FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 27, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2007-335
Petitioner	:	A.C. No. 46-01456-111046
v.	:	
	:	
EASTERN ASSOCIATED COAL CORP.,	:	
Respondent	:	Federal No. 2

DECISION

Appearances: John M. Strawn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), alleging violations by Eastern Associated Coal Corporation ("Eastern") of various mandatory standards set forth in Title 30 of the Code of Federal Regulations.

On July 17, 2006, MSHA Inspector Jason Rinehart inspected Eastern's Federal No. 2 Mine, an underground coal mine. He observed seven areas of unsupported roof in the 7 Right empty track and issued Order No. 6602108 under Section 104(d)(2) of the Federal Mine Safety and Health Act of 1977 ("The Act"), alleging a violation of 30 C.F.R. § 75.202(a).

On October 4, 2006, MSHA Inspector David Severini observed accumulations of loose coal and float coal dust while inspecting a belt entry near the longwall face. These conditions had not been noted in the pre-shift examination record book. Severini issued Order No. 6603046 under Section 104(d)(1) of the Act, alleging a violation of 30 C.F.R. § 75.360(a)(1).

On July 9 and 10, 2008, a hearing was held on this matter in Washington, Pennsylvania.[1] Subsequent to the hearing, the parties each filed proposed findings of fact and a brief.

I. Order No. 6602108

A. Introduction

The 7 Right empty track is a track entry with two rails running down the center of the entry. One side of the entry ("the wire side"), between the rails and left rib facing inby, contains an overhead trolley wire that supplies power to vehicles traveling on the rails. The other side of the entry between the rails and the right rib facing inby is used as a walkway for foot traffic ("the walk side" or "walkway"). The track is approximately 7,000 feet long and is utilized to store unused coal cars.

The roof in the entry, which has been in existence for over thirty years, is supported by a series of roof bolts located generally in the center of the entry, and straps located between the bolts. After the initial bolting when the entry was developed, additional bolts, post, and cribs were installed in the area.

B. Findings of Fact and Discussion

1. The Secretary's Case

According to Rinehart, when he made his inspection on July 17, 2006, the roof and ribs had deteriorated at seven[2] locations in the entry, and the roof was not adequately supported.

Rinehart observed that in an area[3] that extended fifteen feet parallel to the last row of bolts, there were not any bolts or other means of roof support for a seven foot distance between the bolts and the wire side rib. According to Rinehart, a hazard was created inasmuch as subsequent to the initial installation of roof bolts when the entry was first developed, the width of the entry and the distance between the last row of bolts parallel to the rails and the ribs had increased, due to rib sloughage. Rinehart opined that miners who worked or traveled on the wire side of the entry, such as examiners, pumpers, electricians and maintenance men, were exposed to falling rock from the roof. In addition, he alleged that falling material could bring down the

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[1] At the hearing, the parties filed a Motion for Decision and Order Approving Partial Settlement setting forth their agreement to settle nine of the eleven citations at issue. The Motion is granted for the reasons set forth below. (III, *infra*)

[2] He testified regarding his observations at six locations. The seventh location is set forth in the order as follows: "Between No 14 and No. 15 car marker, there is an area 7 feet by 7 feet not bolted. The roof has deteriorated and potted out." (Government Exhibit 1)

[3] The left rectifier area.

trolley wire and cause a fire or an ignition.

According to Rinehart, the ribs had sloughed off on the inby and outby corners of the intersection on the wire side at the No. 2 car marker.[4] The sloughage had also enlarged the width of the entry. Rinehart indicated that the roof had potted out between roof bolts, leaving an unsupported area eight to ten feet wide and more than sixteen feet long through the intersection. Rinehart observed objects on the floor under this portion of the roof. He opined that they had fallen from the roof, and were "nothing like a total roof falling," but were "softball, basketball size." (Tr. 39)

Rinehart indicated that an area of roof to the right of the cited area looking inby had begun to pot out. He opined that intersections are a "weak point" for support and are "typically an area where a roof would fall." (Tr. 52) According to Rinehart, as potting increases due to weathering of the roof between the bolts, the bolts will eventually lose their effectiveness as support. Also, material from the roof will fall down and could cause injury to miners in the area. He also opined that should the roof in the intersection "fall in," it could pull out some bolts, causing injury to persons outside the intersection. (Tr. 51)

Rinehart observed that at the No. 215 car marker, in an area six feet by twelve feet, coal had potted out between the existing roof bolts. He opined that if mining operations would continue, the roof would eventually fall out around the bolts, which would result in inadequate support, and someone in the area could suffer an injury.

According to Rinehart, at the No. 108-110 car marker, he observed a sixteen foot long area on each side of the last line of bolts where there was not any roof support in the seven foot wide distance between the ribs and the last row of bolts on both sides of the entry, i.e., the walkway and the wire side. He opined that a miner in the cited area could be hurt by falling roof material.

Rinehart indicated that at the No. 108-107 car marker, for a distance of twelve feet, the rib had sloughed off on the wire side. There was a seven foot distance between the last row of bolts and the rib line that was not supported. Thus, miners walking under this area of the wire side could have been injured by falling material.

According to Rinehart, at the No. 105 car marker on the walkway side, as a result of roof sloughage, the distance between the rib line and the last row of bolts in the entry had increased to seven feet. This condition extended for a linear distance of twelve feet. Accordingly, miners in that area could have been injured by a roof fall. Rinehart opined that when the roof pots out around a roof bolt, it eventually becomes loose and will no longer be tight against the roof. As a consequence, it will not be able to continue to compress various roof strata, resulting in decreased roof support.

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[4] Locations in the entry are designated by reference to a car marker number. The car markers are twenty-one feet apart.

As a result of his inspection, Rinehart issued an order under Section 104(d)(2) of the Act, alleging a violation of Section 75.202(a), which provides as follows: "[t]he 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."

2. The Respondent's Case

Daniel Edwin Kurry, Eastern's safety supervisor, was with Rinehart on the date of his inspection. He indicated that in addition to the number of bolts that were initially installed, posts have been set, and cribs have been built in the entry to provide additional support. Also, straps were provided between bolts located in the center of the entry above the track, which provide further compression of the roof. He opined that the entry has undergone "normal weathering" (Tr. 150), and there have not been any reportable roof falls in the entry. He testified that "to my knowledge" (Tr. 152), the roof in the entry is at its original height. He opined that this "tells him" that "roof stresses" or "pressure" on the roof is "very limited." (Tr. 152) In general, he indicated that he did not hear any sounds, or observe cracks or small pieces falling from the roof in the cited areas.

Kurry indicated that the maximum allowable distance from the last bolts to the rib is six feet. He opined that an increase of this distance in some areas to only seven feet is "not a distance that I feel will allow a roof fall to propagate into the supported area." (Tr. 156)

James Poe, who was a track boss in July 2006, indicated that fifteen bolts had been installed at the top end of the entry at issue on July 16, 2006. He examined the entry at the end of the midnight shift on July 17, 2006, prior to Rinehart's inspection. He traveled down the entry in an open jeep. He indicated that he did not see any cracks or "hooving" (sic.). (Tr. 185)

3. Discussion

a. Violation of Section 75.202(a)

In essence, it is Respondent's position that it was not in violation of Section 75.202(a) because of the following factors:

> The height of the roof in the Seven-Right empty track has remained at the same height since the original mining occurred in the 1970s, indicating little pressure on the roof.
>
> There was no visible evidence that the bolts in the cited areas were faulty or otherwise unsatisfactory.
>
> The 7 Right empty track was maintained by track bolting, posts, and cribs.
>
> There were steel straps, and possibly also wooden straps, installed between

> the original bolts that aided in the support of the bolts and the roof.
>
> Additional roof bolts have been installed throughout the length of the entry of the 7 Right empty track. Eastern has consistently installed supplemental support since the original mining as recently as the day before the subject inspection when fifteen roof bolts were installed.
>
> Mine personnel have not observed any evidence of stress in the roof or pillars, such as floor heave, changes in the roof height, or cracks.
>
> To the extent there has been any change in the distance between the last row of roof bolts to the rib, that change has been minimal.
>
> Even Inspector Rinehart agreed that some areas he cited had sufficient support:
>
> > At the No. 239 Car Marker, Inspector Rinehart noted two posts and at least four roof bolts that were in contact with the roof.
> >
> > At the No. 215 Car Marker, Inspector Rinehart testified that all bolts were in contact with, and supporting, the roof.

Respondent's Brief, at 38–39 (citations omitted).

30 C.F.R. § 75.202(a) states in pertinent part that "[t]he 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." This standard is broadly worded, and, as such, the Commission has held that:

> [T]he adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard. We emphasize that the reasonably prudent person test contemplates an objective – not subjective – analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue.

Canon Coal Co., 9 FMSHRC 667, 668 (Apr. 1987).

More recently, the Commission has held that:

> The Secretary's roof control standard is broadly worded. *See* 30 C.F.R. § 75.202(a). Accordingly, we have held that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what

> a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard."

Harlan Cumberland Coal Co., 20 FMSHRC 1275, 1277 (Dec. 1998) (following *Canon Coal*, 6 FMSHRC at 668).

For the reasons that follow, I find that a preponderance of the evidence establishes that Eastern violated Section 75.202(a).

The area of inadequately supported roof at the No. 239 car marker was located at an intersection which, according to the uncontradicted testimony of Rinehart, is typically a "weak point for roof support" (Tr. 52), because the intersection lacks continuous rib support.[5]

According to Rinehart, in the more than sixteen foot long cited area that was between eight and ten feet wide, the roof had potted out between bolts, creating gaps between the original and the existing roof height. (Government Exhibit 4-A) As a result, some bolts were loose and their bearing plates were not up against the roof, and as such they were not providing support. Additional potting out was observed at the No. 215 car marker.[6]

In addition, fifteen square feet of unsupported roof existed at both the walk and wire sides of the track at the Nos. 108-110 car marker. As a result, according to Rinehart, the width of the entry was increased, making it more susceptible to roof failure.[7] Significantly, Rinehart observed some material on the floor. He described the material as not like a total roof fall but as "softball, basketball size." (Tr. 39) His testimony in these regards was not impeached or contradicted. I thus accept it.

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[5] Respondent argues in its brief that the roof at the No. 239 car marker was sufficiently supported by "two posts and at least four roof bolts that were in contact with the roof." However, this argument, while factually correct, does not acknowledge that this area is located at an intersection and subject to the problems discussed above.

[6] Additionally, another area of unbolted roof, seven feet by seven feet, located between the Nos. 13 and 14 car markers, was described by Rinehart in the order at issue as "deteriorated" and "potted out." (Government Exhibit 1) This statement in the order, admitted into evidence, was not impeached or contradicted, and therefore I accept it.

[7] Respondent argues in its brief that the height of the roof is the same as it was in the 1970s. This argument is based on Kurry's testimony on direct examination. However, Kurry has only been employed at the mine for five and a half years and, as such, has no personal knowledge of the height of the mine roof prior to his tenure.

Additionally, there were three areas, fifteen square feet each,[8] where unsupported roof exceeded the maximum allowable distance between the last row of bolts and the rib. According to Rinehart, the increase in width of the cited entries due to sloughage compromises the integrity of the roof support system. Respondent argues that, as testified to by Kurry, this increase in the width of the entries was only one foot, and the roof would not be likely to fall because of this increase. However, on cross-examination, Kurry agreed that the bolt support system is designed to create a compression beam from rib to rib, and that the original design regarding roof support was being exceeded.[9]

Within the above framework, I conclude that a preponderance of the evidence establishes that there was inadequate roof support in the cited areas of the entry. This lack of roof support presented the discrete safety hazard of a potential roof fall.

I further conclude that this hazard existed on both the wire and the walkway side of the track, subjecting miners to potential exposure. Examiners traverse the 7,000 foot entry daily. Also, repairmen and wire maintenance persons are required to access the track and wire side of the entry respectively.[10] Further, pumpers are required to traverse the entry to repair and inspect three pumps that were located in the entry.[11]

Based on all the above, I further conclude that a reasonably prudent person familiar with

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[8] The 5-left rectifier, the Nos. 107-108 car marker, and the No. 105 car marker.

[9] Respondent also argues in its brief that there was no visual evidence that any of the roof bolts in the cited areas were faulty, citing page 119 of the transcript. This page contains the testimony of Kevin Luketic, one of Eastern's roof bolters, who was with Rinehart during the latter's inspection. Luketic's testimony relating to the condition of roof bolts is as follows: "Your bolts maybe–you know, because you have no visual evidence there that, you know, that I could say that they're bad, you know, but there's that chance." (Tr. 119) I find that it is not clear whether his testimony refers to what he actually observed during the inspection, or whether his testimony is based generally on his experience as a bolter. Also, it is significant to note that he agreed that there was an unsupported area at the cited left rectifier.

In addition, Respondent advances the argument that the roof had sufficient support at the No. 215 car marker. However, the area at the No. 215 car marker was subject to a separate and distinct problem of being potted out.

[10] Rinehart also pointed out that "[e]xaminers, possibly building the track, track men, motor men," may be on the track itself. (Tr. 67)

[11] One pump was located in a cross-cut on the wire side at the No. 70 car marker. The record does not indicate the exact location of the other two pumps. In Supplemental Stipulations, filed after the hearing, the parties indicated that it could not be conclusively determined whether these pumps were on the wire or walkway side of the entry.

the mining industry and the protective purpose of Section 75.202(a) would have provided additional roof support in the areas cited. *See Canon Coal Co.*, 9 FMSHRC 667 (Apr. 1987). Failure to do so has resulted in a violation of Section 75.202(a).

b. Significant and Substantial

A "significant and substantial" violation is described in Section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) ("*Mathies*"), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

In *United States Steel Mining Co.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission stated further as follows:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U. S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574–75 (July 1984).

(emphasis added)

As set forth above, the record establishes a violation of a mandatory standard, i.e., Section 75.202 (a), and that this violation contributed, to some degree, to a discrete safety hazard of a roof fall. Thus, the record has established the first two factors set forth in *Mathies*. Regarding the third element, the Secretary has the burden of establishing that the hazard contributed to herein, a roof fall, was reasonably likely to have occurred and to have resulted in

an injury of a reasonably serious nature.

In support of its position, Respondent asserts that Rinehart did not provide any opinion regarding the likelihood of an event such as a roof or rib fall that would have reasonably resulted in an injury. Respondent maintains that additional timbers, bolts, straps, and cribs were installed subsequent to the initial bolting of the entry. Further, although the entry had been developed approximately twenty years ago, the record does not contain any evidence of any roof falls. Lastly, when the entry was inspected, there was not any evidence of conditions which would indicate some instability in the roof or ribs, such as cracks in these areas or heaving of the floor.

Also, according to Kurry, any deterioration in the roof resulting in material falling from the roof would not propagate and cause a fall outside the area of deterioration. In this connection, he cited the absence of roof problems in areas adjacent to portions of roof that had potted out.

However, the fact that the roof had potted out in three areas and sloughage increased the width of the entry for a total of approximately ninety feet in the cited areas lends credence to Rinehart's opinion that potting is caused by a weathering or deterioration process, that the roof will continue to deteriorate, and eventually the roof support bolts in the area will no longer be in contact with the roof. I note that, in the main, this specific testimony was not contradicted by Eastern's witnesses.

Moreover, as explained more fully above ((I)(B)(3)(a), *infra*), in the intersection at the No. 239 car marker, some bolts were loose, and their bearing plates were no longer in contact with the roof and were not providing support.

In addition, as set forth above, there was unsupported roof at both sides of the track at the 108-110 car marker. The width of the entry was thus increased, resulting in the area becoming more susceptible to roof failure. Further, according to the uncontradicted testimony of Rinehart, material that had fallen from the roof was observed.

Also, for the reasons set forth above, I find that the increase in the width of the entries due to sloughage at three different areas compromises the integrity of the roof support system. In this connection, I note that Rinehart explained that sloughage is a continuous process eventually leading to potting out of bolts. It thus can be concluded, given continued mining operations in the entry, that sloughage will continue to increase the width of the entry, further reducing roof support.

Finally, I note, as elaborated above, that miners regularly travel the entry at issue.

Within the context of all the above, in combination, I conclude that, given continued mining operations, accompanied by the passage of time, it was more likely than not that there was a reasonable likelihood that the cited violative conditions contributing to the hazard of a roof fall will result in an injury-producing event, i.e., material falling from the roof. Further,

considering the exposure of miners in the entry, the size of materials that had already fallen, and the height of the roof, i.e., approximately six feet, I find that there was a reasonable likelihood of a reasonably serious injury occurring. I thus find that the Secretary has established the third and fourth elements set forth in *Mathies*. Accordingly, I find that the Secretary established by a preponderance of the evidence that the violation was significant and substantial.

c. Unwarrantable Failure

The Secretary also alleges the violation was the result of the Respondent's "unwarrantable failure" to comply with the cited standard.

In *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Id.* at 2003–04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA,* 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure. *Consolidation Coal Co.,* 23 FMSHRC 588, 593 (June 2001). These include the extent of the violative condition, the length of time that it has existed, the operator's efforts at abating the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, whether the violation is obvious, and whether the violation poses a high degree of danger. *Id. See also San Juan Coal Co.,* 29 FMSHRC 125, 128 (Mar. 2007).

i. Extent of the cited conditions

The Secretary argues that the violative conditions were extensive because seven separate areas of unsupported roof were cited, "each of which covered a substantial section of the roof" (Secretary's Post Hearing Brief, at 30), and that sixty-six roof bolts and three jacks were needed to abate the conditions. Three of the cited locations, the No. 215 and No. 239 car makers, and between the No. 13 and 14 car markers, involved conditions of potting in areas of approximately seventy feet and forty-nine feet respectively. The remaining four areas cited each contained an area approximately fifteen feet in length where the allowable maximum width set forth in the applicable roof control plan had been exceeded by one foot, or a total of ninety square feet in five separate locations.[12] I find that the total area cited was not significant compared to the total roof area of the entry in question, which extended approximately seven thousand feet and was sixteen feet in width, i.e., 112,000 square feet of roof. Thus, I find that the violative conditions

[12] The fourth location cited, the No. 108-110 car marker, cited two unsupported areas, one on each side of the entry.

were not extensive compared to the total area of the roof in the entry in question.

ii. The length of time the violation existed

Respondent argues that the cited conditions had not existed for a significant period of time prior to Rinehart's inspection. As support for its position, Respondent cites the pre-shift mine examiners' report of an examination of the entry in question by James Poe on the midnight shift, July 17, which does not note any hazardous condition in any of the areas cited by Rinehart. However, it is significant to note that Poe, who testified on behalf of Eastern, was not asked to describe his specific observations of the cited areas during that, or prior examinations. On the other hand, Rinehart opined that the cited conditions existed for a week and provided his reason as follows: "[s]even areas just don't fall within the shift or don't get wide within the shift." (Tr. 72) I note that Kurry, who was with the inspector, did not proffer any contrary opinion regarding the length of time the cited conditions had been in existence.

Therefore, based on the above, and considering the increase in width in the entry due to sloughage at six different locations including the wire and walk sides at the No. 215 car marker, as well as two separate areas where the roof had potted out, I conclude that the cited conditions had existed for more than a few days.

iii. Whether the conditions cited were obvious or posed a high degree of danger

Respondent asserts, in essence, that its personnel had a good faith believe that the area was well-supported and safe. It argues that accordingly the existence of the violative conditions was not obvious. It further asserts that there was not a high degree of danger inasmuch as, *inter alia*, the twenty year old roof in the entry has not evidenced any roof falls or signs of instability.

I have considered Respondent's arguments. However, for the reasons, set forth above ((I) (B)(3)(b) *infra*), I find that the violation presented a high degree of danger to miners. Further, according to Rinehart, the conditions were obvious and could be seen when walking up the entry. It is significant that Kurry, who was with Rinehart, did not contradict this testimony. Therefore, based on the above, I find that the cited conditions were obvious.

iv. Whether the operator was placed on notice that greater efforts were necessary for compliance, and whether the operator had knowledge of the existence of the violation

The Secretary cites Eastern's having performed supplemental bolting in the entry in question on July 16, 2008, shortly before the inspection, as evidence that it was aware of the need to maintain the roof in the entry. I note, however, that this supplemental bolting was performed approximately 1,000 feet away from the nearest area cited by Rinehart.

As additional support for its position that Eastern was on notice that further efforts were

required for compliance, the Secretary cites the testimony of Kurry, Eastern's safety supervisor, that the entry which was approximately twenty years old and had undergone weathering. However, according to Kurry, the weathering was "normal" (Tr. 150), and did not involve roof falls that had pulled out any bolts.

Significantly, the record does not contain any evidence that Eastern had actual knowledge of the violative conditions. Further, the record does not indicate that there was any history of previous roof falls in the cited entry. Nor was any evidence adduced that, previous to issuance of the instant order, any MSHA officials had communicated to Eastern the need for any additional efforts at compliance with Section 75.202(a). (c.f. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11–12 (Jan. 1997)).

I find that the record has failed to establish that Eastern had knowledge of the violative conditions or had been put on notice of the need for greater efforts to achieve compliance with Section 75.202(a).

v. The operator's abatement efforts

The Secretary does not assert there was any deficiency in Eastern's efforts in abating the violative conditions. The record does not contain any evidence as to any deadline that Rinehart had set for completion by Eastern of its efforts to abate the order. Subsequent to the issuance of the order in question, Eastern installed sixty-six additional roof bolts and three jacks in the cited areas. As a result, the order was terminated five days after its issuance. Significantly, the record does not contain any evidence that any MSHA personnel or agents had, prior to termination, expressed to Eastern any dissatisfaction relating to its abatement efforts, or the time being taken to achieve compliance. Considering all of the above, I find that it has not been established that there was any deficiency relating to Eastern's efforts in abating the violative conditions.

vi. Further discussion

In the context of all of the above, I find that the violative conditions were obvious and posed a high degree of damage. However, the violative area of roof cited was not extensive in comparison with the total area of the roof in the entry. Moreover, it has not been established that Eastern had knowledge of the conditions, or was aware that greater efforts were needed for compliance. Further, although the conditions existed for more than a few days, there is insufficient evidence regarding their existence beyond that limited time period. Thus, I find that Eastern's negligence was mitigated and did not reach the level of aggravated conduct.

Accordingly, I find that it has not been established that the violation was the result of Eastern's unwarrantable failure.

C. Penalty

I find, for the reasons set forth above ((I)(B)(3)(b), *infra*), that the gravity of the violation

was relatively high. I find that the history of violations does not warrant either an increase or decrease in the penalty to be assessed. However, for the reasons set forth above (I(B)(3)(c) *infra*), I find that Eastern exhibited no more than a moderate level of negligence which was below the level of aggravated conduct. Considering all of the above, and the parties' stipulations regarding the remainder of the factors set forth in Section 110(i) of the Act, I find that a penalty of $3,000 is appropriate.

II. Order No. 6603046[13]

On October 4, 2006, MSHA inspector David Severini inspected the 9 Left section of the Federal No. 2 Mine, owned and operated by Eastern. In general, the latter was involved in mining bleeders which had to be completed prior to the start of a longwall section. Severini examined the 9 Left coal conveyor belt which conveyed coal outby, and was approximately 6,000 feet in length. He noted accumulations of loose coal and float coal dust that had not been recorded in the pre-shift examination report for the examination conducted earlier that day. He issued an order under Section 104(d)(1) of the Act, alleging a violation of 30 C.F.R. § 75.360(a)(1), which provides, as pertinent, that "a certified person designated by the operator must make a pre-shift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground."

A. The Secretary's Evidence

According to Severini, the accumulation of loose coal began under the tail piece and extended under the belt approximately two hundred feet to the outby end of the No. 59 block. He indicated that the accumulations were approximately five to six feet wide, and varied between two to twenty inches in depth. According to Severini, the tail roller was turning in an accumulation of loose coal four to eight inches deep, and five inches wide, and was grinding the loose coal into dust that was black in color and was suspended in the air. Also, the first two bottom rollers outby the tail roller were turning in coal from six to sixteen inches deep, and six feet wide. The bottom belt was also running in the coal accumulations. The dust coated the roof, ribs, floor, belt structure, and pipeline, for a distance of approximately one hundred feet outby the tail roller.

B. The Respondent's Evidence

Daniel Kevin Conaway, Eastern's safety supervisor, was with Severini on October 4

[13] Five minutes prior to the issuance of Order No. 6603046, Severini had issued a Section 104(d)(1) Citation No. 660304, alleging a violation of 30 C.F.R. § 400 for coal and dust accumulations. These conditions were the predicate for Order No. 6603046. Respondent is challenging the existence of the conditions cited in Citation No. 660304. However, the validity of the issuance of this citation, and any penalty to be assessed for the violation, are not before me in the case at bar, as it is the subject of a separate penalty proceeding (Docket No. WEVA 2008-944).

when the latter made his inspection of the area in question. He essentially corroborated Severini's testimony regarding the accumulations observed by the latter. However, Conaway indicated that he found it difficult to believe that the material that he observed had been there for three shifts. He explained his opinions as follows:

> A. The reason that you don't want coal around belt rollers is because it will create friction on the belt or on the rollers, and that will generate heat, which, in turn, can start a fire.
>
> We did not find any hot rollers. We did not find any hot stands, and the belt was not running out of alignment, so my issue was what's the heat source?
>
> Q. So you didn't see– when the rollers were checked, they were not hot or warm?
>
> A. Not the ones we checked, no, sir.
>
> Q. What would that indicate to you about how long that material had been there?
>
> A. It would lead me to believe that it hadn't been there that long.

Tr. 285.

Conaway indicated that the belt had been raised approximately one hundred feet outby the tail to allow traffic to travel under the belt in setting up the long wall. He indicated that the raising of the belt is not a normal configuration and it "[put] friction on the belt. Thus material is more prone to accumulate at the tail." (Tr. 281)

On October 4, 2006, between 4:30 a.m. and 5:10 a.m., Theodore Echols examined the 9 Left belt. His pre-shift examination report noted various conditions under the heading violations and other hazardous conditions observed and reported, including "spillage" which was described as being "[b]etween stands 26 to tail." (Government Exhibit 15) Echols indicated that when he was at the tailpiece on October 4, the belt was running and "[t]hey were loading on it." (Tr. 371) Echols testified that he observed spillage on the belt line, but none around the tail. He indicated that the tail roller was not running in coal. He did not identify any coal dust in the air, nor did he observe any coal dust on the roof or rib. Specifically, he indicated that he did not see any accumulations that were sixteen to twenty-one inches deep "[a]t or around the tail area, either the tail roller or the two rollers that are near there." (Tr. 375)

John Kucish, Eastern's mine manager, indicated that on October 4, during the midnight shift, which usually runs from approximately 1:00 a.m. to 8:30 or 9:00 a.m., 407 tons of coal were produced. Kucish indicated that on October 4, 2006, during the entire day shift which

typically runs from 9 a.m. to 4 p.m., 120 tons of coal were produced. Four hundred and nineteen tons were mined during the afternoon shift on October 4.

C. Discussion

Essentially it is the Secretary's position that the dust and coal accumulation at the tail of the belt had not been reported in the pre-shift examination report on October 4, 2006, and as such Eastern was in violation of Section 75.360(a)(1). The record clearly supports the testimony of Severini regarding the extent of the coal and dust accumulations, observed by him at 11:55 a.m. on October 4. Also, I find that there was not any notation of these accumulations in the pre-shift examiner's report for the day shift, October 4. The critical issue for resolution is whether the Secretary has established that the accumulations observed by Severini were in existence at the time that Echols made his examination and subsequent report between 4:30 and 5:00 a.m. on October 4. In this connection, the Secretary relies on the dimensions of the accumulations of coal, and the fact that the belt and rollers were running in the accumulations. Also, the Secretary cites testimony that the float coal dust, which was black, coated all surfaces of the belt entry ranging in depth from a "film" to a "measurable thick[ness]." (Tr. 212) In this connection, Severini and MSHA inspector Melbourne Robinson, who was with Severini during the inspection, opined that it took several shifts for the accumulations to occur. Severini provided the following as the basis for his conclusion: "Just experience and, again, the amount of float coal dust that accumulated on the ribs and the mine roof at that time, it would take – it would take a few shifts to get that dark, that black and in some places on that structure that thick." (Tr. 228) Robinson's testimony on this point is as follows:

> Q. Now, there was some issue raised about the condition of the coal, whether it was wet or dry, what kind of moisture content it had. Can you tell me based on your observation of the coal that the rollers were turning in, what was it?
>
> A. I believe it was dry, dry coal.
>
> Q. And with regard to the float coal dust accumulation, where was the float coal dust?
>
> A. It pretty much covered everything, like, the belt structure, roof, floor, ribs, pipeline.
>
> Q. And was there anything significant about this accumulation? How did it look?
>
> A. It was a serious accumulation problem.
>
> Q. Okay. How would you compare the scene, this accumulation that you saw with Mr. Severini on your experience in the industry?

A. I would have to rate -- it was probably one of the worst conditions I've seen on a belt with nobody working on it. You always have spills along the belt line, but you usually have people in attendance.

Q. And when you came upon this, was anybody working on it?

A. No.

Q. All right. Now, also based on your experience in the industry, how long did it take this accumulation of float coal dust, the coal accumulation to occur?

A. The float dust seemed extensive enough in my opinion it would have been three shifts to accumulate that bad.

Tr. 316–18.

I find that the weight to be accorded to the inspectors' opinion on this critical issue is to be diminished inasmuch as, aside from a reference to their experience, they did not explain how the existence of the conditions that they observed led to their opinion as to the length of time the accumulations had existed.

Further, according to Severini, in essence, the extent of dust accumulations resulted from the effect of the tail rollers grinding accumulations of coal which, as observed by him, produced fine dust that was thrown up into the air and carried throughout the entry. Robinson opined that, based on his experience, due to the extensive condition of dust in the entry, it took three shifts to accumulate. Thus underlying the inspectors' testimony is an assumption that the rollers had been grinding coal dust during and before the pre-shift examination. In this connection, I note that according to Conaway, when rollers have been turning in and grinding coal accumulations, heat would have been generated as a result of the friction that was produced by this action. Thus, the absence of any evidence of hot rollers or stands tends to significantly diminish any inference that the rollers had been grinding coal and producing dust since before Echols' examination seven hours earlier. Further, since the record establishes that 120 tons of coal were produced on the entire day shift, it is incumbent upon the Secretary to prove that the observed accumulations did not result from coal being run on the belt after Echol's examination, and prior to Severini's inspection. I note that when Severini arrived "on the section," although the belt was in operation, it was not running coal. Although the parties stipulated that the inspection party arrived "on the section" at 9:00 a.m., the record is not clear when Severini first observed that coal was not being transported on the belt, i.e., when he first entered the belt entry and had the ability to make this observation.

Subsequent to the hearing, the parties stipulated as follows: "On October 4, 2006, the inspection party arrived on the section at approximately 9:00 a.m. The party proceeded up the 9 Left Track Entry and went to the longwall setup face before entering the 9 Left Coal Conveyor

Belt Entry." (Supplemental Stipulations, B(1)) (emphasis added). However, there is not any evidence in the record as to when Severini and the inspection party actually arrived at the entry. Hence, since the record fails to establish when Severini arrived on the belt entry, there is not any basis to predicate a finding, based upon his observations, as to the length of time the coal had not been run on the belt prior to 11:55 a.m. Moreover, due to the operation of the withdrawal order at issue, the belt was not in operation, and coal could not have been run on the belt between the issuance of the order at approximately 11:55 a.m. and its termination later that day at "1500." (Government Exhibit 10, p. 3). There is not any direct evidence in the record as to whether coal was produced and transported on the belt (1) between Echols' examination and Severini's inspection and/or (2) between the termination of the withdrawal order and the end of the day shift. There is not any basis in the record to allow a specific allocation of the total production of 120 tons for the shift to either of these periods. Therefore, I find that the Secretary has failed to establish that coal, in quantities sufficient to produce the accumulations observed by Severini, was not transported on the belt after Echols' examination.

Therefore, considering all the above, I find that the Secretary has not established by a preponderance of the evidence that the accumulations observed by Severini at approximately 11:55 a.m. had been in existence at the time of the pre-shift examination by Echols. I thus find that the Secretary has not met her burden of establishing a violation of a failure to perform a pre-shift examination as required by Section 75.360(a). Accordingly, I find that Eastern did not violate Section 75.360(a)(1).

III. Citation Nos. 6602109, 6601079, 6601841, 6601849, 6602565, 6602567, 6602568 and 6602569

At the hearing, the Secretary filed a motion for decision and order approving partial settlement relating to these citations. In the motion, it is represented that the parties reached a settlement regarding these citations and seek a reduction in penalties from $11,045 to $6,200. I have reviewed the representations set forth in the settlement agreement, and conclude that its terms are appropriate and are consistent with the terms of the Act. Accordingly, the motion is granted.

ORDER

It is **Ordered** that Order No. 6603046 be dismissed. It is further **Ordered** that the Respondent pay a total civil penalty of $9,200 within 30 days of this decision.

Avram Weisberger

Administrative Law Judge

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