. Tr. 362. At some point after the photographs were taken, they were lost. Grimm did not know what happened to them.[33]

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[31] Concerning the prior violations of section 75.202(a), Grimm testified that in the two years before June 22, 2010, approximately 38 citations and orders were issued for violations of the standard at the mine. Of these, approximately 12 were "rib-related." Tr. 100. (In fact, there appear to have been 13 that were "rib related." Gov't Exhs. 40-52; Tr. 107.) He acknowledged, however, that only one of the prior "rib-related" violations, cited in a section 104(d)(2) order (30 U.S.C. §814(d)(2)) issued to the company on August 11, 2009, related to coal brows. Gov't Exh. 48; Tr. 107-108. According to Grimm, the company was cited on August 11 because the company allowed "quite extensive" parts of the ribs to deteriorate and fall leaving hanging coal brows. Tr. 108. Grimm described the conditions cited on August 11, 2009, as "relatively the same" as the conditions cited on June 22, 2010. *Id*.

On cross examination, Grimm acknowledged that section 75.202(a) is one of the most frequently cited of the mandatory standards. Tr. 163. He further stated that it represented 2.8% of the standards cited at the mine from June 22, 2008 to June 22, 2010. He agreed that nationally, violations of section 75.202(a) represent 4.39% of all violations cited at mines. Tr. 165-166.

[32] In an affidavit, Trozzi stated that Wolfe's photographs were stored on an SD card and that the card was given to DeVault by Wolfe. According to Trozzi, the card was then stored in DeVault's desk. Tr. 463; Gov't Exh. 66.

[33] The missing photographs were a major source of contention before, at and after the hearing. DeVault agreed that Wolfe gave him the SD card and that he put the card in his desk. Tr. 463. But DeVault was adamant that he never saw what was on the card. He was not even sure if he downloaded the photographs onto his computer, although he might have. Tr. 503. In any event, the SD card disappeared from his desk. Tr. 463-464 DeVault speculated that someone might have put the card back into a camera and deleted Wolfe's photographs by mistake. Tr. 463. In addition, and to complicate matters, he testified that in May 2011 his computer was replaced. Tr. 478; *see* Gov't Exh. 67. DeVault stated that although he hoped that the hard drive was not "wiped out" when the computer was switched, "It could've happened." Tr. 501. Of the missing photograhs, DeVault stated, "They're gone. I cannot find them. I looked everywhere . . . [They] either got covered over, deleted or something, I do not know . . . I don't know how it happened. I don't." Tr. 465.

Trozzi testified that because Wolfe's photographs were lost, he and Weiss went to the dinner hole in December 2011 to take pictures of the cited conditions and to measure the ribs. This was the first time Trozzi was in the dinner hole.[34] Consol did not contact MSHA officials or union personnel about Trozzi's visit to the dinner hole so neither inspectors nor union representatives accompanied Trozzi and Weiss. Tr. 683. Trozzi maintained that the conditions he photographed on December 11, 2011, were "basically the same" as what he saw on May [5], 2010, when he was traveling underground with Lyall. Tr. 655-656. The only difference Trozzi noticed was that "the ribs had sloughed off more" in December. Tr. 664. Trozzi was certain that he did not see a brow either in May 2010 when he looked into the dinner hole, or in December 2011 when he actually entered the dinner hole. *Id.* Grimm, who was shown copies of Trozzi's photographs at the hearing, testified that they were not representative of what he saw almost one year and six months earlier. Tr. 153. He stated that he was not even "positive that [the photographs] were [of] the same area." *Id.* They did not show either the mining supplies or the brows that were in the dinner hole on June 22, 2010. Nor did they show jacks and posts that were set to abate the violation.[35] *Id.*

THE MISSING NOTES

Like his photographs, the handwritten notes made by Wolfe during Grimm's inspection also went missing. Tr. 151-152, 460. When Consol decided to contest the order at issue, Wolfe gave the notes to Trozzi. Tr. 641-642. The notes then disappeared. Trozzi did not know what happened, but he speculated that they were lost during a subsequent office move. Tr. 688-689.

THE MISSING PRESHIFT AND ONSHIFT EXAMINATION RECORDS

Prior to the inspection Grimm checked the pre-shift on-shift examination records for June 22, 2010. Grimm also tried to check the pre-shift and on-shift records for June 4 through June 18, 2010, but neither he nor anyone from the company could find the records. Tr. 150-151. MSHA requires an operator to retain pre-shift and on-shift records for one year, but Grimm understood Consol's policy was to retain such records for five years. Tr. 151; *see also* Tr. 466-467 (DeVault's similar testimony). DeVault stated that he did not know why the records were missing. He explained that it was not just individual pages of reports that were missing, but rather that an entire book of reports was missing, a book that included the reports Grimm wanted

[34] The testimony revealed that the exact date of Trozzi's visit was December 11, 2011, almost a year and a half after Grimm's inspection. Tr. 666-667. December 11, 2011, also was the day that Trozzi discovered the photographs taken by Wolfe were lost. Tr. 683.

[35] The Court notes that Craig, who was in the dinner hole on June 22, 2010, also thought that in some respects Trozzi's pictures were not representative. Craig stated,"It's obvious that they had been in there [and] cleaned it all up. [T]hey scooped . . . the ribs or shoveled[.]. . . [a]nd there wasn't near [as many] . . . posts set in . . . [the photographs as] was put in there the day that I was there." Tr. 362. In fact, the Court finds that the conditions photographed and measured by Trozzi in December 2011 have not been shown to be sufficiently similar to those that existed a year and a half earlier that they can be relied upon. Accordingly, Trozzi's photographs will not be considered in deciding the issues regarding the contested order.

to see. Tr. 483; *see also* Tr. 690. Of the missing reports, DeVault stated, "[W]e've looked. We've looked everywhere." *Id.*

DeVault observed that in the summer of 2011 the company contracted to have its safety department moved to a new office. The pre-shift/on-shift books were among the items moved. Tr. 484. Trozzi echoed DeVault. *See* Tr. 661. According to Trozzi, the missing reports disappeared in the lead-up to the move. He stated, "We had college students pack those books up. It's hard to tell. I really don't know [what happened]." Tr. 662. Weiss could not recall another instance in which pre-shift and on-shift examination reports vanished. He described the situation as, "[s]omewhat out of the ordinary." Tr. 585.

ORDER NO.	**DATE**	**30 CFR**
8025378	**6/22/2010**	**§75.202(a)**

The order states:

> The operator failed to support or otherwise control to protect persons from hazards related to falls of the roof and/or ribs in the 6/North Parallel construction area of the 4-5 block #3 entry of the 5 West Mains. When measured the right inby rib was sloughed out creating a coal brow along the rib for a measured distance of 29 feet ranging from 15 inches to 27 inches high and undercut for a depth of 18 inches to 36 inches deep. This condition exposes the mine roof from the coal rib to the nearest permanent roof bolt of 79, 90, 77, 96, 75, 92, 77, 80, 70, and 64 inches respectively. The left outby rib has sloughed out creating a coal brow along the rib for a measured distance of 31 feet ranging from 12 inches to 28 inches high and undercut for a depth of 15 inches to 31 inches deep. This condition exposes the mine roof from the nearest permanent roof bolt of 86, 78, 76, 70, 67, 68, 65,72, 64, 71, and 61 inches respectively. This area is being utilized by miners to store mining suppl[ies] including approximately 70 roof straps, 20 roof bolts, 4 boxes of resin, a roll of rib mesh, hydraulic hoses and wooden one hole boards. The mesh, roof bolts, resin and a portion of the roof straps are stored in close proximity [to] the unsupported ribs. The coal ribs contain small cracks and are soft. Falls of the roof and ribs are a leading cause of underground coal mine injuries and fatalities. It is reasonably likely that if normal mining were to continue and the condition[s] were left unabated that a fall of the coal rib would cause a miner to suffer fatal injuries. This

> violation is obvious and located in an area traveled by a certified examiner. This is an unwarrantable failure to comply with a mandatory standard. This standard has been cited 38 times in two years at this mine.
>
> Gov't Exh. 13.

THE VIOLATION

The record establishes that the violation existed as charged. While the order describes the violative condition in terms of both rib and roof hazards in the dinner hole, the evidence presented by the Secretary almost exclusively focused on the conditions of the ribs, and they were indeed hazardous. The evidence fully supports the inspector's conclusion that the operator failed to support or otherwise control the cited ribs and in so doing, endangered miners who worked or traveled in the dinner hole. There is really no credible evidence that counters Grimm's eyewitness evaluation of the condition of the ribs. He described the ribs as having "deteriorated," and he backed up the description by testifying to the measurements he made during the inspection. His testimony establishes that the ribs on both sides of the dinner hole were "undercut" by at least a foot and a half and that the deterioration of the ribs left overhanging and inadequately supported brows 15 to 27 inches high. Tr. 69-70. Moreover, his testimony that the ribs on both sides of the dinner hole exhibited small cracks was not countered (Tr. 71), nor was his testimony that the ribs were composed of "soft" coal and therefore prone to sloughing. *Id.* Further, and as Grimm persuasively pointed out, as time went on, the soft coal ribs would continue to deteriorate leaving less and less to support the brows. Tr. 76.

Added to this is the fact that it was June and the humidity inside the mine was rising. Tr. 92. While the extent of deterioration of the ribs due to humidity was disputed by the parties, everyone agreed that sloughing increased in the summer. Tr. 92-94, 488, 505. Further, Consol did not challenge Grimm's testimony that rib fall accidents "greatly increased" in the summer because moisture from rising humidity seeps into the ribs. Tr. 92. The Court credits Grimm's testimony concerning the effect of humidity on the ribs and finds that in June and as mining continued throughout the summer, the increased humidity made the cited ribs more likely to fail.[36]

Consol's eyewitnesses to the cited conditions agreed the ribs had sloughed. Indeed, Wolfe agreed that the ribs sloughed essentially as described and measured by Grimm. Tr. 613, 620, 622. Tellingly, Wolfe did not measure how much the ribs were "undercut," a critical measurement when determining the hazard posed by the brows created by the sloughage. Tr. 606. Wolfe's contention that a brow could only exist if the rib sloughed all the way to the floor is not persuasive (Tr. 615) and his implication that an overhanging rib created by sloughage in

[36] The Court observes that although DeVault testified that the effect of increased moisture on the ribs could be counteracted successfully by rock dusting, the record contains no evidence that rock dust applied to the cited ribs. Tr. 488, 505.

the middle of the rib is not hazardous because the sloughage has not continued to the bottom of the rib defies common sense. While there would be nothing left to support an ovehanging rib if the rib sloughed from the overhang to where the rib met the floor, there also could be an inadequate amount of rib left to support an overhang if a rib sloughed only in the middle. As Grimm sensibly testified, when a rib sloughs in the middle, there is less to support the brow. Tr. 76. In short, the evidence establishes that a hazardous overhanging brow can be created by sloughage from the brow to the floor or by sloughage in the middle of the rib. The fact that in this case the sloughage occurred in the middle of the ribs does not negate the hazard.

Weiss agreed that the cited ribs had sloughed so that they were indented "about two feet." Tr. 543. Although he did not remember hazardous brows being created by the sloughage and although he described the ribs as "nothing out of the ordinary" (Tr. 544), Weiss's recollection of what he saw and his assessment of the conditions as he remembered them are far outweighed by Grimm's contemporaneous measurements of the sloughed ribs, measurements which fully support his contention that sloughage had created hazardous brows. Moreover, neither Wolfe nor Weiss disagreed with Grimm that the coal ribs were soft and that the ribs exhibited small cracks, two conditions that increased the hazards posed by the ribs.

By its terms, section 75.202(a) only can be violated if the cited conditions pose a fall hazard to miners. Therefore, to establish a violation the Secretary must prove not only that conditions at issue are hazardous, he also must prove that miners worked or traveled or rested in the immediate vicinity of the cited conditions. The Secretary proved exactly that. The record fully supports finding that a picnic table was present in the dinner hole, as were supplies and cardboard pads. Together these things are indicative of the ongoing presence of miners in the dinner hole. Moreover, Grimm's testimony that at least some of the supplies were stored against the ribs and on the sloughage (Tr. 77-78) was, like the rest of Grimm's description of the cited conditions, credible and worthy of belief. Craig recalled that in addition to being stored on the sloughage, some sloughage had fallen on top of the supplies. Tr. 356. The reason the supplies were stored in the dinner hole was because they were going to be used or moved. To use or move the supplies, miners had to retrieve them by coming into close proximity with the hazardous ribs. In addition, while there was much back and forth regarding whether miners used the cardboard pads as "beds" upon which to sleep (*see e.g.*, Tr. 426. 555, 634), whether or not they did is irrelevant. What is certain from Grimm's testimony is that the pads were used to sit or lie upon. Grimm's testimony that he could see the imprint of miners' bodies on the cardboard was not challeged. Tr. 78, 174. The cardboard pieces were located in such a way that miners sitting or lying on them were endangered. Even Wolfe agreed that the pieces were located toward the sides of the entry. Tr. 633. The record thus confirms that miners worked, traveled and rested in the immediate vicinity of the cited ribs. Accordingly, the Court holds that the Secretary established that the cited ribs were not "supported or otherwise controlled to protect persons from hazards related to falls of the . . . ribs" and that Consol violated section 75.202(a) as charged.

S&S AND GRAVITY

The Court also finds that the violation was S&S.[37] Consol violated the safety standard and the violation created the discrete safety hazard of a rib fall injury. The Secretary established that it was reasonably likely the hazard contributed to would have resulted in an event in which there was a reasonably serious injury. All of the elements for a rib fall were present. There were inadequately supported brows along both ribs, there were cracks in the ribs, the ribs were soft and sloughing, and the geological forces putting pressure on the ribs were unremitting and would not lessen with time. Moreover, it was summer, and the likelihood of rib failure was increased due to the higher moisture content of the mine atmosphere. Further, as mining continued, deterioration of the cited ribs would have continued as sloughing ate away at the ribs, reducing support for the already precarious brows. Tr. 76, 91, 167, 205. The Court therefore concludes that, assuming continued normal mining operations, it was reasonable likely the cited ribs would fail and miners would have been seriously, perhaps fatally, injured, because, as found above, miners worked, traveled and rested in the dinner hole in the immediate vicinity of the cited ribs. The location of the stored supplies and of the cardboard pads meant that miners retrieving or moving supplies and miners sitting or lying on the pads were subject to being hit by pieces of the defective ribs and brows when the ribs failed and the brows fell, something that could happen at any time. Tr. 91, 179, 210; *see also* Tr. 630-631. A miner hit by falling pieces of a brow, at a minimum, was reasonably likely to suffer an injury of a reasonably serious nature. Indeed, as the prior rib fall accidents at the mine showed, a struck miner might well be off work or on restricted duty for months after such an accident. Tr. 449, 450-451. A fatality was also possible.

Finally, in view of the kind of injuries that were reasonably likely to happen if the hazard occurred and in view of the fact that an accident also could prove fatal, the Court finds that in addition to being S&S, the violation was very serious.

UNWARRANTABLE FAILURE AND NEGLIGENCE

The Court further finds that the violation was the result of Consol's unwarrantable failure to comply with section 75.202(a) and of its reckless disregard of the standard's mandate. The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence including conduct that demonstrates a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). The Commission has stated that whether a violation is an "unwarrantable failure" is a question to be evaluated based on the facts and circumstances in each case, and in light of each of the following factors: 1) the length of time that the violation has existed; 2) the extent of the violative condition; 3) whether the operator was placed on notice that greater efforts were necessary for compliance; 4) the operator's efforts in abating the violative condition; 5) whether the violation was obvious or posed a high degree of danger; and 6) the operator's knowledge of the existence of the violation.

[37] The test for determining the S&S nature of a violation has been established, approved by the Courts, and relied upon by inspectors, operators and the Commission for almost 30 years. It need not be repeated here. *Mathies Coal Co.*, 6 FMSHRC 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

See Consolidation Coal Co., 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009).

Grimm's finding that Consol unwarrantably failed to comply with section 75.202(a) was based on several factors. The sloughage, the overhanging brows, and the rib cracks were visibly obvious and should have been a "warning" to the company that the ribs were dangerous. Tr. 94. Further, the condition of the ribs deteriorated over time and therefore their condition was ongoing and not new. Tr. 97, 177. Moreover, the dinner hole had to be examined both before and during a shift, and the examiner should have seen the conditions and reported them for correction. Also, in Grimm's opinion, the company was on notice that it needed to pay particular attention to the condition of ribs in the mine due to the two fairly recent rib fall accidents, the PROP Initiative, MSHA's Rules to Live By, and its history of prior citations at the mine for defective ribs. Tr. 99-100, 148.

The Court concludes that Grimm's reasoning was sound in the main. The defective condition of the ribs was indeed front and center for any and all to see (obviousness of the violation), and the evidence points to the fact that the ribs had been defective for some time (length of time the violation existed).[38] While the Court cannot find, as Grimm maintained, that the defective conditions existed for at least a month, the evidence certainly supports the conclusion that the ribs were defective at a time when the pre-shift and on-sift examiner should have noted the conditions and reported them for correction. The Court credits Grimm's testimony that some of the supplies were resting on top of sloughage, which signaled to Grimm, and which indicates to the Court, that the defective ribs were present when the supplies were moved into the dinner hole. Tr. 97-98, 176. The Court also credits Craig's testimony that there was some sloughage on top of the supplies. Tr. 356. Thus, it is clear to the Court, as it was to

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[38] The Court recognizes that Trozzi vehemently disagreed with Grimm's finding that the alleged violation was due to the company's unwarrantable failure. Trozzi stated:

> [T]here was just no condition that was apparent that would've been that obvious and extensive[,]
>
> that would make someone . . . jump out and say, gee, I need to do something about this. . . [I]t was very , very typical of the rest of the area as far as the rib sloughage and really, very typical as to a large part of the mine.

Tr. 665-666.

Trozzi was not a dissembler, but the Court concludes that Trozzi's belief that there was nothing that would "jump out" at an observer, rather than indicate the lack of a hazard, suggests that the condition of the ribs was so reflective of rib conditions in general in the construction area that representatives of the company were inured to the hazards the ribs posed and could no longer recognize a hazardous violation when one stared them in the face.

Grimm, that the hazard was ongoing. The dinner hole had to be preshift examined prior to that work and it had to be on-shift examined when the work took place. There is no indication in the record that the visually obvious conditions were noted by the examiners, reports that would have given notice to Consol of the existence of the conditions.[39] Further, as the Court has found above, the violation was reasonably likely to cause a reasonably serious injury, even a fatality (the high degree of danger posed by the violation). For these reasons the Court concludes Grimm was correct when he found that Consol unwarrantably failed to comply with section 75.202(a).[40] Neither Grimm nor the Court made findings regarding all of the factors set forth by the Commission in *Consol* and *IO*, *supra*, but the Court does not read those cases as requiring findings on all six factors to validate an unwarrantable failure finding.

Moreover, although Grimm initially found Consol to be highly negligent, on reflection he concluded the company recklessly disregarded its duty to comply with the standard. Tr. 98. The

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[39] Of course, the missing examination book might (or might not) definitively answer whether an examiner noted the defective ribs, and the Secretary argued repeatedly and at great length that the Court should draw adverse inferences against Consol from the fact that the pre-shift and on-shift records (and Wolfe's photographs and notes) went missing. The Secretary also argued that if the Court declined to draw the inferences, the Court should nonetheless sanction Consol by striking the testimony of Wolfe and Weiss concerning the appearance of the cited conditions on June 22. *See* Sec.'s Reply Br. 48 - 65. The Court declines to do either. Findings can be made and conclusions can be drawn resolving all issues based on the record as it stands without the inferences or sanctions argued for by the Secretary, and the Court is mindful that above all, restraint and at least a token amount of humility are called for. The essence of restraint is only to make findings and draw conclusions that are necessary to decide a case. The essence of humility is to recognize that like a physician, whenever possible, the Court should, "First, do no harm." Drawing adverse inferences and imposing sanctions can be precarious and potentially hurtful actions. They are especially worthy of caution when they involve assumptions of illicit motivation, assumptions that, given the limits of human intuition and the complexities of human causation, easily may be wrong but that once published never can be fully recalled. And this is all the more true where, as here, the witnesses' testimony regarding the missing documents and photographs has the color of credibility.

[40] In reaching this conclusion, the Court has not overlooked the fact the company's history of rib related violations prior to June 22 was a good one. In the two years prior to June 22, 2010, only 13 "rib-related"violations appear to have been issued at the mine and only one of those was charged in a section 104(d) order and for a condition that was "relatively the same" as that cited on June 22, 2010. Tr. 100. 107-108. The Court recognizes, as acknowledged by Grimm, that of all violations occurring at the mine, the percentage of violations of section 75.202(a) was below the national average. Tr. 165-166. While commendable, this history does not change the Court's conclusion that the violation cited on June 22 was the result of the company's unwarrantable failure. A litany of prior violations of a standard at issue is but one factor to be considered when determining unwarrantable failure. *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012); *San Juan Coal Co.,* 29 FMSHRC 125. 131 (Mar. 2007). In addition, the particular history of violating a standard and the overall history of all violations is, of course, fully taken into account when a penalty is assessed.

evidence supports Grimm's latter conclusion. There is ample basis in the record to find that Consol "exhibit[ed] the absence of the slightest degree of care." *Aracoma Coal Co., Inc.* 32 FMSHRC 1639 (Dec. 2010). There is nothing indicating that the company made any meaningful effort to prevent and/or correct the specific conditions Grimm found in the dinner hole. The very fact that company management chose to make the area a dinner hole required the company to meet a high standard of care. As Consol officials well knew, by so designating the area and by placing a picnic table in the area they extended an open invitation to miners to gather and linger. Moreover, by placing supplies adjacent to the ribs, the company required some who worked in the area to do so in close proximity to the ribs. Management also knew, or should have known, that cardboard pads were located in the area, some very close to the ribs, and that the miners were using them as places to sit and to lie. Further, as Grimm made clear, the company should have recognized it had a problem with effective rib control. The soft nature of the coal, the rising humidity in June, the two relatively recent fall-related accidents, the reminders of the need for heightened awareness of rib conditions delivered by the government through the agency's PROP Initiative and its Rules to Live By messages should have raised Consol's awareness and prompted heightened compliance efforts. They did not. Although in the daily section safety meetings referred to by DeVault, miners were presumably generally reminded about the need to adequately support the roof and ribs of working sections and although the subject was part of the company's general program of instruction, the cited conditions belie the effectiveness of the programs and there is no evidence that the company went beyond general reminders to heighten the awareness of its miners and supervisors of the necessity of adequate rib control. Tr. 446-447. The company also knew the area's ribs sloughed and sloughage was an ongoing event. As the Court found, the evidence supports the conclusion that the ribs were in violation of the standard before Grimm's inspection. The area was, or should have been, preshift and on shift examined and the condition of the ribs should have been noted, reported and addressed These things did not happen. In fact, with regard to correcting the condition of the ribs, nothing happened. The only conclusion the Court can reach is that Consol exhibited a complete absence of care and recklessly disregarded its duty to comply with the standard.

CITATION NO.	**DATE**	**30 CFR**
8025516	**7/21/2010**	**§75.220(a)(1)**

The citation states:

> The operator failed to follow page 4a, paragraph 4, of the mine['s] approved roof control plan requiring [that] areas where crosscuts will be turned will be identified with flagging to warn workers of rib areas not rib bolted on initial mining. The left inby and outby corners of the #2 entry, 8 block intersection on the 14 W longwall set up section, MMU 064-0, which were previously mined are not flagged to warn miners of unbolted mine ribs.
>
> This standard has been cited 30 times in two years at this mine.
>
> Gov't Exh. 23.

Inspector Grimm issued Citation No. 8025516 on July 21, 2010. Tr. 227-228. Gov. Exh. 23. On that date he was inspecting the No. 14W area of the mine, an area where the company was "driving the back end of the bleeders . . . to set up [the] longwall."[41] Tr. 229. Grimm was accompanied by the company's representative, Stanley Apanawicz, and by the miners' representative, Eric Greathouse. *Id.* In the No. 2 entry of Eight Block, Grimm saw an intersection where he believed the left inby corner and the left outby corner were not rib bolted as required by the mine's approved roof control plan. *Id.*; *See* Gov't Exh. 27. Grimm noted that on May 26, 2010, an addendum titled "Rib Bolting Plan for Continuous Miners" was added to the plan. Paragraph 4 of the addendum states in pertinent part:

> Areas where crosscuts will be turned will be identified with flagging to warn workers of rib areas not rib bolted on initial mining. Any area[s] not rib bolted on initial mining, such as areas where crosscuts are mined through or where the distance inby or outby are not within standard cycle of every other roof strap will be bolted when the miner rib bolter or other rib bolter can be utilized . . . .
>
> Gov't Exh. 20 at 4a; *see* Tr. 232-233.[42]

Grimm identified a map of the general area in which the alleged violation was cited. Gov't Exh. 27; Tr. 230. Grimm circled the area where he found the alleged violation. *Id.* He explained that in the No. 2 Entry, "The left inby corner . . . [of the circled intersection] was not completely rib bolted according to the rib bolting plan." Tr. 231. When asked in what way the rib bolting plan was violated, Grimm replied, "The inby and outby corners were not flagged or rib bolted at that intersection." Tr. 235. As he recalled, 15 feet of the left inby corner and 17 feet of the left outby corner were not rib bolted or flagged. *Id.* Grimm depicted the area in his notes. Gov't Exh. 24 at 3 (page 8); Tr. 235-236. Grimm acknowledged the rib bolting plan stated that, "Any area not bolted on initial mining . . . will be bolted when the [continuous] miner rib bolter . . . can be utilized." Gov't Exh. 20 at 4(a); Tr. 236. When asked how he knew that the continuous miner rib bolter could have been utilized, Grimm responded, "Everything else on the section had been rib bolted. Everything that was required to be rib bolted was rib bolted and

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[41] The word "bleeders" is used as shorthand for the term "bleeder entries," which are defined as:

> [P]anel entries driven on a perimeter of a block of coal being mined and maintained as exhaust airways to remove methane promptly from the working [face] to prevent the build up of high concentrations either at the face or in the main intake airways. They are maintained, after mining is completed, in preference to sealing the completed workings.

DMMRT at 55.

[42] Grimm speculated that Consol added the addendum because of the two prior rib fall accidents noted above. Tr. 291.

they were mining inby that point, and that area had been center bolted." Tr. 236. He explained that, "The area was mined with a full-face miner utilizing roof straps. And once they mine an area and leave that entry or that cycle, they have 72 production hours to rib bolt."[43] Tr. 237. He added that the section foreman told him the area had been mined approximately two weeks before Grimm's visit. Tr. 236-237; *see* Gov't Exh. 24 at 3 (page 9). The fact that the No. 2 Entry had been center bolted meant to Grimm that, "The roof bolting machine traveled past the cited area." Tr. 238. The No. 1, No. 2, and No. 3 entries had been rib bolted in their entirety including crosscuts, but in bolting the entries, the company simply missed the subject intersection. Tr. 239.

Grimm acknowledged that the rib bolting plan specifically excluded some areas from its requirements, including "longwall setup entries." Tr. 243; *See also* Tr. 262; Gov't Exh. 20 at 4a. He described the longwall setup entry as "the entry that is driven at the back of a panel in order for . . . the operator to set up the longwall mining machine, the shearer, the shields, headgate drive, tailgate drive. That's where the initial mining starts to retreat out of that section." Tr. 243. He described the term "longwall setup entry" as a "common" term that is is used to describe one entry of a longwall setup section. Tr. 244. Grimm identified an MSHA document entitled *Longwall Mining*, which lists and defines many terms. Tr. 245; Gov't Exh. 28. In the document, the term "setup entry" is defined as an "[e]ntry developed for purpose of assembling the longwall equipment. This setup entry will become the longwall face after equipment is assembled and ready to operate." Gov't Exh. 28 at 11. He further identified a publication authored by West Virginia University professors Syd S. Peng & H.S. Chaing entitled *Longwall Mining*. Tr. 249; Gov't Exh. 68. In describing longwall panel layouts, the professors state: "Longwall mining begins at the setup room or entry, SR, where all of the face equipment is set up." Gov't Exh. 68 at 12-13; Tr. 253. Grimm maintained that the authors' definition of a "set up room" corresponds to his understanding of what constitutes a "setup entry." Tr. 253.

With regard to Citation No. 8025516, Grimm pointed out that although the longwall setup section included the No. 1, No. 2, No. 3 and No. 4 Entries of the area he cited (*see* Gov't Exh. 27), the plan does not exclude the entire setup section; rather it excludes the longwall setup entry. Tr. 256. The longwall set up entry is excluded because after the entry is driven, it has to be widened by about four feet in order to accommodate the shearer, the panline, the headgate drive, the tailgate drive and the shields. Tr. 257. If the entry is rib bolted after it is driven, the bolts have to be cut out when it is widened. *Id.* Referring to the map of the cited area (Gov't Exh. 27), Grimm maintained that Entry No. 4 was the longwall setup entry, not Entry No. 2. *Id.* Therefore, Entry No. 2 and the cited intersection were not excluded from the requirements of the addendum.

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[43] Grimm used the term "rib bolt" but stated that he had meant to say "center bolt." In other words, he meant to say that the company had "72 hours to install a center bolt, which they do with a rib center bolting machine, which is capable of putting rib bolts in also." Tr. 237. He described a center bolting machine as "a roof bolting machine . . . capable of putting either bolts in the mine roof or mine ribs." Tr. 238. Grimm did not identify the basis for his belief that Consol had 72 production hours to install the required bolts, but the Court assumed at the time and continues to assume that Grimm was referring to a requirement of the mine's approved roof and rib bolting plan.

Robert Trozzi disagreed. He maintained that the cited ribs were in a longwall setup entry and that they did not need to be rib bolted. Tr. 707; Gov't Exh. 20 at 4a. Trozzi acknowledged, however, that if the exclusion for the longwall setup entry was not in the rib bolting plan, the missing rib bolts at the intersection would constitute a violation of the plan. Tr. 708.

Because the ribs were in good condition, Grimm did not believe that the alleged violation was S&S. Tr. 273. Nonetheless, in his opinion the condition had existed for at least two weeks and the preshift examiners should have noticed and reported it. Tr. 274. Grimm found that the alleged violation was the result of the company's high negligence. When asked to explain why, Grimm stated that he based his finding on:

> [T]he fact that [MSHA inspectors] were continually issuing citations on ribs, on the rib bolting plan, the accidents that were recent, the length of time that [the cited condition] existed and the operator's failure to act and also it's a Rules to Live By standard. . . . [Further,] we were going over the PROP [I]nitiative at that time. All [these] were pieces of the puzzle that just accumulated into . . . high negligence.
>
> Tr. 239-240.

Grimm recommended that the alleged violation be specially assessed because it was "one of the Rules to Live By standards" and Consol had been "made aware of the Rules to Live By campaign and the need for extra steps and vigilance . . . to provide for the safety of the miners." Tr. 277. When Grimm's recommendation for a special assessment was reviewed by his supervisor, the supervisor agreed. The supervisor believed that Consol demonstrated a "high degree of negligence" based on "repetitive violations" of section 75.220(a)(1).[44] Tr. 279, 281.

THE VIOLATION

Section 75.220(a) requires the operator of an underground coal mine to develop a roof and rib control plan. The intent is to afford comprehensive protection against roof and rib collapse, a leading cause of injuries and deaths in the nation's underground coal mines. *See UMWA v. Dole,* 870 F.2d 662, 669 (D.C. Cir. 1989)). The standard's aim is to create a plan through a collaborative approval and adoptive process with provisions understood by both the Secretary and the operator. Moreover, "[A]fter a plan has been implemented (. . . gone through the adoption/approval process) it should not be presumed lightly that terms in the plan do not have an agreed upon meaning." *Jim Walter Resources, Inc.*. 9 FMSHRC 903, 907 (May 1987) (quoting *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). In order to prove a violation of a mine plan provision, the Secretary, "must first establish that the provision

[44] Counsel for the Secretary advised the Court that if the alleged violation had not been specially assessed, a penalty of $687 would have been proposed. The special assessment amount was $1,900, almost three times as much. Tr. 280-281.

allegedly violated is part of the approved and adopted plan. *Jim Walter*, 9 FMSHRC at 907 . . . . [He] must then prove that the cited condition or practice violated the provision." *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1280 (Dec. 1998).

Much testimony was offered regarding the alleged violation, a substantial amount of which the Court found confusing and/or not on point. None the less, the issues are clear to the Court. The citation states that Consol, "failed to follow . . . page 4a, paragraph 4, of the mine[s] approved roof control plan requiring [that] areas where crosscuts will be turned will be identified with flagging to warn workers of rib areas not rib bolted on initial mining." Gov't Exh. 23. As previously noted, paragraph 4 of the mine's "Rib Bolting Plan for Continuous Miners" was approved by MSHA as an addendum to the mine's roof control plan. Gov't Exh. 20 at 4a; *see* Tr. 232-233. Once adopted by Consol and approved by the Secretary, the company was required to comply with the addendum. The question is whether the Secretary proved the company violated the plan as the Secretary charged.

To reiterate, Paragraph 4 states:

> Area[s] where crosscuts will be turned will be identified with flagging to warn workers of rib areas not rib bolted on initial mining. Any area[s] not rib bolted on initial mining, such as areas where cross cuts are mined through or [where] the distance inby or outby are not within standard cycle of every other roof strap will be bolted when the miner rib bolter or other rib bolter can be utilized. ([A]s noted in #1 statement.)[.]
>
> Gov't Exh. 20 at 4a.

The citation alleges that, "The left inby and outby corners of the #2 entry, 8 block intersection on the 14 W longwall set up section, . . . which were previously mined are not flagged to warn miners of unbolted mine ribs." Gov't Exh. 23. The citation clearly and specifically charges that the provision of the plan that Consol failed to follow is the first sentence of paragraph 4: "Areas where crosscuts will be turned will be identified with flagging to warn workers of rib areas not rib bolted on initial mining." It is undisputed that there was no flagging in the cited area. It also is undisputed that the left inby and outby corners of the No. 2 entry were not rib bolted. The existence of the violation as described in the body of the citation thus turns on whether or not the Secretary established the cited corners were in an area "where crosscuts will be turned." *Id.* He did not. The weight of the testimony is that in the cited area there was no crosscut to be turned. A review of Grimm's testimony fails to reveal one instance in which he maintained there was such a crosscut. Nor did any other of the Secretary's witnesses testify the cited ribs were located "where [a crosscut] will be turned." Gov't Exh. 20 at 4a. But this does not end the matter.

Although the body of the citation does not describe a violation of the second sentence of paragraph 4, Grimm did through his testimony. He stated that among the reasons he issued the citation was the fact that the inby and outby cited corners were not "rib bolted at [the subject] intersection." Tr. 235. In Grimm's opinion, the company simply neglected to properly place the

missing bolts when it initially bolted the ribs. Grimm recognized paragraph 4 did not specify a specific time when the company had to come back and install the missing bolts, but Grimm maintained that the condition existed for at least two weeks and during that time the company could have come back and corrected its initial error. He noted that the company rib bolted all of the other ribs required to be bolted on the section and that it was mining inby the cited corner. Tr. 236, 239.

Consol did not object to Grimm's testimonial expansion of the alleged violation, and far from claiming it was prejudiced by the allegation, the company responded with its own testimonial evidence. Nieman acknowledged the cited corners had to be rib bolted (Tr. 396) and Trozzi esentially agreed. Tr. 708. Therefore, the Court concludes that although the issue of whether Consol violated the second sentence of paragraph 4 was not charged in the body of the citation, it was admitted as an issue during the trial, and it is before the Court.

The Court finds that Grimm was right when he maintained that during the time between when the ribs were initially bolted and the citation was issued, the company should have installed the missing bolts. Grimm persuasively testified that the center bolter passed the area once and maybe twice. Tr. 303. The company could have and should have installed the missing bolts using the center bolter. Tr. 303. Neiman agreed. Tr. 387. Once left unbolted, the addendum required the cited ribs to be bolted within a reasonable time. By failing to bolt the ribs when it had the opportunity to do so, Consol violated the second sentence of paragraph 4 of the addendum and therefore violated section 75.220(a)(1).[45]

GRAVITY

Even though bolts were missing on both sides of the entry, the ribs in the cited area were in good condition. Tr. 273. 333. Grimm did not think that the violation was serious (Gov't Exh. 23), and the Court agrees. *See also* Jnt. Exh 1, Stip. 20.

NEGLIGENCE

Grimm found that the violation was due to Consol's high negligence. Gov't Exh. 23. Grimm testified that he made the finding based on several factors. He stated that he considered

[45] The Court rejects any suggestion that compliance with the rib bolting plan was not required at the cited intersection because the No. 2 Entry was a "longwall setup entry" and therefore was specifically excluded from the requirements of the addendum by paragraph 1.C. ("The following areas are not included in this plan; longwall setup entries . . . unless conditions warrant rib bolting at the time of initial mining." Gov't Exh. 20 at 4a.) The Court accepts Grimm's sensible explanation that a longwall setup entry is the entry in which the longwall equipment is assembled (Tr. 256-257) and that such an entry is excluded because if it is required to be rib bolted, the bolts subsequently have to be cut out. Tr. 257. In the situation at hand, while the No. 2 Entry may have been part of the longwall setup section (*i.e.* the section on which the longwall was assembled), it was not the entry in which the longwall was assembled, and ribs in the No. 2 Entry were not excluded by the plan. *See* Tr. 256.

the two prior rib fall accidents, the fact that the violation existed for up to two weeks, and the fact that Consol knew MSHA was highlighting the need for enhanced rib control though its Rules to Live By and PROP Initiative. Tr. 239-240. While Grimm was correct in considering these factors, the Court finds that he also should have considered two significant mitigating circumstances. First, the extent of the violation was very limited. It was restricted to the ribs at the corners of one intersection in one entry. There were many other intersections and entries on the section and all of them were properly bolted. Second, the cited ribs were in good condition. Tr. 273-274. There was nothing about their condition to call out to a pre-shift and on-shift examiner that they might harbor a violation. Tr. 274. Thus, while there is no doubt the missing bolts should have been detected and installed, the conditions under which they were missing did not make their lack especially noticeable to mine management personnel or management's agents who traveled and examined the area. In other words, the missing bolts were very easy to miss. The Court concludes that Consol's negligence was moderate.

CITATION NO.	**DATE**	**30 CFR**
8025562	**7/26/2010**	**§75.220(a)(1)**

The citation states:

> The operator failed to follow page 4(a), of the mine[']s approved roof control plan requiring areas where crosscuts will be turned [to] be identified with flagging to warn workers of rib areas not rib bolted on initial mining. The solid side rib of 45 block, #3 entry of the 17 W section, MMU 068-0, is not rib bolted or flagged for a measured distance of 19 feet. This condition has been cited 3 times within 7 days at this mine. Future violations of this condition may be looked at with a higher degree of negligence.
>
> This standard was cited 31 times in two years at this mine.
>
> Gov't Exh. 29.

Grimm testified that on July 26, 2010, he returned to the mine to survey the level of noise on the 17W section. Tr. 294. When he went underground he was accompanied by the company representative, Douglas Moyer, and the miners' representative, Hugh Nieman.[46] *Id.*

During the inspection Grimm issued Citation No. 8025562. Tr. 295; Gov't Exh. 29. He did so because he saw that a rib in the No. 3 entry on the 17W Section was not rib bolted for 19

[46] Neiman started working at the mine in 1981. Tr. 379. He estimated that he had about 20 years of experience setting up longwalls. Tr. 383. Nieman also worked as a roof and rib bolter, and at the time of the inspection, Neiman was working as a timberer building cribs and carrying out other tasks involving roof support. TR. 380

feet and the rib was not flagged. Tr. 295. Grimm described the cited area as a face area when it was driven. Tr. 300. As such, the area could not be accessed by the rib bolting mechanism on the continuous mining machine. Tr. 300-301. Therefore, after the continuous mining machine "pull[ed] out" leaving the area unbolted, the area "need[ed] to be flagged and then it need[ed] to be bolted with the center bolting machine." Tr. 301. Grimm believed the operators of the center rib bolting machine had "a couple of different opportunities to install . . . [bolts in the area] over a . . . lengthy period of time" but failed to do so. Tr. 302; *see also* Tr. 303. In addition, Grimm maintained that after mining progressed on the section, it became possible for the continuous mining machine to return and rib bolt the area. Grimm contended the machine actually passed the area once, but did not install the missing bolt. Tr. 304.

Grimm found that in failing to bolt the rib, the company exhibited "high" negligence. Gov't Exh. 29, Tr. 296-298. Although the rib was unbolted for only 19 feet, Grimm did not find that the company's negligence was mitigated. Tr. 296-298.

> It's not a large area. However . . . with the accidents, with the PROP Initiative, with the safety talks, with the violations and talking to the operator, doing everything that I could get done, they were not taking it seriously.
>
> Tr. 305-306.

Moyer, the company safety escort who traveled with Grimm, described the cited area as a "solid wall . . . [that] looked like . . . [it] was missing rib bolts." [47] Tr. 733. Nieman, the miners' representative, also noted the missing bolt. There was, he stated, "an area of rib that wasn't supported for . . .I think . . . 19 feet, no flagging and it was just . . . a violation." Tr. 386. *see also* Tr. 738. Although the condition was abated by flagging, Moyer stated that "per the plan . . . we probably should've abated it with a bolt." *Id.* Moyer noted that flagging was not needed in the area because, "It's just a solid face." Tr. 735.

Moyer did not recall speaking with Grimm about the plan's rib bolting and flagging requirements. Tr. 735-736. Nor did he know how long the rib bolt was missing. Tr. 737. However, the parties stipulated the cited area was mined on July 16, 2010. Stip. 18. Grimm noted the period of time that had passed since the entry was mined. Tr. 304-305. He testified that if the mine had been working on its typical six days a week schedule, the cited area would have been subject to approximately 18 pre-shift/on-shift examinations before Grimm's inspection. Tr. 305. Nieman believed the area was subject to even more scrutiny. He testified, "[A] fire boss goes there every two hours, so . . . in 10 days, you had a qualified person walk by there at least 100 times and no effort was made to either flag it or bolt it."[48] Tr. 386.

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[47] Moyer used the plural, "bolts," but later confirmed that only one rib bolt was missing. Tr. 734.

[48] Robert Trozzi had another view. He testified that after the area was mined and before the citation was issued, the area would have been subject to a total of approximately 30 pre-shift and on-shift examinations. Stip.18; *see also* Tr. 718, 720. Moreover, Trozzi observed that when the citation was issued, pre-shift and on-shift examiners were required to look for "hazardous"

Grimm recommended that the alleged violation be specially assessed because he "could not get it through to [Consol] how important it was that they comply with the rib control plan . . . . It just was not happening. I had to continually use whatever tools I could to get them to come into compliance. . . . I upped the negligence. I did as much as I could." Tr. 315-316. He added, "I had to do whatever I had to do to ensure the safety of the miners, and to pull out all of the stops other than issuing each [alleged violation] as a [section 104] (d)(2) order and it was getting close to having to do that."[49] Tr. 316. However, echoing Trozzi, Grimm agreed that although the area in which the condition existed would have been preshift and onshift examined, the examiners would have been looking for hazardous conditions and the cited condition was not dangerous. Tr. 328. Nonetheless, the fact that the rib bolting plan recently was added to the roof control plan meant to Grimm that the rib bolting plan "should have been fresh on everyone's [mind.]" Tr. 306. He added, "when something's added to the roof control plan, prior to being implemented, that part of the plan has to be gone over by everyone associated with either making examinations or working with that plan, including . . . anybody installing the rib bolts[.]" *Id.*

THE VIOLATION

The parties stipulated that the violation of section 75.220(a)(1) occurred as charged. Stip. 14.

GRAVITY

Grimm found that the violation was not S&S and that it was unlikely that an accident resulting in lost workdays or restricted duty would occur as a result of the missing bolt. Gov't Exh. 29. Grimm explained that it was not reasonably likely the rib would have deteriorated and fallen because "at the time of the inspection the rib was solid. It did not show any deterioration." Tr. 333. In fact, Grimm agreed that the cited condition was so devoid of danger that it was "probably not a hazard." Tr. 328. The Court finds that the violation was not serious.

NEGLIGENCE

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conditions, and he suggested a "non-S&S citation on a rib" would not be a hazard and therefore might not be noted during an examination. Tr. 719.

[49] Grimm's testimony reflected a statement he wrote on MSHA's Special Assessment Review Form, to wit:

> This violation is one of the rules to live by standards. The operator has been made aware of the rules to live by campaign and the need for heightened awareness to comply on their behalf to provide for the safety of the miners. This condition has been cited 3 times in 7 days at this mine and a conference was held with mine management on 7-[22]-2010 concerning this practice.

Exh. R-19.

Grimm's finding that the violation was due to Consol's high negligence cannot be sustained. The Secretary defines "high negligence" as, "The operator knew or should have known of the violative condition . . . and there are no mitigating circumstances." 30 C.F.R. § 100.3. In the Court's opinion the record establishes a "mitigating circumstance," one that has been recognized over and over. For example, the Commisison's Chief Judge, Robert Lesnick, has quoted two well known commentators as stating: "The amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater the actor is required to exercise caution commensurate with it." W. Page Keeton, *et al*, *Prosser and Keeton on the Law of Torts* § 34 at 205 (5th ed. 1084) (*quoted in PBS Coals, Inc.*, 30 FMSHRC 1087, 1093 (Nov. 2008)). Here, where one rib bolt was missing in a solid rib that showed no sign of deterioration (Tr. 333), the duty of care was lower than it would have been had more bolts been missing and/or had the rib shown signs of failing. In the Court's view, the minimal gravity of the violation – and the Court again notes Grimm's agreement that the cited condition "[p]robably was not" a hazard (Tr. 328) – constituted a significant mitigating circumstance that lessened Consol's duty of care. Therefore, under the Secretary's own definition of "high" negligence, Consol's failure to note and correct the single missing bolt did not rise to that level. 30 C.F.R. § 100.3.

The Court finds that the company exhibited moderate negligence. In making this finding the Court recognizes that the area in which the violation existed was visited by agents of the operator on numerous occasions and that despite this, the missing bolt was not detected and installed. The Court also recognizes that the company had been warned by the inspector that it "didn't have forever to bolt [the ribs] in . . . places" like the one cited. Tr. 315. Moreover, the Court is cognizant of the fact that the violation was cited against a backdrop of two recent rib fall accidents at the mine and heightened emphasis by MSHA on the need for compliance with the dictates of the roof control plan as it related to the ribs. But even given these factors, the Court cannot divorce its finding from the particular facts of the violation and when, as here, those facts unquestionable establish that the violation was of a minimally hazardous nature, the Court cannot conclude that Consol's duty of care was unmitigated and high.

REMAINING CIVIL PENALTY CRITERIA

SIZE OF THE OPERATOR

Neither party disputes that Exhibit A of the Secretary's Proposed Assessment form indicates that the Blacksville No. 2 Mine is a large mine and Consol is a large operator. Gov't Exh. 3, Exh. A; *see* 30 C.F.R. §100.3((b).

HISTORY OF PREVIOUS VIOLATIONS

Although the parties stipulate that the "Secretary's Assessed Violation History Reports are authentic, and accurately reflect the history of violations at [the mine] during the time period that Consol operated . . . [the mine.]" (Stip. 9), beyond the stipulation the situation with regard to the company's applicable history of previous violations is murky.

Concerning the violation of section 75.202(a) set forth in Order No 8025378, the Secretary argues that Consol "was assessed 705 violations over 1,174 inspection days." Sec. Br. 79. The Secretary refers the Court to Exhibit A of his Petition for Assessment of Civil Penalty. *Id.* Exhibit A is Part of Government Exhibit 3. Exhibit A indeed indicates that in the 15 months prior to June 22, 2010, there were 705 assessed violations that had been paid, finally adjudicated or otherwise had become final orders at the mine and that they were cited during 1174 inspection days over the same period. *See* Gov't Exh. 3, Exh. A. The Secretary also asserts that "[o]f those violations, 19 were repeat violations of [section] 75.202(a)." Sec. Br. 79. The Secretary further states that this "significant [number] of repeat violations [counsels] in favor of the Secretary's proposed penalty assessment." Sec. Br. 80. Exhibit A is not helpful in affirming the Secretary's allegations with regard to the alleged repeat violations. It states "Special Assessment - See attached Narrative." Gov't Exh. 3, Exh. A. The Narrative, however, says nothing about "repeat violations." The Secretary offers no citation for his assertion that the company had 19 repeat violations of section 75.202(a) in the 15 months between March 22, 2009 and June 22, 2010. However, the parties stipulated that the violation history reports (Gov't Exh. 4, 5 and 6) are accurate. When the Court reviews the reports it finds that Government Exhibit 6, the last dated report, showed 21 violations of section 75.202(a) that occurred at the mine between March 22, 2009 and June 22, 2010. As best as the Court can determine, this represents a small, not large, number of repeat violations of section 75.202(a). 30 C.F.R. §100.3(c)(2). Based on these documents and on the Secretary's penalty regulations as set forth in 30 C.F.R. § 100.3(a), the Court finds that Consol has a large overall history of previous violations and a small history of repeat violations of section 75.202(a). 30 C.F.R. 100.3(c)(1); 30 C.F.R. §100.3(c)(2).

With regard to the previous history concerning Citation No. 8025516 cited on July 21, 2010, Exhibit A indicates that 687 violations were cited at the mine over 1163 inspection days in the 15 months between April 21, 2010 and July 21, 2010 and Government Exhibit 7 indicates that during the same period of time there were 16 final violations of section 75.220(a) cited between April 21, 2009 and July 21, 2010. Gov't Exh. 3 at 5 (Exh. A);Gov't Exh. 7. Based on the Secretary's regulations the Court concludes this represents a large overall history of previous violations and a small history of repeat violations of section 75.220(a).

Finally, with regard to the previous history concerning Citation No. 8025562 cited on July 26, 2010, Exhibit A indicates that 670 violations were cited at the mine over 1160 inspection days between April 26, 2009 and April 26, 2010, and Government Exhibit 7 indicates that during the same period of time there were 15 final violations of section 75.220(a) cited. Gov't Exh. 3 at 5 (Exh. A); Gov't Exh. 7. Based on the Secretary's regulations, the Court concludes this represents a large history of previous violations and a small history of repeat violations of section 75.220(a). 30 C.F.R. §§100.3(c)(1), 100.3(c)(2).[50]

GOOD FAITH ABATEMENT

[50] In addition, the Court notes that counsel for Consol established though questioning Inspector Grimm that with regard to the violation of section 75.220(a) cited in Citation No. 8025562, the frequency with which the standard was cited at the mine was below the national average. Tr. 279-280.

The parties stipulated that Consol demonstrated good faith in abatement of the alleged violations, and the Court so finds. Stip. 8.

ABILITY TO CONTINUE IN BUSINESS

The parties stipulated that Consol's payment of the total proposed civil penalty would not affect the company's ability to remain in business. Stip. 10. Given that the total payment of the civil penalty the Court will assess is less than that proposed, the Court concludes that the total payment will not affect the company's ability to continue in business.

PENALTY ASSESSMENTS

ORDER NO.	DATE	30 CFR	PROPOSED ASSESSMENT
8025378	**6/22/2010**	**§75.202(a)**	**$50,700**

The Court has found that the violation was S&S and very serious. It further has found that the violation was due to the company's unwarrantable failure to comply with the standard and that it recklessly disregarded its duty to comply with the standard. These findings, as well as Consol's large size and the fact that the penalty assessed will not affect its ability to continue in business, lend support to the Secretary's proposed assessment. However, the Court also has found that while Consol's overall history of previous violations is large, its repeat violations of section 75.202(a) is small, a factor that in the Court's view warrants a slight reduction of the Secretary's proposed assessment. Accordingly, the Court concludes that a civil penalty of $47,700 is appropriate.[51]

CITATION NO.	DATE	30 CFR	PROPOSED ASSESSMENT
8025516	**7/21/2010**	**§75.220(a)(1)**	**$1,900**

The Court has found that the violation was not serious. It further has found that the violation was due to the company's moderate negligence. The fact that the violation was not serious, that Consol is large in size, that it will not be affected by the penalty assessed and the fact that the mine has a large overall history of previous violations all lend support to the Secretary's proposed assessment. However, the fact that the company's negligence was moderate and the fact that the company has a small history of repeat violations of section 75.220(a)(1) warrant a reduction in the Secretary's proposed assessment. Accordingly, the Court concludes that a civil penalty of $800.00 is appropriate.[52]

CITATION NO.	DATE	30 CFR	PROPOSED ASSESSMENT
8025562	**7/26/2010**	**§75.220(a)(1)**	**$1,900**

[51] The Court views the fact that Consol demonstrated good faith in abating the violation as a neutral factor warranting neither an increase nor a decrease in the assessed penalty.

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The Court has found that the violation was not serious. It further has found that the violation was due to the company's moderate negligence. The fact that the violation was not serious, that Consol is large in size, that it will not be affected by the penalty assessed and the fact that the mine has a large overall history of previous violations all lend support to the Secretary's proposed assessment. However, the fact that the company's negligence was moderate and the fact that the company has a small history of repeat violations of section 75.220(a)(1) warrant a reduction in the Secretary's proposed assessment. Accordingly, the Court concludes that a civil penalty of $800.00 is appropriate.[53]

ORDER

Within 40 days of the date of this decision, Consolidation Coal Company **SHALL PAY** a total civil penalty of $49,300, and upon payment of the penalty this proceeding **IS DISMISSED**. [54]

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

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[53] The Court views the fact that Consol demonstrated good faith in abating the violation as a neutral factor warranting neither an increase nor a decrease in the assessed penalty.

[54] Payment shall be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.