FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

August 4, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 94-267
v.	:	A. C. No. 15-07201-03628
	:	Docket No. KENT 94-309
HARLAN CUMBERLAND COAL COMPANY, Respondent	:	A. C. No. 15-07201-03630
	:	C-2 Mine
	:	Docket No. KENT 94-822
	:	A. C. No. 15-08414-03619
	:	Docket No. KENT 94-844
	:	A. C. No. 15-08414-03620
	:	Docket No. KENT 94-845
	:	A. C. No. 15-08414-03621
	:	H-1 Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
H. Kent Hendrickson, Esq., Rice and Hendrickson, Harlan, Kentucky, for Respondent.

Before: Judge Maurer

In these consolidated cases, the Secretary of Labor (Secretary) has filed petitions for assessment of civil penalties, alleging violations by the Harlan Cumberland Coal Company (Harlan Cumberland) of various and sundry mandatory standards set forth in Title 30 of the Code of Federal Regulations. Pursuant to notice, these cases were heard before me on February 22-23, 1995, in London, Kentucky. The parties filed posthearing briefs and proposed findings of fact and

conclusions of law on June 28, 1995, which I have duly considered in writing this decision.

During the course of the trial of these cases, the parties discussed and negotiated settlements concerning some of the citations contained in these five dockets. I will deal with and dispose of these settled citations in this decision as well as decide the remaining issues concerning the still contested citations, in order, by docket number.

In addition to the arguments presented on the record in support of the proposed settlements, the parties also presented information concerning the six statutory civil penalty criteria found in section 110(i) of the Act. After careful review and consideration of the pleadings, arguments, and submissions in support of the proposed settlements, and pursuant to Commission Rule 31, 29 C.F.R. ' 2700.31, I rendered bench decisions approving the proposed settlements. Upon further review of the entire record, I conclude and find that the settlement dispositions which have been previously approved are reasonable and in the public interest, and my bench decisions are herein reaffirmed.

Docket No. KENT 94-267

The parties have agreed to settle five of the six citations included in this docket as follows:

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
3835289	7/30/93	75.400	$ 412	$ 350
3835291	7/30/93	75.400	412	350
4040231	8/13/93	75.330	147	124
4040189	9/28/93	75.220	147	124
4040190	9/28/93	75.400	204	173

One citation remains to be decided in this docket which was tried before me and was subsequently briefed by the parties. Citation No. 3835295, issued on July 30, 1993, by MSHA Inspector Larry L. Bush, alleges a violation of the standard found at 30 C.F.R. ' 75.370(a)(1) and charges as follows:

> The operator has made a major ventilation change by shutting down the Louellen side fan and taking it out of service without prior approval from MSHA to do so.

This citation has an unbelievably long and tortured history, beginning even before November 18, 1992, when MSHA Inspector Robert Rhea issued an earlier citation, Citation No. 2996273, to this operator. Inspector Rhea issued this earlier citation for a violation of 30 C.F.R. ' 75.310(b)(1) because the respondent was operating the No. 2 mine fan (the Louellen side fan) from a power circuit inside the mine rather than from an independent power circuit as required by the mandatory standard.

For many years before this, the respondent had operated this extra fan on the Louellen side under a waiver from the MSHA District Manager based on the permissive language in a now repealed mandatory standard (30 C.F.R. ' 75.300-2(c)(1)). The use of the word "should" in that standard rather than "shall" was interpreted by MSHA to allow the District Manager to exempt operators from the requirement that they have an independent circuit for electrically powered mine fans.

In 1992, new regulations went into effect making independent power circuits for mine fans mandatory rather then permissive. On September 2, 1992, respondent applied for a modification of this new standard to allow it to continue providing power to its No. 2 mine fan from a power circuit inside the mine just as it had done under waiver since 1984. While this request was pending, Inspector Rhea issued Citation No. 2996273 on November 18, 1992, for a violation of the new standard, 30 C.F.R. ' 75.310(b)(1). However, taking note of the pending Petition for Modification, the abatement of the citation was continually extended, eventually up to July 1, 1993.

On July 8, 1993, MSHA denied Harlan Cumberland's Petition for Modification. Respondent at that point then had 30 days within which to file an appeal (that is, request a formal hearing at the Department of Labor) of that denial.

Meanwhile, back at the Harlan Field Office, Inspector Rhea became aware that the modification petition had been denied and he was informed by Mr. Clyde Bennett, the General Manager of Harlan Cumberland Coal Company, that an appeal was going to be filed. Rhea also states that at some point Mr. Bennett later informed him that the appeal was going to be withdrawn. Harlan Cumberland disputes this and in fact did file a timely appeal on July 28, 1993, 2 days before the citation at bar was issued by Inspector Bush.

In any event, Rhea, assuming that Harlan Cumberland was not going to pursue the modification petition any further, sent Inspector Bush out to terminate Citation No. 2996273.

This citation could have been abated by either shutting down the No. 2 mine fan (the option taken) or installing a generator or running a power line in from outside.

When Bush arrived at the mine on July 30, 1993, the No. 2 mine fan had been shut down. He therefore terminated Citation No. 2996273. But one thing leads to another. The abatement of Citation No. 2996273 was in its turn a violation of 30 C.F.R. ' 75.370(a)(1) and the cause for the issuance of Citation No. 3835295, the citation at bar. The shutting down of the auxiliary fan was a major ventilation change done without the prior approval of the District Manager.

The violation itself is straightforward. The inspector simply found that a major change in ventilation had taken place because of the shutdown of the fan without the approval of the District Manager, period.

The point of contention concerning this citation turns on what really amounts to a matter of courtesy or perhaps it could be called "custom and practice". The operator's position is that the citation at bar should not have been issued and the earlier citation should have been extended rather than terminated, until

such time as the Petition for Modification was finally decided. Inspector Bush himself allows that he would not have issued the citation at bar had he known an appeal had been taken from the

initial denial of the operator's petition. But he did not know, and no one at the mine bothered to tell him. If he had known, he testified that he would have just extended the abatement period for Citation No. 2996273, with the No. 2 fan still running, as it had since 1984.

The Secretary makes the excellent point in his brief that with the appeal being mailed from Gray's Knob, Kentucky, on July 28, 1993, it is highly unlikely that anyone at MSHA had notice of the appeal until after the issuance of the citation at bar on July 30, 1993.

This citation was eventually abated by the installation of a temporary generator and, later, a permanent power line.

In the final analysis, I find a simple violation of the cited standard is proven as charged.

As for the factual disputes in the testimony about who said what to whom, I do not find that Bush or Rhea at any time ordered the No. 2 fan shut down, although there undoubtedly was some discussion about that option as well as the company's option to continue to pursue their Petition for Modification. I also find that neither Bush nor Rhea was aware of the company's appeal as of July 30, 1993, the date the citation at bar was written. Had either of them understood that an appeal was pending, the citation would not have been issued as a matter of courtesy to the operator or the existing "custom and practice" of that office.

Nonetheless, the citation was in fact issued, it does state a violation, and I am going to affirm it herein.

After consideration of all the statutory criteria in section 110(i) of the Act, I find a civil penalty of $300 to be appropriate.

Docket No. KENT 94-309

The parties have agreed to settle four of the eleven citations included in this docket as follows:

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
4040315	10/13/93	75.1101-1	$ 157	$ 120
4040316	10/19/93	75.1103-5(a)(2)	147	110
4040319	10/19/93	75.523	147	110
4040320	10/19/93	75.342(a)(4)	157	120

Seven citations remain to be decided in this docket which were tried before me and were subsequently briefed by the parties.

Citation Nos. 4248531 and 4248533 were issued by MSHA Inspector Lloyd Sizemore on July 29, 1993. Both allege nearly identical violations of 30 C.F.R. ' 75.603, which standard provides, in relevant part, that "[t]railing cables or hand cables which have exposed wires. . . shall not be used."

Harlan Cumberland admits the violations of 30 C.F.R. ' 75.603 (see proposed findings), but disputes the "significant and substantial" special findings in each citation.

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 C.F.R. ' 814(d)(l). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), 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 Company, Inc., 7 FMSHRC 1125, 1129 (August 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).

The trailing cables in question were providing power to the two shuttle cars noted in the citations (GX-7 and GX-9). These shuttle cars move coal from the mine to the dumping point and are continuously powered by these trailing cables.

Inspector Sizemore observed exposed conductor wires in both of these cables. He testified that he could see approximately 1 inch of the exposed copper wire conductor in each of these two cables. These cables carry 277 volts which Sizemore opined would cause death or permanent disability from electrical shock if contacted by a miner.

The company's position on these citations is that the cables are on an automatic reel and are only occasionally manipulated by hand. Also, Mr. Eddie Sergent testified on behalf of the respondent that there are many safety features incorporated into the cable to knock the power off the circuit if a short occurred. He also contradicted the inspector's opinion regarding the likelihood of someone being injured by the condition of these cables as described by the inspector. Sergent testified that miners do not normally handle these cables when the power is on, but he conceded that someone could be injured if he touched an exposed conductor on the cable.

It seems to me, however, that having miners working in close proximity to an electrical hazard that might not be immediately obvious to the casual observer, even if these cables are only occasionally manipulated by hand is an accident waiting to happen. It is reasonably likely in my opinion that on one of those "occasions," a miner could be reasonably expected to contact the exposed wire and be electrocuted. Therefore, I conclude that there was a reasonable likelihood that the hazard contributed to by the violation herein would result in at least an injury-producing event. Accordingly, I find that it has been established that the violations found herein were "significant and substantial" and serious.

Upon careful consideration of all of the statutory criteria in section 110(i) of the Act, I assess a civil penalty of $1200 for each violation, or $2400 for the two.

Citation No. 4248534 alleges a "significant and substantial" violation of the standard found at 30 C.F.R. ' 75.520 and charges as follows:

> The start switch on the No. 2 off standard side 21 SC Joy shuttle car, will not return to the position that allows the holding circuit to be activated. The switch stays in the start position therefore when the cable is energized the car will start. This car is located on the No. 4 section. This citation is being issued as a contributing factor to imminent danger withdrawal order No. 4248532. Therefore no abatement is set. Order dated 07-29-93.

After starting the motor, the start switch is supposed to spring back to the neutral mode. The basic problem here was the start switch would not return to the neutral mode once it was

activated. This created two separate potential problems: First, if it was already energized and for some reason the shuttle car operator could not hear the car running, he could unintentionally start the car moving if he accidentally hit the foot switch, which essentially functions like the gas pedal on an automobile. Secondly, in an emergency situation where the shuttle car operator had some reason to use the panic bar or deenergization device to stop the shuttle car, the car would start up again on its own when the panic bar was released.

I find the violation to be proven as charged. The citation was terminated upon the repair of the start switch, which brought it into compliance with the mandatory standard. I therefore will affirm the citation, as modified herein.

I agree with the operator on the issue of gravity and the "significant and substantial" special finding. These shuttle cars have an auto-braking system installed that even Inspector Sizemore agrees would also have to be unintentionally released to allow the car to move. To recap, two completely separate, independent and unintentional actions would have to be taken, that is, release the auto-brake lever and press the tram foot switch in order to allow the shuttle car to move. In my opinion, too many independent conditions have to co-exist for the car to unintentionally move. It is possible, but that is not enough to carry the Secretary's burden of proof on "S&S". Accordingly, Citation No. 4248534 will be affirmed as a non "S&S" citation and assessed a civil penalty of $400 in accordance with section 110(i) of the Act.

Citation Nos. 4040061, 4040439, and 4040440 were all issued by Inspector Bush on August 30, 1993. All allege violations of 30 C.F.R. ' 75.220 in the No. 1 and 2 left rooms off the No. 7 belt main off the 6th right panel.

Inspector Bush identified these three cited areas of the mine where he found adverse roof conditions, which according to the operator's extended cut plan, required the respondent to limit the depth of the cut to a "distance compatible with the prevailing conditions." That phraseology "prevailing conditions" is the bone of contention here.

Harlan Cumberland's extended cut plan allows extended cuts up to 32 feet, but when adverse roof conditions are encountered, they must limit their cuts in accordance with prevailing conditions. This is a very subjective call, and as the respondent points out in its brief, the foreman on the scene has to make it, subject to an MSHA inspector's later disagreement. And, of course, in case of a disagreement, the inspector's opinion prevails, and the citation issues.

In connection with the area cited in Citation No. 4040061, Inspector Bush observed heavy rib sloughage, heavy crushing action on the pillars, rib rolls and the mine floor heaving. With regard to the area cited in Citation No. 4040440, Bush testified that there was heavy roof sloughage, stretch cracks and the roof was loaded up with pressure. With regard to Citation No. 4040439, Bush testified that like the other two areas, there were adverse roof conditions which in his opinion precluded the taking of deep cuts in this area of the mine.

The crux of these violations are that Bush measured these deep cuts as 27 feet (Citation No. 4040061), 25 feet (Citation No. 4040439) and 31 feet (Citation No. 4040440) whereas he believes the prevailing conditions were such that the operator should have limited the cuts to 20 feet in each of the three instances. Whether the company gets a violation or not is entirely dependent on whether or not the inspector believes adverse conditions exist. Although initially the operator has discretion under the plan to cut up to 32 feet, if the inspector subsequently disagrees, the operator is issued a citation for violating its roof control plan as happened here.

In this case, the respondent produced expert testimony on the basic underlying issue of whether or not there were adverse conditions extant in these areas which testimony I find somewhat persuasive, at least on the issue of the quantum of negligence the respondent is properly chargeable with.

Mr. Kenneth B. Miracle testified that he has worked 40 years in underground coal mines, including 3 years as an inspector for MSHA's predecessor agency, MESA. I found him to be an expert in roof control, and allowed him to state his opinion on the ultimate issue in this controversy, i.e., whether the conditions were so adverse so as to preclude the extended cuts that were taken. He personally viewed the areas in question and was

convinced that these areas were safely minable. His findings contrasted with and contradicted Bush in several important respects concerning the state of the floor and the ribs in the cited areas.

I am nevertheless going to go along with Inspector Bush's finding that the operator was in violation of its Roof Control Plan because sufficiently adverse conditions existed in the cited areas that should have alerted them to the requirement to cease taking extended cuts. I am also going to find as a fact that taking deep cuts in the face of these conditions exposed the miners working and traveling in these panels to the hazards of roof and rib falls because these deep cuts increased the pressure on the roof and pillars which, in turn, increased the likelihood of rib rolls which could reasonably be expected to lead to

injuries to the miners working in these areas. If the sloughing of the mine roof or ribs had continued unabated, it is reasonably likely that a serious injury would have occurred. I therefore am going to affirm the three aforementioned citations as "S&S" citations.

In assessing a civil penalty for these violations, however, I find only "moderate" negligence vice "high" negligence involved. I do not believe there is any evidence in this record of "high" negligence. Rather, I find that the conflicting expert opinions of whether or not the prevailing conditions were adverse in the cited areas demonstrates the closeness and subjectiveness of this call, and it is a judgement call made at the operator's peril, with little or no objective criteria to rely on. After considering all the statuary criteria in section 110(i) of the Act, I assess a civil penalty of $500 for each violation, or $1500 for the three.

Section 104(d)(1) Citation No. 4040438 (GX-13), issued August 30, 1993, alleges a violation of the standard found at 30 C.F.R. ' 75.220 and charges as follows:

> Evidence indicates that the operator had in use a roof drill on 004 section and did use this drill in heights exceeding the ATRS reach. The maximum extended reach of the ATRS is 94 inches and areas were measured at 107, 110, 105 inches from floor to roof, thus roof bolting was done in unsupported roof inby support.

The ATRS (Automated Temporary Roof Support) system is a hydraulic roof support system physically attached to the roof bolter and its purpose is to provide roof support while the bolt machine operator and his helper install roof bolts. This is accomplished when hydraulic jacks set a bar, 9 to 11 feet long and 8 to 10 inches wide, under pressure against the mine roof while bolting takes place.

As Inspector Bush explained, the ATRS mechanism must be pressed against the mine roof in order to function as it was designed. If it is not under pressure against the roof, it essentially leaves the miners under unsupported roof.

Bush's testimony as to what he observed and the basis for his conclusion that there was in fact, a violation of the cited standard is as follows in pertinent part (Tr. 205-206):

> Q. All right. What seam height did you measure in government Exhibit 13?
>
> A. I measured heights at 107, 110 and 105.
>
> Q. All right. And how high is the extended reach of the ARTS system?

A. I had the bolter operator extend it as far out as it would go and it would only expand to 94 inches.

Q. Did you measure that?

A. Yes, I did.

Q. So, what was the obvious conclusion from that measurement?

A. Any places they bolted--any cut places that the miner had just cut they would have technically, or basically be under unsupported roof while bolting.

Q. And did Mr. Shuler tell you that they had in fact bolted some places that were higher than 94 inches?

A. Yes, he did.

Q. Is that the basis for your issuing the D1 citation?

A. Yes, sir.

Q. Based on his knowledge?

A. Yes, sir.

Basically, Bush measured three places that had been bolted, found that those floor to ceiling measurements were 107, 110, and 105 inches, respectively, and that since each measurement exceeded the 94 inch reach of the ATRS, he deduced that there must have been a violation. He also deduced that no temporary supports had been used.

Anticipating the operator's defense, Bush was questioned about the use of temporary supports as follows (Tr. 207-208):

Q. Now, when you questioned Mr. Shuler about the use of this 94 inch ATRS system in areas that were higher than that, did you ask--did he indicate to you in any way that they had set temporary supports in that area?

A. No, sir. He did not.

Q. And you conclude they had not?

A. Yes, sir.

Q. And that's why you issued the citation?

A. Yes, sir.

But on cross-examination, it was also brought out he had not asked Shuler anything about temporary supports either (Tr. 208):

> Q. Did you ask him specifically if he had used temporary support? You said you concluded that he hadn't, but did you ask him?
>
> A. It's my memory, if it serves me correctly, there was no temporary supports on the roof.
>
> Q. I mean, did you ask Mr. Shuler had he used any?
>
> A. No. sir. But there was no temporary supports on the drill.

I agree with the respondent that Bush's rationale for issuing this citation, gleaned from his own trial testimony, is all based on an assumption or deductive reasoning at best, that an ATRS violation must have occurred at the three points he measured. He arrived at this conclusion because: (a) the operator had in fact bolted some places that were higher than 94 inches and (b) Shuler volunteered nothing to him about the use of temporary roof supports during the bolting process. Clearly, he did not witness a violation, he assumed it, or to cast it in a somewhat better light, deduced it from Shuler's silence.

The fact that Bush saw no temporary supports on the drill on August 30, 1993, really adds nothing to the inquiry since no evidence of when the suspected violative drilling took place was introduced into the record. Not only could Bush not remember where he made the three measurements, he made them at places that had already been bolted, adding confusion to when the roof bolting had taken place.

The respondent, on the other hand, did produce credible evidence of its general practice to use steel screw jacks if the ATRS system cannot reach the ceiling, i.e., when roof heights exceed the reach of the ATRS, as here. The Secretary has made no showing in rebuttal that this general practice was not followed whenever and wherever the bolting was performed at the three places Bush measured.

Accordingly, I find that the Secretary has failed to carry his burden of proof with regard to this citation and it will be vacated herein.

Docket No. KENT 94-822

The parties have agreed to settle three of the five citations included in this docket as follows:

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
3835491	11/18/93	75.400	$ 178	$ 178
3835492	11/18/93	75.700	168	168
3835495	11/18/93	75.1100-2	178	178

Citation No. 3835490 alleges a "significant and substantial" violation of the standard found at 30 C.F.R ' 77.205(e) and charges as follows:

> The inclined steps leading from ground to drive level on surface did not have side rails or guards to prevent falling from side. Steps are approximately 5 ft high.

Inspector Bush testified that this stairway was approximately 5 feet high and steep, being more like a ladder than a stairway. He testified that these steps went almost straight up and did not have toe boards to prevent a person's foot from slipping between the steps.

Bush further testified that this mine was classified by MSHA as being in BE status, that is, nonproducing, but some persons were working. He stated that he found Mr. Bill Shuler, the mine foreman and one other miner inside the mine working on the belt entry setting timbers. He also observed footprints on this stairway and a well-used pathway from the top of the stairway to the mandoor going into the belt entry where he found Shuler and the other miner working within 100 to 150 feet of this portal.

The stairway was not covered and was exposed to the weather, causing a further slipping hazard. Bush opined that a miner could suffer an injury to his back, neck, arms or legs if he fell from this unguarded stairway. He recounted a tale of a disabling back injury that had occurred to a friend of his who fell on his own self-rescuer.

Bush served the citation on Bill Shuler, whom he believed had probably travelled into the mine by way of these steps on the date he issued this citation. Shuler told Bush that he (Shuler) would have to get the construction crew back to the mine site to install the handrails.

The operator's defense is that the steps were simply still under construction. They were not yet complete, but Mr. Sergent, who testified for the operator, was unable to state how long the

steps had set there without the handrails.

The operator also argues that the likelihood of an injury is remote because of the limited exposure of miners to the hazard. But I note that whether the footprints and foot traffic are attributable to the construction crew or the miners, the risk of injury is not reduced and the gravity remains the same. Any person, miner or construction worker, using these steps is exposed to the serious slip and fall hazard presented.

Accordingly, I am going to affirm the citation as issued and assess a civil penalty of $168, as proposed by the Secretary.

Citation No. 3835496 alleges a "significant and substantial" violation of the standard found at 30 C.F.R ' 75.1106-5(a) and charges as follows:

> The oxygen gauge located at No. 4 belt tailpiece was damaged and cutting pressure could not be determined.

At trial, Inspector Bush was unable to recall the nature of the damage to the pressure gauge which allegedly caused it to be inoperative. Consultation with his notes failed to shed any light on the subject. All he could testify to was that the oxygen gauge was somehow damaged and cutting pressure could not be determined. But that is the allegation contained in the citation, almost word for word, not the proof of the facts to support that allegation. I pointed out to the witness and counsel for the Secretary at the hearing, that this citation and these factual matters have now been contested by the respondent and they are entitled to factual proofs of these allegations.

It boils down to the proposition that the Secretary was proving the fact of the violation by the fact that Inspector Bush issued the citation. He told us that he does not issue frivolous citations. If it is not a violation, he would not issue a citation. Learning that provided little comfort for the respondent and they moved to vacate the citation. That motion is granted for failure of proof and Citation No. 3835496 will be vacated herein.

Docket No. KENT 94-844

The parties have agreed to settle six of the nine citations included in this docket as follows:

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
3835498	11/23/93	75.370(a)	$ 168	$ 168
3835500	11/23/93	75.370(a)	168	168
4257801	11/23/93	75.370(a)	168	168
4257802	11/23/93	75.370(a)	168	168
4257803	11/23/93	75.370(a)	168	168
4257804	11/23/93	75.370(a)	168	168

Three citations remain to be decided in this docket which were tried before me and were subsequently briefed by the parties.

Citation No. 3835497 alleges a "significant and substantial" violation of the standard found at 30 C.F.R ' 75.202(a) and charges as follows:

> There is an area of loose broken roof approximately 20 ft X 20 ft 4 crosscuts inby the No. 3 belt power center in the intake air course.

Although the roof was bolted, it had broken at an angle up over the bolts so that the roof bolts were exposed. You could see the bolts above the roof that had separated. The hazard was the loose broken roof itself and the fact that its located in the intake air course, which is the main escapeway. Because it is the primary escapeway for the mine, it has to be examined at least weekly when men are working at the mine. Furthermore, there were pumps and seals located inby the area of this roof and when miners are working underground, a preshift examination would have to be performed daily.

At the time this citation was written, the mine was in a BE status, that is, it was not producing coal, but two men were working underground nevertheless.

The violative condition is unrebutted in the record. The operator instead has focused on the likelihood of exposure to this roof fall hazard that its two miners working underground would have faced. According to Bush, this mine has a history of bad roof conditions and he testified that if this condition had not been abated, the roof would have collapsed. He went on to state that if such a collapse occurred with a miner in the immediate area, he would have expected the injury to be at least of a disabling nature depending on the amount of material which fell out of the roof.

While the miners exposed to the hazard created by this broken and loose roof may have been limited in number, it nevertheless subjected them to a serious likelihood of injury. Accordingly, I am going to affirm this citation as issued and assess the proposed civil penalty amount of $220.

Citation No. 3835499 alleges a "significant and substantial" violation of the standard found at 30 C.F.R. ' 75.202(a) and charges as follows:

> There is an area of unsupported roof in the entry leading to the No. 2 and 3 seal. Area is approximately 20 ft. long and 10 ft wide.

This was a completely bare area of the roof, that is, one lacking any kind of roof support. The cribs which had been installed earlier down the middle of the entry, were rotten and deteriorating.

This was also an area through which the miner examining the No. 2 and 3 seals would have had to travel to make his examination, and this roof hazard subjected him to at least a reasonably likely threat of death or serious injury from roof fall.

Accordingly, I find the violation proven as charged, will affirm the citation as written and assess a civil penalty in the amount of $220, as originally proposed by the Secretary.

Citation No. 4257806 alleges a "significant and substantial" violation of the standard found at 30 C.F.R ' 75.400 and charges as follows:

> The power center, 4160 V.A.C., located at the start of the slope to fan had accumulation of float coal dust inside the power center and on the electrical components therein.

Inspector Bush testified that he observed a heavy concentration of float coal dust inside this power center which was black in color and covered the component parts of the power center, including the connecting leads, fuses, and insulators. He further stated that the power center was turned on when he observed the float coal dust and that it had various pieces of electrical equipment connected to it, including a battery charger and a conveyor belt power junction box.

Inspector Bush also described the various ignition sources in the power center which in his opinion could cause this float coal dust accumulation to explode or burn. He named the transformers, bus bar, and input/output cables. He also testified that there are electrical arcing sources of ignition as well as heat sources inside this power center and he stated that the turning on and off of the power center can produce electrical arcing which would ignite or cause this float coal dust to burn. Miners working in the vicinity of this power center or inby would
be exposed to fire and/or smoke inhalation hazards as well as a potential explosion of this float coal dust. Bush described an incident at another mine where a power center had caught fire and burned for two hours, emitting smoke and fumes to such an extent that caused the mine to be evacuated, and the miners to suffer respiratory damage.

I conclude that the Secretary has established an "S&S" violation of the cited standard. The inspector described a heavy concentration of black float coal dust inside this power center which contained a variety of ignition sources. If this condition went unabated, I find it would be reasonably likely, in the face of continuing use, that an explosion or fire would occur, resulting in at least serious injury to the miners working near-by or inby this power center.

Upon careful consideration of all of the statutory criteria contained in section 110(i) of the Act, I find a civil penalty of $168, as originally proposed by the Secretary, to be appropriate, reasonable, and in the public interest.

Docket No. KENT 94-845

The parties have agreed to settle both of the citations contained in this docket on the following terms:

CITATION NO.	DATE	30 C.F.R. SECTION	ASSESSMENT	SETTLEMENT
3835488	11/18/93	75.512	$ 178	$ 89*
4257805	11/23/93	75.202(a)	987	400**

* Citation modified to delete "S&S" special findings.

** The section 104(b) order issued in conjunction with this citation, Order No. 3164779 is also vacated as a part of this settlement.

Accordingly, I enter the following:

ORDER

Docket No. KENT 94-267

1. Citation Nos. 3835289, 3835291, 4040231, 4040189, 4040190, and 3835295 **ARE AFFIRMED.**

2. Respondent **IS ORDERED TO PAY** the assessed civil penalties of $1421 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED**.

Docket No. KENT 94-309

1. Citation Nos. 4040315, 404316, 4040319, 4040320, 4248531, 4248533, 4040061*, 4040439*, 4040440* **ARE AFFIRMED**.

* Modified negligence finding from "high" to "moderate".

2. Citation No. 4248534 **IS AFFIRMED** as a non "S&S" citation.

3. Citation No. 4040438 **IS VACATED**.

4. Respondent **IS ORDERED TO PAY** the assessed civil penalties of $4760 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED**.

Docket No. KENT 94-822

1. Citation Nos. 3835491, 3835492, 3835495, and 3835490 **ARE AFFIRMED**.

2. Citation No. 3835496 **IS VACATED**.

3. Respondent **IS ORDERED TO PAY** the assessed civil penalties of $692 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED**.

Docket No. KENT 94-844

1. Citation Nos. 3835498, 3835500, 4257801, 4257802, 4257803, 4257804, 3835497, 3835499, and 4257806 **ARE AFFIRMED**.

2. Respondent **IS ASSESSED** civil penalties of $1616, and having already paid $1008 of this penalty to the Secretary of Labor previously, **IS ORDERED TO PAY** the remaining $608 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED**.

Docket No. KENT 94-845

1. Citation No. 4257805 **IS AFFIRMED**. The section 104(b) order issued in conjunction with this citation, Order No. 3164779 **IS VACATED**.

2. Citation No. 3835488 **IS AFFIRMED** as a non "S&S" citation.

3. Respondent **IS ORDERED TO PAY** the assessed civil penalties of $489 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED**.

Roy J. Maurer
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 372215-2862 (Certified Mail)

H. Kent Hendrickson, Esq., Rice & Hendrickson, P. O. Box 980, Harlan, KY 40831 (Certified Mail)

dcp