

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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May 30, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 96-254
Petitioner	:	A. C. No. 15-07201-03681
v.	:	
	:	Docket No. KENT 96-320
HARLAN CUMBERLAND COAL	:	A. C. No. 15-07201-03683
COMPANY,	:	
Respondent	:	Docket No. KENT 96-321
	:	A. C. No. 15-07201-03684
	:	
	:	Docket No. KENT 96-322
	:	A. C. No. 15-07201-03685
	:	
	:	Docket No. KENT 96-333
	:	A. C. No. 15-07201-03686
	:	
	:	Mine C-2

**DECISION**

Appearances: Joseph B. Lockett, Esq. U. S. Department of Labor, Nashville, Tennessee,  
for the Secretary;  
H. Kent Hendrickson, Esq., Rice & Hendrickson, Harlan, Kentucky, for  
the Respondent.

Before: Judge Barbour

These proceedings concern petitions for the assessment of civil penalties filed by the Secretary of Labor (Secretary) on behalf of her Mine Safety and Health Administration (MSHA) against Harlan Cumberland Coal Company (Harlan or the company) pursuant to sections 105(d) and 110(a) of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act) (30 U.S.C. ' ' 815(d), 820(a)). The Secretary alleges that Harlan violated various mandatory safety standards for underground coal mines and that several of the violations were significant and substantial contributions to mine safety standards (S&S violations). (The standards are found in Title 30 C.F.R. Part 75.)

Harlan generally denied that it violated the standards, challenged the Secretary's S&S assertions, and contested the amounts of the proposed penalties.

The mine involved is Mine C-2, a bituminous underground coal mine located in Harlan

County, Kentucky. The proceedings were heard in Harlan, Kentucky. At the commencement of the hearing, counsel for the Secretary read into the record stipulations agreeable to the parties (Tr. 14-16). Counsel also announced that the parties had settle many of the violations (Tr. 8). The settlements were explained on the record, and I will approve them at the close of this decision (Tr. 8-13, 221-224).

### **STIPULATIONS**

The parties stipulated as follows:

1. Harlan mines and produces coal that enters into and has an effect upon interstate commerce;
2. Harlan is subject to the jurisdiction of the Act, and the Administrative Law Judge has the authority to hear the cases and issue a decision;
3. A reasonable penalty will not affect Harlan's ability to continue in business;
4. During February 29, 1995, through February 29, 1996, Harlan produced 569,727 tons of coal, and the mine produced 411,803 tons of coal. Further, from June 30, 1995, through June 30, 1996, Harlan produced 691,172 tons of coal, and the mine produced 520,277 tons of coal.
5. Harlan exhibited good faith in abating the alleged violations (see Tr. 14-16).

In addition to the stipulations, counsel for the Secretary stated without contradiction that there are 58 employees at the mine and that Harlan employs approximately 80 miners. He characterized the size of the company as at the lower end of the large size companies (Tr. 15). Finally, counsel characterized Harlan's applicable history of previous violations as medium in size (Tr. 225; see Gov. Exh. P-73).

### **CONTESTED CITATIONS**

#### **KENT 96-254**

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>
4243656	3/11/96	75.202(a)	\$309

Citation No. 4243656 states:

The intake roadway has areas of loose broken drawrock along the roadway at several locations. The intake roadway is also the mantrip and supply access [roadway] (Gov. Exh. P-5).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

Section 75.202(a) requires in part that A[t]he roof, face and ribs ... where persons work or travel shall be supported or otherwise controlled to protect person from hazards related to falls of

the roof, face or ribs.

Larry Bush, an MSHA roof and ventilation specialist, who inspected Mine C-2 for the last 5 years, testified for the Secretary (Tr. 20). He stated that during an inspection on March 11, 1996, he traveled along the main intake roadway and observed that the roof contained areas of loose and hanging drawrock (Tr. 29, see also Tr. 21). (He described drawrock as ~~A~~rock that's just above the coal seam between the coal seam ... and the immediate roof ... [and that] tends to separate from the main roof (Tr. 21). The roadway, which is approximately 2 miles long, was used by the miners when they entered the mine and was used to transport supplies into the mine. It also was used as the mine's main escapeway.

The roof above the roadway was supported by roof bolts. In addition, at various locations, steel straps supplemented the roof bolts. According to Eddie Sargent, Harlan's safety director, the straps were approximately 13-14 feet long and 8 inches wide. They were perpendicular to the ribs (Tr. 34-35), and they were bolted into the roof (Tr. 35). Harlan routinely used them because, according to Sargent, the drawrock would have presented ~~A~~a pretty bad situation without them (Tr. 36).

Sargent did not see the cited conditions but was told by the mine superintendent, Louis Blevins, that the ~~A~~drawrock was lying on straps ... and it was supported (Tr. 37). Although Bush agreed that some of the hanging rock was supported by the straps, he still believed the hanging drawrock would fall. ~~A~~[O]nce the rock is actually broken loose, it do[es]n't mean its going to ... stay right there over the strap. ~~E~~ventually, it will fall (Tr. 30). Moreover, the drawrock that was not hanging on the straps could fall at almost any time. ~~A~~Because the drawrock ... was loose ... [i]t was going to fall ... within a short period of time, ~~h~~e stated (Tr. 23).

The height of the roof averaged between 5 and 7 feet. The pieces of drawrock that were loose and that Bush believed would fall ranged from an inch thick to a foot thick (Tr. 22, 24). In Bush's opinion, if the drawrock fell and hit a miner, the resulting injuries would range from serious to fatal (Tr. 22-23).

Supplies were transported along the roadway two or three times a day. Also, the roadway had to be preshift examined (Tr. 23, 39). Sometimes the preshift examiner walked the roadway and sometimes he or she rode in a vehicle (Tr. 39). Further, the mantrip passed under the roof as miners were brought to the active sections (Tr. 28-29). Although all mobile equipment at the mine had canopies (Tr. 31, 39), Sargent agreed that if the equipment broke down, the miners might have to get out and walk (Tr. 40).

Bush believed that a preshift examiner should have seen the hanging drawrock and should have made sure it was pulled down (Tr. 23). As Bush stated, ~~A~~When it's observed ... the condition should be taken care of immediately (Tr. 27).

To terminate the condition, Harlan pulled down the drawrock (Tr. 25).

## **THE VIOLATION**

I credit Bush's testimony that at various points along the subject roadway the drawrock was hanging and ready to fall (Tr. 29). Sargent did not view the area, and his testimony cannot overcome Bush's first hand observations. I also credit Bush's testimony that miners traveled under the cited roof. The Secretary conclusively has established that the cited roof was not supported or otherwise controlled to protect miners who traveled under it from roof fall hazards. The violation existed as charged.

## **S&S and GRAVITY**

A violation properly is designated S&S, Aif, based on 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 reasonable serious nature@(*Cement Division, National Gypsum Co.*, 3 FMSHRC 825 (April 1981)). There are four things the Secretary must prove to sustain an S&S finding:

- (1) the underlying violation of a mandatory safety standard;
- (2) a discrete safety hazard -- that is, a measure of danger to safety contributed to be 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 reasonable serious nature (*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984); see also *Austin Power Co. v. Secretary*, 861, F.2d 99, 104-105 (5th Cir. 1988) (approving *Mathies* criteria).

Here, the Secretary has proven all four.

There was a violation of section 75.202(a). The violation resulted in a discrete safety hazard in that the failure to support or otherwise control the roof at various points above the roadway subjected miners traveling beneath the roof to injury from falling drawrock. While it is true that many of the miners who traveled the entry did so in vehicles equipped with canopies and that these canopies undoubtedly offered considerable protection from such falls, Sargent confirmed that preshift examiners at times walked the roadway and that if equipment broke down other personnel had to walk as well (Tr. 39-40).

Given the fact that the cited drawrock was hanging, and loose, Bush believed that it would fall (Tr. 23). I accept Bush's testimony in this regard. Moreover, I agree with Bush that a miner struck by falling draw rock would be seriously injured or even killed, particularly when some of the drawrock was a foot thick (Tr. 24). Considering the number of times the roadway was traveled, or could have been traveled if it needed to be used as an escapeway, and considering the condition of the drawrock, I conclude that it was reasonably likely that as mining continued a miner would be struck and seriously injured or killed by falling rock. Therefore, I find that the violation was S&S.

In addition to being S&S, the violation was very serious. It long has been held that the gravity of a violation is determined by analyzing the potential hazard to the safety of miners and the probability of the hazard occurring (*Robert G. Lawson Coal Co.*, 1 IBMA 115, 120 (May 1972)). The potential hazard was serious injury or worse due to falling rock. Because the drawrock was hanging and would fall and because miners traveled on foot under the rock, it was probable that a miner would be hit, injured, or killed by the falling rock.

**NEGLIGENCE**

Negligence is the failure to exercise the care required by the circumstances. Because the condition of the roof was visually obvious, Bush believed that the foreman and/or the preshift examiner should have seen the unsupported roof and taken corrective action (Tr. 23). I agree. The evidence fully supports Bush's opinion that the condition was obvious (Tr. 27). In failing to correct the problem, the company failed to exercise the care required.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F.¹</u>	<u>Proposed Penalty</u>
4243658	3/11/96	75.380(d)(1)	\$288

Citation No. 4243658 states in part:

The 004 section intake has water accumulated across both intake entries too deep to travel thru or carry an injured person if needed (Gov. Exh. P-7).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

Section 75.380(d)(1) requires that escapeways be maintained in a safe condition to always assure passage of anyone, including disabled persons.²

According to Bush, on March 11, 1996, the mine's main intake entries had water in them, and the water was deep enough to impede miners who might have to travel or carry an injured miner through the entries. The entries were part of the escapeway for the 004 Section, an active section that was being mined (Tr. 41, 45, 49). Although there was an alternate escapeway and although the alternate escapeway had no water in it (Tr. 48), the intake escapeway was the primary escapeway, and it provided the quickest and safest way to the surface (Tr. 48, 50-51).

The water was in a dip,³ about a mile from the portal (Tr. 45, 47). It was not unusual for water to collect there, and in the past, it had been pumped out. However, March 11 was a Monday, and Blevins, the mine's superintendent, told Bush the pumps had not worked on the weekend.

Bush walked along the rib at one side of the entry. The water reached the top of his boots, making it 14 to 16 inches deep (Tr. 42, 48). Bush did not go into the middle of the entry, but he estimated that there the water was 18 inches to 2 feet deep (Tr. 42, 48). Bush also estimated that the water extended for approximately 80 feet (Tr. 42).

Bush believed it was reasonably likely the water would hinder the exit of miners using the

escapeway, including any miners who were transporting an injured miner on a stretcher (Tr. 43). The water could cause the miners, especially the stretcher bearers, to slow their egress, to slip and fall, and to drop the stretcher (Tr. 44-45).

In Bush's opinion the violation was due to the company's negligence. The superintendent knew the pumps had not worked over the weekend, yet he had taken no steps to correct the situation on Monday (Tr. 43-44).

To terminate the citation, Harlan got the pumps running and pumped down the water (Tr. 45).

### **THE VIOLATION**

The testimony establishes that the primary escapeway for the 004 Section was not maintained in a safe condition to assure that anyone could pass through it. Although the escapeway was not blocked C Bush walked along the side of the entry to get through, and I infer that other miners could have done this too C it is clear that the passage of miners would have been hindered by the water. I accept Bush's testimony that the water came to the top of his boots near the sides of the entry and his estimate that the water was 18 to 2 feet deep in the middle of the entry. Harlan offered absolutely no testimony to the contrary. It is a simple fact that walking through this much water creates a slipping and stumbling hazard and slows down anyone trying to get through it.

Chief Administrative Law Judge Paul Merlin has observed that section 75.380(d)(1) imposes a general obligation for safe escapeways and in order to determine whether this obligation has been satisfied, each case must be examined and judged on its facts (*Jim Walter Resources, Inc.*, 16 FMSHRC 1264, 1268 (June 1994)). Because a delayed exit is an unsafe exit this general requirement means that the passage of miners not be impeded so as to hinder and slow even one miner's exit from the mine. Because the water in the cited escapeway would have hindered and slowed those miners who had to go through it, I find that the violation existed as charged.

### **S&S and GRAVITY**

The hazard contributed to by the violation was that of inhibiting the evacuation of miners trying to leave the mine due to an emergency. It is apparent to me that there was a reasonably likelihood such a delay would result in injuries of a reasonably serious nature when viewed in the context of continuing mining operations and of an emergency necessitating use of the escapeway. Indeed, if the emergency were a fire or an explosion, the delay easily could have resulted in serious injuries or even deaths. Moreover, even if miners were not injured by the effects of the fire or explosion there was a reasonable likelihood of slipping or falling injuries (*see Consolidation Coal Co.*, 16 FMSHRC 1286, 1293 (June 1994) (ALJ Feldman)). Thus, the third element of the *Mathies* test was established.

The other three elements of *Mathies* also were satisfied, given there was a violation, that it contributed to the hazards set forth above, and that serious injuries, even deaths, could have

resulted.

The fact that miners could have used a secondary escapeway, does not undermine the S&S nature of the violation. As Bush pointed out, the primary escapeway was the quickest, most direct way to exit the mine (Tr. 49, 50-51). It was also the route miners were trained to use. I cannot assume that in the event of an emergency, miners would have diverted their escape to the secondary escapeway rather than travel through the water.

The violation also was serious. In an emergency, a rapid exit from the mine can mean life or death for the miners involved. Anything that impedes the rapidity of a miner's escape can have serious consequences.

### NEGLIGENCE

Bush's testimony that the superintendent told him the pumps did not work all weekend, and his testimony that the company made no attempt to get the pumps working, was not refuted by Harlan. The company should have known that with the pumps not working, water would collect in the Adip@. After all, that is why the pumps were there. The company either should have corrected the situation or should have been in the process of correcting it. It did neither. I therefore find that Harlan failed to exhibit the care required by the circumstances and was negligent.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>
4243659	3/11/96	75.202(a)	\$309

Citation No. 4243659 states :

The 004 section has loose[,] broken ribs across the section at several locations where men are required to work & travel (Gov. Exh. P-8).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

The requirements of section 75.202(a) are set forth above.

When Bush inspected the 004 Section on March 11, 1996, he observed A[]loose, broken ribs across the section at several locations where persons were required to work and travel@ (Tr. 53). Some of the loose and broken ribs were sloughing into the entry (Tr. 60).

A rib is the wall of a pillar that is left after mining. On the 004 Section, the ribs were between 5 and 7 feet high and 60 feet long (Tr. 54). The pillars and ribs provided support for the roof (Id.). The areas where Bush believed the pillars were loose and broken were areas where mines worked (Id.).

Bush recalled in particular that two crosscuts outby the face there was a pillar where the weight of the overburden had caused the rib to fracture (Tr. 55-56). The overburden had pushed

the rib outward toward the entry (Id.).

In this particular pillar there was a 12 to 15 inch thick band of rock lying between the coal seam and the immediate roof. Bush believed that when the fractured part of the rib rolled into the entry, the rock would tend to roll out with the coal. The rock could cause injuries even more serious than those caused by the rolling coal (Tr. 55-57).

To Bush, the cracks in the ribs meant that the ribs could roll at any time (Tr. 58). He explained that when a rib gave way, it would, Ajust roll out ... just collapse@ (Tr. 59). He stated, AIt was not if. It was ... a question of when@ they were going to roll (Id.; see also Tr. 62). He also noted that at the mine the company had constant problems with the ribs and roof due to the pressure put on them by the overburden (Tr. 59). He believed three miners had been injured previously by rib rolls at the mine (Id.).

Bush saw two miners working in the areas of the loose ribs. One was the section foreman (Tr. 58). They were within 3 to 4 feet of the ribs and were in danger if the ribs rolled (Tr. 64). In addition, eight to ten miners worked on the section (Tr. 58). In Bush's view, during the shift all of them would have to travel in the areas where the faulty ribs were located (Id.). If any of the miners were hit by the rolling ribs, their injuries could range from minor abrasions, to broken bones, to fatalities (Id.).

Bush believed that Harlan was negligent in allowing the rib conditions to exist. The foreman was on the section and the section was producing coal when the conditions were observed and cited. The foreman should have seen the conditions and taken steps to correct them (Tr. 57). In addition, the section was required to be preshift examined, and the conditions should have been noted and corrected as a result of that examination.

The company's safety director, Sargent, testified that the company was in the process of retreat mining and this caused more weight to bear down on the ribs than otherwise would have been the case (Tr. 66). To Sargent the cracks in the ribs indicated the ribs were under increased pressure (Tr. 67). Given these conditions, the sloughing and cracking of the ribs was normal. In Sargent's view, part of effective rib control required letting the ribs slough and allowing the sloughed material to build up at the base of the ribs. This buttressed the ribs (Id.).

Sargent stated the danger was not from the ribs rolling (Tr. 68), but from outbursts of coal caused by the pillars Aexploding@ under the pressure (Tr. 67). Although the cracks did not necessarily indicate a coal outburst was imminent, if one did occur, the rib material could strike and injure a miner (Tr. 67-68).

The condition was corrected when the loose, broken ribs were pulled down (Tr. 60).



## **THE VIOLATION**

The Secretary bears the burden of proof. In the context of this alleged violation of section 75.202(a), the Secretary must establish that miners worked or traveled in the cited areas and that the cited ribs were not sufficiently supported so as to protect the miners from rib rolls or outbursts. The company did not offer the testimony of any witness who was with Bush during his inspection and who observed the conditions. Bush was a credible witness, and I accept his uncontroverted description of the cited ribs as being loose (meaning fractured) and as sloughing into the entries (Tr. 53-54, 55, 60). I also accept his testimony that during the course of the inspection he observed two miners working in the area, one being the section foreman, as well as his testimony that all of the section crew had to travel in the area of the cited ribs at some time during the shift (Tr. 55, 58).

Bush believed that the rock that was layered between the coal seam and the immediate roof in one of the cited ribs was likely to travel further into the entry when the ribs rolled (Tr. 55). This testimony was not disputed, nor was his opinion that if the coal or rock hit a miner working or traveling in the vicinity of the rib, the miner could suffer abrasions, broken bones, or even be killed (Tr. 56).

The parties generally agreed that the overburden was putting increased pressure on the roof and ribs (Tr. 59, 66), and that when retreat mining was underway, more pressure was exerted on the ribs than might otherwise have been the case (Tr. 66). It is logical that this pressure caused the fractures and sloughing Bush observed. It is also logical that given the pressure, the cracked and sloughing ribs would have rolled out at any time and that the roll would have injured a miner working or traveling in the immediate vicinity of the roll (Tr. 58).

For these reasons, I conclude that the record amply supports finding that the miners on the 004 section were not protected from injuries related to rib rolls, and that the violation existed as charged.

## **S&S AND GRAVITY**

The violation contributed to the hazard that members of the section crew would suffer abrasions, broken bones, or worse from being struck by coal and/or rock. Given the continued pressure on the ribs and their fractured state, I have concluded the ribs would have rolled at any time. Also, given Bush's unrefuted testimony that two miners were working in the immediate vicinity of one of the cited ribs when the violation was first observed, and his testimony that as mining continued all section crew members would have worked or traveled in the vicinity of the ribs, it was reasonably likely the rolling coal and/or rock would have struck and injured miners (Tr. 68). Obviously, abrasions, broken bones, or worse are injuries of a reasonably serious nature. Therefore, I conclude the violation was S&S.

In addition, the combination of the likelihood of the injuries and the potential degree of the injuries resulting from the violation meant that the violation was very serious.

## **NEGLIGENCE**

I have accepted Bush's testimony that he observed the section foreman working in the immediate vicinity of one of the cited ribs (Tr. 57). Even though the cracking and sloughing was readily visible, the foreman had done (and was doing) nothing to correct the situation. His failure represented a lack of care required by the circumstances, and it is attributable to Harlan.

In addition, I infer from the extensiveness of the cited conditions that they had been in existence for some time and should have been observed and noted by the preshift examiner. Therefore, the conditions should have been corrected or have been in the process of being corrected.

For both of these reasons, I find that the company was negligent in allowing the violation to exist.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>
4243921	3/11/96	75.220	\$431

Citation No. 4243921 states in part:

The approved roof control plan was not followed on the 005 M.M.U. A row of pillars was mined and 4 of the pillars were cut in one direction and 2 cut in the opposite direction in the same row. The plan stipulates that [the] sequence of mining stay the same in each row (Gov. Exh. P-12).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

Section 75.220 requires in part that A[e]ach mine operator shall develop and follow a 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.®

Bush explained that on March 11, 1996, the 005 M.M.U. Section was in the process of retreat mining. He described retreat mining as requiring the Afull extraction of the pillars that were left from advance mining®(Tr. 71). The approved sequence for the extraction of the pillars was set forth in the mine roof control plan (Gov. Exh. P-10). Under that sequence, a cut was made in the middle of the pillar (the key cut) and the roof was supported by roof bolts. Then, a second cut was made from the middle on the other side of the pillar and the pillar was split in two.

The two portions of the pillar are the Awings®. Each wing was then cut in a series of three cuts, one wing at a time. However, a small triangular portion of each wing was left standing. (Tr. 72-73; Gov. Exh. 10 at 135 (on the exhibit designated as page 24, Drawing No. 15)).

The pillars on the section were square and measured 70 feet by 70 feet. They were located on centers of approximately 90 feet, making the entries between the pillars approximately 20 feet wide (Tr. 74; Gov. Exh. P-11). The pillars were in rows of six.

On March 11, Bush was concerned with the row closest to the gob -- the most inby row (see Gov. Exh. P-11). When Bush arrived on the section, the two pillars on the furthest left when facing the gob (pillars 1 and 3 on Gov. Exh. P-11) had been mined completely, as had the two on the farthest right when facing the gob (pillars 4 and 2 on Gov. Exh. P-11) (Tr. 76-77). The two middle pillars (pillars 6 and 7 on Gov. Exh. P-11) were being mined (Tr. 74-75). Bush determined that the key cuts in pillars 1 and 3 had been made from right to left when facing the gob and that the key cuts in pillars 4 and 2 had been made from left to right. Bush observed that pillars 6 and 7 were being cut straight ahead toward the gob (Tr. 75; Gov. Exh. P-11).

As Bush understood the plan, because the key cuts in the first pillars had been cut from right to left, the rest of the key cuts were required to be cut from right to left. (Bush stated, **A**[H]owever you attack the first pillar, you have to follow that sequence in that row all the way across .... [Y]ou're supposed to mine [the pillar line] the same way all the way across@ (Tr. 81, see also Tr. 82)). According to Bush, Harlan's failure to cut the two right and the two middle pillars in the same direction as the two left pillars violated a provision in the plan which stated, **A**More than two pillars may be worked in cycle, provided that the same sequence of recovery and support is followed@ (Tr. 89, see also Tr. 91-92; Gov. Exh. 10 at 136).

Bush acknowledged, however, that the roof control plan allowed deviation from the cutting sequence. A provision entitled **A**Additional Safety Precautions For Retreat Mining (Pillaring)@ stated, **@**The standard cut sequence as indicated may be deviated from where adverse conditions make it impractical to attack a pillar in the locations indicated@ (Gov. Exh. 10 at 116 (on the exhibit designated as page 7); Tr. 83-84). Bush stated that although this provision allowed the company in the presence of adverse conditions to change the direction in the way the pillars were **A**keyed@ (Tr. 86), if such a deviation was made, it had to be followed consistently all of the way across the row of pillars. (**A**[They can attack the pillar from a different direction if conditions warrant, but they have to follow that sequence all the way across@ (Tr. 84)).

Although Bush stated that he observed no adverse conditions that warranted deviation from the standard cut sequence (Tr. 85), he agreed that he did not know what the actual roof conditions were when pillars 1, 3, 4 and 2 were mined, because he was not then present on the section. Nor, did he know what the conditions were when mining was started on pillars 6 and 7, because, when he arrived on the section mining had commenced (Tr. 86).

Bush believed that cutting the pillars in the same row in different directions could cause the weight distribution of the roof to shift and could lead to hazardous roof falls (Tr. 76, 79). Such a deviation from the roof control plan could also lead to some of the pillars being crushed or the wings being crushed while miners worked on them (Tr. 76). The miners most endangered were the continuous mining machine operator, his helper, and the shuttle car operator, all of

whom were engaged in mining the number 6 and 7 pillars when Bush reached the section (Tr. 78). Bush noted that 1 month prior to March 11, a continuous miner operator had been trapped twice by roof falls while mining pillars (Tr. 79).

Bush believed the company was negligent in failing to follow the plan because the section foreman was responsible for knowing what the roof control plan required and should have known how the pillars were cut (Tr. 78).

The alleged violation was abated when the continuous mining machine was pulled back from pillars 6 and 7 and the company abandoned them (Tr. 80).

Blevins, the mine superintendent, testified that he accompanied Bush to the section. Blevins confirmed that when he and Bush arrived on the section the crew was in the process of mining the center pillars. Some of the roof between pillars 6 and 7 had fallen, and the crew had installed roof bolts between the pillars. The crew also had installed two lines of breaker posts at the lower end of the entry between pillars 6 and 7 because of the adverse roof conditions between the pillars (Tr. 94). In Blevins' view, the key cuts in pillars 6 and 7 had to be taken from the pillars' sides furthest from the gob because of these breaker posts (Tr. 95).

In addition, Blevins maintained that the key cuts in the two pillars on the left (pillars 1 and 3) were made from right to left because there was a swag on the far left side of the section. He also maintained that the key cuts in the two pillars on the right (pillars 4 and 2) were made from left to right because of a similar swag on the right side of the section. The swags prevented the key cuts in the two groups of pillars from being mined in the same direction (Tr. 96-97). (A swag is defined as a subsidence ... of the roof (US. Department of the Interior, *A Dictionary of Mining, Mineral, and Related Terms* (1968) at 1109.)

### **THE VIOLATION**

It is a fundamental principle of mine safety law that provisions of a plan required to be adopted by the operator and approved by the Secretary are enforceable as mandatory standards (see, *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398 (D.C. Cir 1976) (enforcement of ventilation plans)). Section 75.220 requires the operator to adopt and the Secretary to approve such a plan. Thus, the question of whether there was a violation of the standard is resolved by comparing the factual situation in the mine with the requirements of the adopted and approved plan.

Bush determined that the key cuts were taken from right to left in pillars 1 and 3 and from left to right in pillars 4 and 2 (Tr. 76-77). In addition, he determined that the key cuts in pillars 6 and 7 were taken straight ahead, toward the gob (Tr. 75-77). Blevins did not disagree with Bush about the direction in which the pillars were cut (Tr. 95). Therefore, I find that the key cuts were mined as described by Bush.

Under the roof control plan, whether one pillar was mined at a time (a one pillar cycle) or whether two pillars are mined in sequence (a two pillar cycle), Harlan was required to follow the same sequence of recovery and support (Gov. Exh. 11 at 135, 136). To Bush, this meant taking

cuts from the pillars in the same direction (Tr. 81). Bush's interpretation conforms to both the words and the diagrams of the plan, and I conclude he was correct (Gov. Exh. 11 at 135, 136).

Since the cuts in the pillars were not made in the direction of the first key cut -- i.e., from right to left -- Harlan violated the plan, unless Harlan can establish the plan contained an applicable exception to the requirement.

As previously noted, the plan contained a provision titled "Additional Safety Precautions for Retreat Mining (Pillaring)." The complete provision stated:

The standard cut sequence as indicated may be deviated from where adverse conditions make it impractical to attack a pillar in the locations indicated. Such deviation is permitted only where equivalent pillar support is maintained in the alternate method (Gov. Exh. 11 at 116 (designated page 7 on exhibit)).

Blevins maintained that roof conditions between pillars 6 and 7 and the resulting roof support (the breaker posts) between the two pillars prevented mining the key cut from right to left (Tr. 94-95). He also testified that a swag on the far right side of the entry prevented mining the key cuts on pillars 4 and 2 from right to left (Tr. 96-97). Bush candidly admitted that he did not know what the actual roof conditions were when pillars 1, 3, 4, and 2, were mined and that he did not know what the conditions were when mining started on pillars 6 and 7 (Tr. 86). I accept Blevins testimony regarding the presence of the breaker posts and the swags.

However, given these roof conditions, Harlan did not prove the exception applied. First, while the swag and the low roof caused by the swag on the right side of the section may have prevented pillars 4 and 2 from being cut from right to left, there is no reason apparent why pillar No. 7 could not have been cut from right to left. The adverse roof conditions and the breaker posts were between the middle pillars, not on their right. Second, the exception states that "deviation is permitted only where equivalent pillar support is maintained" (Gov. Exh. 11 at 116). In other words, Harlan also had to show that it maintained pillar support equivalent to the support provided by full compliance. Harlan did not introduce any evidence concerning this critical condition. Because, I cannot find that Harlan has established the applicability of the exception, I conclude that the company violated section 75.220.

### **S&S AND GRAVITY**

The Secretary did not establish a reasonable likelihood that the hazard contributed to would result in an injury. Bush was asked why he believed an accident was reasonably likely and he responded "Because ... mining ... off-sequence like that causes ... irregular weight distributions and can cause, could cause roof falls and subject people to serious and even fatal injuries" (Tr. 78). This minimal testimony was too tentative ("can cause, could cause") to establish reasonable likelihood, and there was no additional testimony offered by the Secretary regarding likelihood. Further, although Bush testified that some roof in the area of the

005 MMU Section had fallen twice within a month during prior pillar recovery operations, he did not link the falls to deviations in the sequence of recovery, and there is not basis to assume that such was the case.

Despite the lack of proof regarding the inspector's S&S finding, the Secretary established the violation was very serious. The parties agreed some of the roof between the middle pillars had fallen in a way not contemplated in the plan (Tr. 78, 96). This created an adverse roof condition in the middle of the pillar line. There is no indication that the mining sequence Harmon was using provided support equivalent to that provided by the plan. During retreat mining the roof is supposed to fall in a carefully controlled and predictable way. When the plan is not followed, control and predictability are lost. Pillar recovery is dangerous under the best of circumstances. Failure to follow the approved plan for recovery makes it even more so, as evidenced by the falls between the middle pillars.

### NEGLIGENCE

Bush believed Harlan was negligent because the section foreman, who was responsible for knowing what the roof control plan required, should have made certain that the plan was followed (Tr. 78). Bush was right. The foreman was responsible for compliance. When there was noncompliance and when there was not an acceptable excuse for the noncompliance (as in the case of pillar No. 7, for example), the foreman, and through the foreman the company, did not meet the standard of care required.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>
42433726	2/27/96	75.1106-3(a)(2)	\$288

Citation No. 4243726 states:

The oxygen & acetelene tanks located in the No. 2 entry outby the 004 MMU last open cross cut were not secured in an upright position (Gov. Exh. P-3).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

Section 75.1106-3(a)(2) requires in part that A[l]iquified and nonliquified compressed gas cylinders stored in an underground coal mine shall be [p]laced securely in storage areas designated ... for such purpose, and where the height of the coalbed permits, in an upright position ... secured against being accidentally tipped over.@

MSHA inspector Rober Clay testified that on February 27, 1996, during an inspection of the 004 MMU Section, he saw one oxygen tank and one acetylene tank leaning against the rib of a coal pillar, in an active roadway, approximately 300 feet outby the face of the section (Tr. 100-101, 104). (Clay did not know if any oxzgen or acetelyne remained in the tanks (Tr. 104)).

According to Clay, the tanks should have been stored securely in an upright position to

prevent them from being damaged by falling rocks or mobile equipment. The roadway was used by A very large equipment@ (diesel scoops, battery scoops, diesel personnel carriers). He described the diesel scoops as being A big as an automobile@ and the battery powered scoops as being 25 feet long and 10 feet wide. He also explained that the diesel scoops and the diesel personnel carriers provided their operators with very limited visibility (Tr. 103).

Tracks on the mine floor indicated to Clay that equipment had come within 12 inches of the tanks (Tr. 105). If the tanks had been hit and punctured, any gas they contained, could have become very volatile and could have exploded (Tr. 101, 102). If the acetylene and oxygen mixed, the explosion could have been even more violent. In fact, Clay maintained that two miners had been killed in an explosion caused by the puncturing of tanks identical to the cited tanks (Tr. 102, 103). Clay had seen a tank rupture and produce a A very violent explosion and fire@ at the mine (Tr. 103).

Clay was asked why he found the alleged violation to be S&S, and he replied it was because serious burns or fatalities likely would occur as the result of damage to the tanks. He graphically described what happened when one tank exploded, A [A] miner was literally blown to bits. There were very, very few body parts left intact@ (Tr. 103).

The citation was issued after the section had been both preshift examined and onshift examined. In addition, there was a foreman on the section. Further, according to Clay, everyone who worked on the section had traveled past the tanks during the course of the shift (Tr. 101-102). Even though the tanks were in plain view, they had not been placed upright and secured.

The condition was corrected when the tanks were tied upright (Tr. 103).

### **THE VIOLATION**

The standard requires compressed gas cylinders, such as those cited by Clay, to be placed in designated storage areas and secured against accidentally tipping over. Harlan did not dispute Clay's testimony that the cylinders were leaning against the rib, as Clay put it, A like a chair... against a wall@ (Tr. 104). The cylinders were not secured against accidentally tipping over, and I find that the violation existed as charged. Clay testified that he did not know whether the cylinders contained oxygen and acetylene, but this lack of knowledge does not impact on the violation. The standard makes no distinction between empty or full cylinders.

### **S&S AND GRAVITY**

Clay's testimony regarding the hazards posed by the violation was compelling. Acetylene and oxygen tanks are indeed potentially very hazardous, and I agree with Clay that were both to rupture at the same time, the hazard would be compounded (Tr. 102-103). The fact that mining equipment passed within 1 foot of the tanks, and the fact that on some of the equipment, the driver's field of vision was restricted, in my opinion made it reasonably likely that as mining continued on the section, the tanks would have been knocked over, punctured and

a very violent explosion and fire would have resulted (Tr. 103). Since one of the pieces of equipment that regularly passed by the tanks was a mantrip, it was also reasonably likely that the explosion and fire would have resulted in serious injuries or death to one or more miners (Tr. 103). Accordingly, I conclude Clay was correct when he found that the violation was S&S (see, *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 2305, 2306-10 (October 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1838-40 (August 1984)).

In addition, this was a serious violation. The inspector compellingly testified about what could happen if the unsecured tanks were knocked over and punctured. The explosion and fire the inspector described could have been catastrophic to those in the immediate vicinity of the tanks (Tr. 103).

### NEGLIGENCE

The area had been preshift and onshift examined. A foreman was working on the section (Tr. 102). The tanks were in plain view. The visually obvious condition should have been noticed and corrected. In allowing the tanks to remain leaning against the rib, Harlan negligently failed to exercise the care required of it.

### KENT 96-320

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>
4244151	4/28/96	75.202(a)	\$252

Citation No. 4244151 states:

A loose inadequately supported coal rib approximately 3 [feet] high, 5 [feet] long & 14 [inches] thick was observed on the 9 Right Section[,] No. 3 entry. The rib was on the corner of the No. 3 Entry on 9 Right (Gov. Exh. P-15).

(The citation describes the dimensions of the rib as 3' high, 5" long & 14" thick. Clay's testimony confirms that 5" is a typographical error and that he meant to write 5' (Tr. 122).)

In addition to alleging a violation of the standard, the citation includes an S&S finding.

The requirements of section 75.202(a) are set forth above.

Clay arrived at the 9 Right Section, No. 3 Entry during the third shift, a service shift. Mining equipment was being moved on the section to prepare the area for the day shift. Three or four miners were working (Tr. 121-122).

Clay noticed that a pillar on the section had a fractured rib (Tr. 122, 125-126). The fracture had caused part of the rib to pull away from the rest of the pillar (Tr. 122). (Clay described the part as 3 feet high by 5 feet long by 14 inches thick, or as approximately the size



of a file cabinet (Tr. 124)). The part was leaning out from the rib toward the roadway. Clay could see rock dust behind the fracture (Tr. 122, 124). The rock dust indicated to Clay that the rib had been fractured for some time, but he agreed that ribs can fracture at any time, especially in an area where the pillars have not yet been mined (Tr. 124, 128).

The rib was coal, but Clay noticed that the fractured part of the rib had a vein of rock running through it. The rock added weight to the leaning part of the rib, and Clay believed it was going to fall into the entry (Tr. 122).

When it fell, Clay feared it would seriously injure or kill a passing miner (Tr. 123). Because preparations were underway to move the section, there was much activity in the immediate area of the fracture, and Clay cautioned a miner who was walking by the fractured rib to walk in the middle of the entry (Tr. 124).

Clay explained that in a 24-hour period, the area where the loose rib was located had to be preshift examined three times. Further, it had to be onshift examined during each of the three shifts. The fractured rib was obvious.

The condition was abated when the loose rib was pulled down (Tr. 125).

### **THE VIOLATION**

Clay's testimony that miners both worked and traveled in the area of the fractured rib was not disputed, nor was his description of the fractured rib's size, composition, and condition. I credit his testimony and his opinion that the fractured rib would have fallen into the entry and injured or killed any miner unlucky enough to be passing by. I conclude that the cited rib was not supported or otherwise controlled to protect miners and that the violation existed as charged.

### **S&S AND GRAVITY**

The violation was both S&S and very serious. The hazard contributed to by the violation was that the inadequately supported rib would fall into the entry and seriously injure or kill a passing miner. The fact that the fractured part of the rib was leaning into the entry, the fact that it carried the added weight of a rock vein, and the fact that miners worked on the section who frequently passed the rib, made it reasonable likely that as mining continued an accident would occur. Further, given the size of the fractured rib, I agree with Clay that at the least the resulting injuries would have been of a reasonably serious nature.

The gravity of the violation was attested to by the fact that the rib was more than just loose, it was leaning into the entry, a fact from which I infer that it was getting ready to fall. When a rib part that was the size of a file cabinet was ready to topple on passing miners, the failure to support or otherwise to control the rib was very serious indeed.

## NEGLIGENCE

Clay's testimony established the inadequately supported or otherwise controlled rib was due to the preshift examiner's failure to exercise the care required by the circumstances and thus was due to Harlan's negligence. The presence of rock dust behind the fracture permits the inference that the fracture was in existence at least at the beginning of the shift during which Clay found it. (No rock dusting was done on the service shift.) The preshift examination for the service shift had been conducted and the preshift examiner should have detected the condition and have had it corrected.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>
4244150	4/29/96	75.202	\$252

Citation No. 4244150 states:

Loose inadequately supported coal ribs were observed at various locations on the 004 MMU where men normally work and travel (Gov. Exh. P-23).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

The requirements of section 75.202(a) are set forth above.

Clay was conducting an inspection, on April 29, 1996, on the 004 MMU Section when he observed loose, inadequately supported coal ribs at various locations where miners normally worked and traveled. He described one area where he saw the ribs as A[i]n the last open crosscut@ (Tr. 135). This including an area Anear the ratio feeder on the belt line@ (Tr. 130). Clay especially remembered the loose rib by the ratio feeder because the roadway narrowed there from 18 or 20 feet to 6 feet, and miners had to travel right past the rib (Id.). He also saw some loose ribs outby the last open crosscut (Tr. 135).

All of the loose ribs were within 300 feet of each other (Tr. 135). Some, but not all, of the ribs had rock dust behind where they had fractured (Tr. 136). Because of weight from the overburden, some of the ribs had begun to separate from the pillars and the separated portions of the ribs were leaning out toward the roadway (Tr. 131, 134). In addition, some of the ribs contained a vein of rock (Tr. 131).

Harlan's safety director, Sargent, took issue with the number of ribs that were fractured and leaning. Sargent, who did not accompany Clay on April 29 (Tr. 138), stated that Harlan routinely pulled down such ribs (Tr. 137-138), although A[y]ou might find one occasionally that needs [to be taken] down@ (Tr. 137). He believed if the ribs had been of the number and condition described by Clay, they would have been detected by the preshift examiner and the situation would have been corrected (Tr. 138).

Clay inspected the section during the early morning hours when the maintenance shift was underway. Work was being done on the section, including the area containing the ribs, and the area therefore had to be both preshift and onshift examined (Tr. 130-131, 132). Clay did not know how long the ribs had been in the condition in which he observed them.

Should the ribs have fallen on a miner, a broken foot, leg, or even a fatality could have resulted. Separation of the ribs from the pillars indicated to Clay that a massive weight was being exerted on the pillars. In addition, the rock in the ribs indicated that the separating ribs weighed more than if they were comprised solely of coal (Tr. 131). The fact that the ribs were beginning to separate from the pillars and were leaning into the entry, or, as Clay put it, were pitching out, in Clay's opinion made it likely that the ribs would fall (Tr. 131).

The ribs were pulled down to abate the condition (Tr. 132).

### **THE VIOLATION**

I credit Clay's testimony regarding the presence of the loose ribs. Harlan did not present any testimony by persons with first-hand knowledge of the conditions on the section (see, Tr. 138).

I also credit Clay's testimony that the ribs had fractured to the extent that they were leaning into the roadway and that a massive weight on the pillars was causing them to fracture and lean (Tr. 131). Harlan did not offer any evidence to dispute this, nor did it offer anything to suggest that Clay's description of and explanation for the fractured ribs was other than accurate.

It is clear from the testimony that miners were working on the section when Clay observed the ribs and that miners worked and traveled in the immediate vicinity of the ribs during the shift (Tr. 130-131, 135). I agree with Clay that the ribs could have fallen, and if they struck a miner, that a serious injury or worse could have resulted.

Given all of this, the conclusion is inescapable that the cited ribs were not supported or otherwise controlled to protect the miners from rib falls. In other words, the conclusion is inescapable that Harlan violated the standard as charged.

### **S&S AND GRAVITY**

The violation was both S&S and very serious. The violation created a danger that miners would be injured by a rib fall a hazard that otherwise should not have existed. That such an injury was reasonably likely was established by Clay's unrefuted testimony regarding the massive weight that was pressing down on the pillars (Tr. 131), by the fact that the weight had caused the pillars to fracture and the ribs to separate and lean into the roadway (Tr. 131, 134), and by the fact that during the course of continuing mining on the section, miners would travel

and work in close proximity to the ribs. In this regard, I note especially Clay's testimony regarding the area near the ratio feeder where miners could not help but travel in harm's way (Tr. 130-135). Finally, Clay accurately stated that rib fall injuries could range from broken bones to a fatality, all of which are reasonably serious results (Tr. 131).

The widespread nature of the violation, extending as it did for 300 feet, increased the likelihood of injury. This, and the type of injuries the violation could have caused, leads me to conclude that the violation was very serious.

### NEGLIGENCE

Clay testified without contradiction that some of the fractured ribs had rock dust in areas where they had pulled away from the pillars (Tr. 136). I infer from this that at least those ribs were in violation of the standard prior to the April 29 maintenance shift. Their condition should have been noted by the preshift examiner for that shift and reasonable care required the fractured ribs to be pulled down. They were not, nor was there any indication the company intended to correct the situation. Therefore, I conclude that Harlan negligently failed to exercise the care required by the circumstances.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>
4250669	5/8/96	75.604(b)	\$252

Citation No. 4250669 states:

A permanent splice in the 2 AWG, 480 VAC trailing cable extending to and serving the 004 MMU Fletcher roof bolter would not exclude moisture as required. The splice is approximately 150 [feet] from the machine itself. The cable is handled frequently (Gov. Exh. P-26).

In addition to alleging a violation of the standard, the citation includes an S&S.

Section 75.604(b) requires in part that Apermanent splices in training cables ... shall be ... [e]ffectively insulated and sealed so as to exclude moisture.@

Clay noticed, on May 8, 1996, during an inspection of the 004 MMU Section, the trailing cable to the section's roof bolting machine contained a defective permanent splice. The ends of the splice had not been taped (Tr. 107, 110), and Clay could Asee down into the splice@(Tr. 107). The splice was damp and there was water on the section (Tr. 109, 110).

The trailing cable was handled frequently by miners. Several times during the mining cycle it was picked up and suspended from the ceiling to allow the continuous mining machine to travel under it (Tr. 109, 110). To lift and move the cable, miners used their hands rather than hot sticks or ropes or other devices (Tr. 112).)

The cable carried 480 volts of electricity, which Clay described as five times enough current to cause an electrocution (Tr. 109). Clay felt that a miner who picked up the cable and touched the open splice could receive a serious electrical burn (Id.). In fact, because there was water on the section, and because the splice was damp, Clay believed it more likely that the miner would be killed (Tr. 110).

In Clay's opinion, Harlan was negligent because the roof bolting machine had to be examined on a weekly and monthly basis. Further, the cable was lying in an area that had to be examined by both the preshift and onshift examiners. Clay maintained that the open splice was very obvious (Tr. 110, see also Tr. 110-111). The splice appeared to Clay to have been open for a while, Clay guessed for more than 24 hours (Tr. 112).

The condition was abated when the ends of the splice were taped (Tr. 111).

### **THE VIOLATION**

Section 75.604(b) requires permanent splices on trailing cables to be effectively insulated and sealed so as to exclude moisture. Clay's testimony regarding the condition of the splice was not challenged, and I find that it was not taped at the ends, was open, and damp. As such, the splice did not conform to the requirements of the standard, and the violation existed as charged.

### **S&S AND GRAVITY**

The violation was both S&S and very serious. I have accepted Clay's unrefuted testimony that the open splice was damp. I have also accepted his testimony that there was water on the section and miners frequently picked up the cable. As mining continued the cable would be picked up, and rehung again and again. In view of this, and in view of the fact that this would have been done on a section where water was present, I conclude that it was reasonably likely that a miner would have been injured seriously. Indeed, a serious injury was the best that could have been expected under the circumstances. These factors are more than enough to support the inspector's S&S finding (see, *ABM Coal Co., Inc.* 16 FMSHRC 2345, 2352 (Hodgdon, ALJ)).

The violation was very serious because it presented the very real likelihood that a miner would be electrocuted while handling the cable.

## NEGLIGENCE

Clay testified without dispute the violation was readily visible. From the appearance of the splice, Clay believed it had been open for at least 24 hours. Clay's opinion was a reasonable inference, and I credit it.

Given the fact that the defective splice was visually obvious, it should have been detected at least by the preshift examiner prior to Clay's arrival in the area, and perhaps by the onshift examiner as well. Had the preshift examiner exercised the care required, the splice would have been repaired or the cable would have been removed from service before Clay observed the violation. The failure of the examiner is attributable to the company and represents negligence on Harlan's part.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>
4250670	5/8/96	75.517	\$252

Citation No. 4250670 states in part:

The 2 AWG, 480 VAC trailing cable extending to and serving the 004 MMU Fletcher twin head roof bolter was not adequately insulated and fully protected where the outer jacket of the cable has been ruptured and the energized power conductors were visible. The cable's damaged area is approximately 250 [feet] from the machine & is frequently handled (Gov. Exh. P-27).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

Section 75.517 requires in part that power cables ... shall be insulated adequately and fully protected.®

During an inspection of the 004 MMU Section, Clay noticed a rupture in the outer jacket of the trailing cable of the section's roof bolting machine. Clay could see the insulated power conductors inside the jacket (Tr. 141). The ruptured area was about 250 feet from the machine, and was readily visible (Id.). Mining was in progress on the section (Tr. 151).

The jacket was designed to protect the conductors (Tr. 147). Clay believed that in order for the jacket to be torn open, some sort of extensive force had been applied to the cable. He stated, ®[A]t some point in time, this [cable] ... had a heck of a lick on it® (Tr. 143). Clay also believed it likely that the same force that ruptured the jacket did internal damage to the conductors (Tr. 145). He maintained, that the cable could not be ruptured without damaging the conductors (Tr. 152). He noted that if even a small portion of a conductor were damaged to the point of being exposed it could conduct enough electricity to electrocute a miner (Id.).

The cable was moved by hand to the sides of the entries so that mobile equipment could pass by (Tr. 148). Therefore, as mining continued the cable was being handled constantly. It was also dragged through wet areas of the section (Tr. 143). Clay feared that miners who picked up the cable would be seriously burned or electrocuted (Tr. 143).

Clay found the breach in the cable around 7:00 p.m. A foreman was in the area. Miners also were present (Tr. 149). Clay admitted he did not know when the cable had ruptured and he agreed the condition could have just happened (Tr. 151).

The condition was corrected when the ruptured area was patched (Tr. 149).

### **THE VIOLATION**

Clay's testimony that the cable's outer jacket was ruptured and the interior insulated conductors were exposed, was not refuted. A cable with an opening in its outer jacket through which its interior insulated conductors are exposed is not a fully protected cable. The outer jacket not only protects the conductors inside the cable, it provides them with insulation additional to the insulation with which each conductor is wrapped. Therefore, when the jacket is ruptured, the cable is not insulated as designed. In other words, it is not adequately insulated as required by the standard (see, *Beech Fork Processing, Inc.*, 16 FMSHRC 1346, 1354 (Hodgdon, ALJ)).

### **S&S AND GRAVITY**

The violation was both S&S and very serious. I have accepted Clay's testimony that the rupture exposed the cable's interior conductors (Tr. 141). I also accept his testimony that mining was in progress, and as it continued, miners working on the section would have to manually move the cable to the side of the entry to allow equipment to pass (Tr. 148).

I recognize that the Secretary presented no conclusive evidence that anything was wrong with the conductors or with their interior insulation. Nonetheless, I conclude the violation was S&S. I agree with Clay that whatever caused the cable to rupture probably did so with such force that the interior conductors were damaged and presented an immediate shock hazard (Tr. 152). I note Clay's testimony that a small strand of a conductor, sticking through a pin size hole in the conductor's insulation, was enough to electrocute a miner (Tr. 145).

I also conclude it was reasonably likely that as mining continued a miner would pick up the cable and be seriously injured or electrocuted. In reaching this conclusion, I am cognizant that Commission Judge Avram Weisberger has held that a violation of the standard was not S&S when there was no evidence of defects in any of the inner conductors (*Harlan Cumberland Coal Co.*, 18 FMSHRC 1447, 1454 (August 1996)). However, I read the Commission's decision in

*U.S. Steel Mining Co., Inc.* as recognizing that a defect in the outer jacket weakens the protection afforded by the inner insulation to the extent that it is reasonably likely the defect will contribute to a miner being seriously injured or electrocuted as mining continues (7 FMSHRC 1573 (July 1984)).

The violation was very serious because it presented the very real likelihood that a miner would be seriously burned or electrocuted when handling the cable.

### **NEGLIGENCE**

The testimony does not support finding that Harlan was negligent. While the violation was visually obvious, Clay did not testify regarding evidence suggesting the jacket had ruptured during previous shifts, or was ruptured when the preshift or onshift examinations were conducted for the shift during which he found the condition. Rather, he agreed that the break in the cable's jacket could have just happened (Tr. 151). I cannot find that Harlan knew or should have known of the cable's condition.

### **KENT 96-321**

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>
4250624	5/14/96	75.604(b)	\$252

Citation No. 4250624 states:

A permanent splice approximately 300 [feet] from the machine would not exclude moisture at this location in the 2/0 995 VAC trailing cable extending to and serving the 005 MMU ... continuous miner ... located in the No. 3 entry (Gov. Exh. P-36).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

The requirements of section 75.604(b) are set forth above.

Clay inspected a continuous mining machine on the 005 MMU Section. The power to the machine was disconnected and he inspected the machine's trailing cable. Approximately 300 feet from the machine, he came upon a permanent splice that was open. Clay could see into the splice. He could see the interior conductors. It was obvious to Clay that the splice would not exclude moisture (Tr. 113-115).



The cable carried 995 volts of electricity, voltage Clay described as **Avery lethal** (Tr. 116, see also Tr. 114). Because the splice was open, water **C** an excellent conductor of electricity **C** could get into the cable and around the conductors (Tr. 115). There was water in the section and some of the cable was lying in water. Moreover, the continuous mining machine itself was provided with water (Tr. 115).

Clay testified that during the shift, the cable was handled frequently by miners **C** at least, 100 times a shift. The miners pulled the cable to the side of the roadway to get it out of the way of passing equipment (Tr. 115-116, 117). Given the number of times the cable was handled, Clay believed a miner would be electrocuted because of the defective splice (Tr. 116-117).

The splice had been properly taped, but the tape had worn away. Clay estimated the splice had been open to moisture **A**for a couple of shifts at least (Tr. 119). Because the defective splice was visually obvious, Clay thought the preshift examiners should have detected the condition (Tr. 117). He also observed that the equipment had to be examined by a certified electrician on a weekly basis (Id.).

The condition was abated when additional insulation was applied to the spliced area and when both ends of the splice were taped (Tr. 118).

### **THE VIOLATION**

Clay's testimony that the splice on the trailing cable was open and he could see into the splice was not disputed. An open splice is not effectively insulated and sealed to exclude moisture. The violation existed as charged.

### **S&S AND GRAVITY**

The violation was both S&S and very serious. I accept Clay's unrefuted testimony that there was water on the section and parts of the cable were lying in water (Tr. 115). I also accept his testimony that during the course of a shift, miners frequently pulled the cable to the side of the roadway (Tr. 115-116, 117). There is no dispute that the cable carried 995 volts of electricity and Harlan did not contest Clay's description of the voltage as **Avery lethal** (Tr. 116).

Whether or not the open splice became wet, it posed a very dangerous shock hazard to miners. The presence of water on the section intensified that hazard, and the fact that the cable was handled at least a 100 times a shift, as Clay testified (Tr. 117), made it reasonably likely that as mining continued on the section, a miner would be severely shocked or electrocuted.

In addition, the condition of the splice, the **Avery lethal** voltage carried by the cable, and the fact that the cable was handled frequently meant this was a very serious violation.

## NEGLIGENCE

The defective splice was readily visible. The tape had worn away. I credit Clay's estimate, based upon the appearance of the splice, that the splice had been in violation of the standard for at least two shifts (Tr. 119). I conclude that had the preshift examiners exercised the care required, the defective nature of the splice would have been detected and the splice would have been repaired or the cable would have been taken out of service. The examiners were negligent, and their negligence is attributable to Harlan.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>
4250672	5/18/96	75.400	\$252

Citation No. 4250672 states:

Combustible material in the form of float coal dust has accumulated in and on the energized power conductors of the 150 KVA 4,160 VAC line power center located outby the 004 MMU tailpiece (Gov. Exh. P-30).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

Section 75.400 requires in part that A[c]oal dust, including float coal dust ... shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.@

Clay conducted an inspection of the power center for the 004 MMU Section. The power center was located approximately 500 feet out by the section's tail piece. The power lines into the center carried 4,160 volts of electricity. Two transformers in the center Astepped down@the voltage to make it useable by mining equipment (Tr. 153-154).

Clay shone a flashlight through a window in the side of the power center. Clay saw black float coal dust in and on the energized conductors of the center (Tr. 153, 155). Clay believed the presence of the float coal dust created an explosion and fire hazard. He noted that there were exposed conductors inside the power center, that the conductors could arc, and that an electrical arc could provide an ignition source for the float coal dust (Tr. 154). In addition, there were circuit breakers on the transformers and they too could arc and ignite the dust (Tr. 157, 160). He also noted that when the transformers Astepped down@the voltage the transformers generated a great deal of heat (Tr. 154-155). This heat as well could ignite the float coal dust (Tr. 155). He described float coal dust as extremely combustible (Tr. 160).

If the float coal dust ignited there was the possibility that miners could be burned in the resulting explosion and fire (Tr. 156). Clay believed that 10 to 12 people worked in by the power center. This constituted a normal production shift at the mine (Id.). All of the miners in by the center were endangered by the violation.

Clay thought the float coal dust entered the power center through the center's ventilation louvers (Tr. 158-159). In Clay's opinion, it took some time[,] ... more than ... a shift or two[,] for th[e] float dust to accumulate@ (Tr. 159). Therefore, the accumulation should have been detected and eliminated (Tr. 157, see also Tr. 158).

The condition was abated by removing the dust (Tr. 158).

### **THE VIOLATION**

The standard specifically prohibits the accumulation of float coal dust on electrical equipment in active workings. Clay's un rebutted testimony establishes the presence of the cited dust on the conductors in the power center C in other words, on the electrical equipment. Clay testified the power center is moved as mining progresses (Tr. 160). To do this miners must work around the power center. I infer from this that the power center was in an active working. The violation existed as charged.

### **S&S AND GRAVITY**

The violation was both S&S and very serious. As Clay testified, float coal dust is extremely combustible (Tr. 154). Moreover, I credit his testimony that electrical arcing inside the power center was not uncommon and the transformers in the power center generated a great deal of heat (Tr. 157,160). I find, the arcing and heat provided potential ignition sources for the float coal dust (Tr. 157, 160).

An explosion and/or fire at the power center would have subjected miners working around the center to injury due to burns or to smoke inhalation. I conclude that given the presence of the arcing, the heat, and the extreme combustibility of the float coal dust, it was reasonably likely that as mining continued the dust would have ignited, and miners would have been injured. Commission Administrative Law Judge Jerold Feldman has said it best, *to allow combustible materials to accumulate on [or adjacent to] potential ignition sources is a very bad idea@ (Amax Coal Co., 18 FMSHRC 1868, 1871 (October 1996) (Feldman, ALJ) (appeal pending D.C. Cir. No. 1487)).*

Obviously, the consequences to a miner who suffered burns due to the resulting explosion and/or fire, would be serious, perhaps even catastrophic. This was a very serious violation.

**NEGLIGENCE**

Clay was the only person to testify who viewed the accumulated float coal dust. He noted both the amount of the coal dust and its dark black color (Tr. 153-155). Therefore, I credit his belief that it took more than one or two shifts for the dust to accumulate (Tr. 160).

However, the testimony falls short of establishing Harlan's negligence, because Clay only testified that the power center is required to be examined weekly and monthly (Tr. 157), and there is no basis to infer the accumulation was present when such examinations were conducted, or that the propensity of float coal dust to accumulate in the power center was such that the power center should have been examined more frequently. Therefore, I find that Harlan was not negligent in allowing the prohibited accumulation to exist.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>
4250623	5/13/96	75.1713-7(b)	\$252

Citation No. 4250623 states:

The 004 MMU first aid kit was inadequate in that the required 2 cloth blankets were missing (Gov. Exh. P-35).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

Section 75.1713-7(b) requires in part that among the first aid equipment keep underground are A[t]wo cloth blankets@.

Clay testified that the required cloth blanks were not present on the 004 MMU Section. He maintained that cloth blanks are especially important underground, where they can provide warmth in a very cool environment (Tr. 163). In the event a miner is injured, and needs to be carried by stretcher, one blanket can provide insulation over the miner's body and the other can furnish insulation between the miner's body and the aluminum stretcher (Tr. 164). (Most stretchers are made of aluminum and are cold to the touch (Tr. 163).) In Clay's opinion, the retention of body heat is important because it can keep the injured miner from going into severe shock (Tr. 164).

The first-aid equipment is required to be examined weekly by the section foreman (Tr. 163).

The condition was abated when two blankets were provided (Tr. 165).

## THE VIOLATION

The parties stipulated that two cloth blankets were not among the first-aid supplies kept on the 004 MMU Section and that the violation existed as charged (Tr. 162).

## S&S AND GRAVITY

The violation was not S&S and was not serious. The inspector's S&S finding is defective in that it does not meet the third element of the *Mathies* test. It was not reasonably likely that the hazard contributed to (the loss of body heat following an injury) would result in another injury. There are simply too many variables to allow a contrary conclusion **C** for example, it would be critical to know the type of injury sustained by the miner. Did it require him or her to be transported on a stretcher, and if so, was it an injury that might induce shock? How far was the injured miner from the portal? Of what was the stretcher constructed? (With regard to the latter unknown, the standard does not require all stretchers to be made of aluminum).

Nor was the violation serious. The lack of blankets need not lead to an injured miner going into shock. While it is undeniably true that an injured miner may require protection from the cold, and while the required blankets are the most convenient way to provide the protection, there are alternatives **C** for example, the outer garments of other miners and/or the cloth used to direct ventilation in the mine.

## NEGLIGENCE

Also, the testimony falls short of establishing negligence on Harlan's part. Clay testified that the first-aid equipment must be examined weekly but did not offer an opinion as to how long the blankets had been missing or whether any special circumstances in the mine put Harlan on notice that it should have checked more frequently to make certain the blankets were present (Tr. 163).

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>
4250628	5/14/96	75.518	\$252

Citation No. 4250628 states:

Adequate overload protection was not provided for the twin head Fletcher roof bolter on the 005 MMU. The instantaneous unit in the 480 VAC three phase breaker is a 6/12. The instantaneous unit was set on 11 and is required to be set on 6 as this is a 3 AWG cable (Gov. Exh. P-40).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

Section 75.518 requires in part that Automatic circuit-breaking devices ... of the correct type and capacity shall be installed so as to protect all electrical equipment and circuits against short circuit and overloads. In addition, it requires, A[t]hree-phase motors on all electrical equipment [to] be provided with overload protection that will deenergize all three phases in the event that any phase is overloaded.

Clay testified that electrical circuits providing power to underground equipment are required to have overload and short circuit protection to protect miners who operate, handle, and work on the equipment (Tr. 167). While conducting an inspection of the 005 MMU Section, Clay found that the trip setting on the circuit breaker for the 480 volt, three-phase cable to the roof bolting machine was incorrectly set at almost twice the allowable setting (Tr. 167-168).

Clay explained that to determine whether a circuit breaker is of the correct capacity, it is necessary to refer to 30 C.F.R. ' 75.601, and in particular to section 75.601-1, which contains a schedule that sets forth the maximum allowable instantaneous settings for circuit breakers providing short circuit protection for trailing cables (Tr. 170). If the setting of a circuit breaker for a trailing cable is too high according to the schedule in section 75.601-1, section 75.518 is violated (Tr. 172).

Here, the dial on the circuit breaker had didgets that equaled 200 amps each. The trailing cable had an AWG (average wire gauge) of 3 (Tr. 177). Under the schedule in section 75.601-1, the cable's circuit breaker maximum allowable instantaneous setting was 600, or didget 3 on the dial (Tr. 178-179, 180). However, Clay found that the dial was set at a didget that equaled 1100 amps, almost double that allowed (Tr. 181-182).

The danger presented by having the circuit breaker set at 11 was that A[t]he cable would actually burn up before the breaker could de-energize the electricity (Tr. 172). (The transcript frequently misquotes Clay and others as saying Reenergize rather than Ade-energize.) Although Clay saw one person in the vicinity of the trailing cable when he cited the condition, he noted that seven miners worked on the 005 MMU Section, and he believed that all of the miners in the vicinity of the cable would be subject to electrical burns and/or smoke and fumes if the cable caught fire (Id.). He also believed that miners working inby the cable would be endangered by smoke carried inby (Tr. 173-174).

Clay thought that in the context of continued mining operations, a fire was reasonably likely. The longer the cable was in operation, the hotter it became. In addition, there were several splices in the cable which would raise the level of heat. The cable sometimes was used constantly on two shifts and at times on a third shift as well. Thus, there was Aan excessive amount of heat generated by the cable (Tr. 173).

Clay acknowledged, however, that he did not test the cable's ground fault protection, and he agreed that if the protection was working properly, it would deenergize the cable should the cable suffer an electrical overload (Tr. 176). Nonetheless, he maintained that even if the cable was deenergized, there could still be a fire before the electricity was cut off (Tr. 183).

The cable, the circuit breaker, and the settings were required to be examined on a weekly and monthly basis. Clay maintained that the examiners found no problem and did nothing about [the high setting], despite the fact that the setting was visually obvious to anyone who read the dials at the circuit breaker (Tr. 174).

Normally, when the shift began, the foreman or a certified electrician put in the circuit breaker. Either person easily should have observed the dials. When Clay found the condition, the shift was 2 or 3 hours old and the foreman was on the section (Tr. 175).

The violation was abated by resetting the circuit breaker (Tr. 175).

### **THE VIOLATION**

Section 75.518 codifies section 305(m) of the Act (30 U.S.C. § 865(m)). Section 305 contains two general provisions for all electrical equipment. First, that all electrical equipment and circuits be protected from short circuits and overloads by automatic circuit-breaking devices or fuses. Second, that three-phase motors on all electrical equipment be provided with overload protection that will deenergize all of the phases in the event any phase is overloaded.

Section 306 of the Act contains provisions specifically related to trailing cables (30 U.S.C. § 866). Section 306(b) requires short circuit protection for trailing cables to be provided by circuit breakers of adequate current-interrupting capacity (30 U.S.C. § 866(b)). Mandatory safety standard 30 C.F.R. § 75.601 codifies section 306(b) Act, and section 75.601-1 specifies the maximum allowable instantaneous settings for trailing cable circuit breakers.

Harlan did not dispute Clay's testimony that the circuit breaker exceeded the allowable setting, and I find this was the case (Tr. 167-168). However, Harlan maintained that it did not violate section 75.518, the standard Clay chose to cite, and I agree. The problem is that Clay did not cite Harlan for a violation of section 75.601-1. Therefore, in order to find a violation, I must accept the Secretary's argument that the facts also encompass a violation of section 75.518. They do not.

Clay cited section 75.518 because he believed that its second sentence required the trailing cable to be provided with protection that would deenergize the cable in the event of an overload (Tr. 170). The second sentence of section 75.518 pertains to [three-phase motors on all electric equipment]. It was not the three-phase motor of the roof bolting machine about which Clay was concerned, but rather the trailing cable, a part of the equipment regulated by section 75.601. When trailing cables have a separate status in the Act and the regulations,

violations of the requirements relating to trailing cables should be cited under such regulations. The violations should not be subsumed under a more general provision. In other words, the phrase "three-phase motors" in section 75.518 does not include the trailing cables that provide electricity to those motors. (In this regard, I note previous decisions of the Commission's judges upholding citations of section 75.601-1 when, as here, short circuit protection has been improperly set for a trailing cable providing power to mining equipment (*Ramblin Coal Company, Inc.*, 14 FMSHRC 1025, 1026 (ALJ Fauver); *C.W. Mining Company*, 12 FMSHRC 804, 862 (April 1990) (ALJ Morris)).

For these reasons, I conclude that the evidence does not support finding a violation of section 75.518.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>
4250629	5/14/96	75.518	\$252

Citation No. 4250629 states:

Adequate overload protection was not provided for the off standard 10 SC Joy shuttle car in use and located on the 005 MMU. The trailing cable is a No. 4 AWG. The instantaneous unit in the 480 VAC three phase breaker is a 5/10. The instantaneous unit was set on 687 amps. The maximum allowable setting for a cable this size is 500 amps (Gov. Exh. LP-41).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

The requirements of section 75.518 are set forth above.

On May 14, 1996, Clay inspected the short circuit and overload protection for the trailing cable of the shuttle car used on the 005 MMU Section. The trailing cable size was 4 AWG, and the maximum allowable trip setting for the circuit breaker was 500 amps. The trip setting was 687 amps, or 187 amps more than the maximum allowable amp (Tr. 185).

### **THE VIOLATION**

As with the previous alleged violation, I conclude the Secretary did not prove a violation of the cited standard. The circuit breaker for the shuttle car on the 005 MMU Section was set above the amperage allowed by section 75.601-1, but this did not equate to a violation of section 75.518.



<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>
4250631	5/16/96	75.804(b)	\$252

Counsel for Harlan objected that the condition stated in the citation did not constitute a violation of section 75.804(b). In response, the Secretary moved to vacate the citation because there [was] no violation@ (Tr. 192). I granted the motion (Id.).

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>
4250632	5/16/96	75.1720(a)	\$267

Citation No. 4250632 states:

Safety glasses were not being utilized in the No. 1 entry of the 005 MMU where a danger of flying particles was present. Resin type roof bolts were being installed and no eye protection was observed in use (Gov. Exh. P-44).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

Section 75.1720(a) requires that miners regularly employed in the active workings of an underground coal mine wear face-shields or goggles when welding, cutting, or working with molten metal or when other hazards to the eyes exist from flying particles.@

Clay testified that on May 16, 1996, during an inspection of the 005 MMU Section, he observed a roof bolting machine operator. The operator was not wearing eye protection, (Tr. 194).

Following this testimony, there was an off the record discussion after which counsel for Harlan agreed that the company would pay the proposed penalty. I accepted the agreement (Tr. 194).

**KENT 96-322**

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>
4250646	5/21/96	75.202(a)	\$252

Citation No. 4250646 states:

Dislodged roof supports in the form of previously installed cribs were observed in the intersection of the No. 49 cross cut of the main intake. [One] crib has been torn completely down and [four] have been damaged [and] kicked

around where they are no longer serving their purpose. Drawrock is present and the mine roof shows evidence of taking excessive weight by cutters down the rib line (Gov. Exh. P-49).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

The requirements of section 75.202(a) are set forth above.

Clay testified that on May 21, 1996, he conducted an inspection of the mine. He was at the No. 49 crosscut of the mine's main intake entry when he observed several dislodged cribs. Although this area is approximately a mile and a half from active mining, Clay described the entry as *one of the ... most-traveled entries in and out of the coal mine* (Tr. 196). Clay saw people traveling through the area. The entry also was part of the mine's primary escapeway (Tr. 195-196).

Harlan's safety director, Sargent, did not agree that the entry was traveled frequently. He testified that at the time the condition was found by Clay, the entry was only traveled when it was examined, which was once a week. According to Sargent, miners did not enter and leave the mine through this part of the entry. Rather, there was another area of the mine where miners entered and went to the active working sections (Tr. 201).

As Clay recalled, the roof in the area showed signs that it was under pressure from excessive weight. At the intersection, where the pillar met the roof, there were cracks, or *cutters*, in the roof. The cutters varied in length. One was 8 to 10 feet long (Tr. 196-197). The roof had been bolted and four cribs had been installed (Tr. 196). Generally, cribs are installed when adverse roof conditions are encountered (Tr. 199). Clay looked and saw that none of the cribs was contacting the roof. In other words, the cribs were no longer supporting the roof (Tr. 196-197).

Clay believed the cribs had been hit and knocked out of position by a large piece of mobile equipment (Tr. 197). However, he did not know when this had happened (Tr. 199-200).

Clay testified that the area had previously experienced adverse roof conditions, which was why the cribs had been installed. Moreover, the cutters indicated to Clay that the roof was under increased pressure (Tr. 197-198). Clay feared pieces of the roof would fall and injure miners and that the injuries would range from serious fractures to fatalities (Tr. 198).

Sargent testified that cribs are also installed to deter bad floor conditions, such as bottom heaving (Tr. 202). Sargent was asked whether he knew if the bottom was heaving in the area of the cribs. He did not respond directly but rather answered that the mine *has had* a lot of heaving bottom (Id.). Although Sargent maintained the cribs had been in place *for a while* (Tr. 200), he did not know if they were installed to counter the roof conditions Clay observed (Tr. 200-201).

The condition was terminated when the cribs were reconstructed (Tr. 199).

### **THE VIOLATION**

The violation existed as charged. Clay's contention that cutters ran along the rib line where the top of the rib and the roof intersected and that this indicated the roof was taking excessive weight (Gov. Exh. P-49) was not refuted (Tr. 196-197). Indeed, Sargent was candid in stating he did not know if the cutters were present or if the roof was under pressure (Tr. 200-201).

Although Sargent testified, and I find, that cribs can be installed both to provide additional roof support and to prevent bottom heaving, he was not responsive when asked directly if the bottom was heaving in the area cited (Tr. 202). Given the presence of the cutters, I infer the cribs were installed to provide needed additional support for the roof at the intersection of the main intake entry and the No. 49 crosscut. Further, since Harlan did not dispute the fact that the cribs did not touch the roof and thus did not provide any of the necessary additional support, I conclude the roof was not supported adequately and that the failure to properly support the roof created a roof fall hazard for miners traveling in the immediate vicinity of the cribs.

It is clear that at least the weekly examiner regularly traveled through the area (Tr. 198, 201). It also is clear that Clay saw miners traveling through the area (Tr. 195-196). Clay did not know when the cribs became dislodged from the roof and thus did not know how long the condition had existed (Tr. 199-200). However, the miners Clay saw traveling through the area certainly did so when the roof was inadequately supported, and I conclude they at least were subjected to hazards relating to falls of the roof and that the roof was in violation of section 75.202(a).

### **S&S AND GRAVITY**

The violation was both S&S and very serious. I have credited Clay's testimony that the cutters indicated increased pressure on the roof (Tr. 197-198). I also credit his fear that pieces of the roof would fall and seriously injure or kill miners in the area (Tr. 198). The presence of the cribs and the cutters testified as eloquently as Clay to the instability of the roof. The fact that pieces of the roof were not falling at the time of the inspection is not dispositive of the S&S nature of the violation as long as a miner could be at risk during the course of continued mining operations (see, *Halfway Incorporated*, 8 FMSHRC 8, 12 (January 1986)).

The area in which the cribs were located was examined periodically. It is reasonable to conclude that given the increased pressure on the roof, as mining continued and the examiner passed the area, pieces of the roof would have fallen. Also, it is reasonable to conclude that the exposed examiner would have sustained a serious, if not a fatal, injury.

The Commission has noted that mine roofs are inherently dangerous and that even good roof can fall without warning (*Consolidation Coal Company*) 6 FMSHRC 34, 37 (January 1984). It also has stressed the fact that roof falls remain the leading cause of death in underground mines

(*Halfway, Incorporated*, 8 FMSHRC at 13; *Roof Mining Co.*, 4 FMSHRC 1207, 1211, n.8 (July 1982)). The failure to support the roof in an area where a miner periodically traveled and where the roof was under increasing pressure, produced a situation that easily could have lead to serious injury or death and constituted a very serious violation of the cited standard.

### NEGLIGENCE

Although the violation was visually obvious, the Secretary failed to show how mine managment knew or should have know of the violative conditions, and without such a showing I cannot find the company failed to exercise the care required of it. Clay did not know when the cribs were dislodged, nor did he offer an opinion in this regard (Tr. 199-200). The testimony established the cited area was examined on a weekly basis. It also established that Clay saw two miners traveling in the cited area, from which I can infer the area was preshift examined (see 30 C.F.R. ' 360). However, without more evidence on the issue I cannot assume the violation existed when these examinations were made.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F.'</u>	<u>Proposed Penalty</u>
4250649	5/21/96	75.202(a)	\$252

Citation No. 4250649 states:

The mine roof is inadequately supported at several locations throughout the intake roadway leading to the mine fan. Several pieces of rock, some 36"x36" [and] 3 to 5 inches thick have separated from the immediate mine roof [and] were observed hanging down at various locations (Gov. Exh. P-50).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

The requirements of section 75.202(a) are set forth above.

Clay testified that on May 21, 1996, while he was inspecting the intake roadway leading to the main mine fan, he observed separated and hanging drawrock. As best Clay could recall, the rock was located approximately 1,500 to 2,000 feet from the fan (Tr. 203-204). One of the pieces of hanging rock was 36 by 36 inches square and 3 to 5 inches thick.

The roof was composed of laminated shale. The area containing the hanging rock was located outby the fan. Clay believed the velocity of the air the fan was moving along the roadway, along with periodic changes in the atmospheric pressure, caused the drawrock to separate from the roof (Tr. 204).

Clay believed miners worked and traveled through the area and therefore the roadway had been preshift examined (Tr. 204-205). He testified that there was a water hole in the roadway and that Sargent told him a miner had been in the area pumping water from the hole (Tr. 205). The area had to be preshift examined before the miner could travel to the water hole. Clay also believed that the area was examined weekly (Tr. 205).

Clay feared for the safety of miners who examined the area and who checked the pump. They were endangered by the hanging drawrock. He noted that the entry ranged from 4 to 9 feet high, and that the greater the distance the rock fell, the more serious the injury if the rock struck someone (Tr. 204). A miner could suffer a broken neck, back, or worse, particularly if the miner was hit by the rock that measured approximately 3 feet square (Tr. 205-206).

Sargent agreed that if miners had worked in or had traveled through the area, it had to be preshift examined. However, he believed the area was not being preshift examined at the time the condition was cited. This was because to get to the water pump and to turn it on, a miner did not go into or through the cited area. The miner could turn the pump on and check on it from another entry (Tr. 208-209). For this reason, the area was not being regularly preshift examined. Rather, it was being examined weekly (Tr. 208).

According to Sargent, the cited area had been examined 3 days before Clay found the conditions, and it was not scheduled to be examined again for another 4 days (Tr. 209).

The condition was corrected when the drawrock was pulled down (Tr. 206).

### **THE VIOLATION**

The standard requires the Secretary to prove that miners were required to work or travel in or through the cited area and that the roof was not supported adequately to protect the miners from roof fall injuries. Because the Secretary has not proved miners were exposed to the cited roof conditions, I conclude there is inadequate proof to support a violation.

Clay's belief that miners worked and traveled in the cited area was based upon his belief that the miner who attended the water pump worked and traveled there and the area had to be preshift examined (Tr. 205-206). However, Sargent maintained that miners who traveled to the pump did not have to work or travel the area but could get to the pump and attend it via another entry (Tr. 208-209). The Secretary did not dispute that this was in fact the case, and I credit Sargent's testimony. I therefore conclude the Secretary did not prove that miners who worked at the pump ever were in the the cited area. It follows from this that the Secretary also did not prove that a preshift examination was required in the cited area and therefore that preshift examiners must have traveled there.

Sargent testified without dispute that the area was examined weekly and that it was examined 3 days before Clay found the conditions (Tr. 208-209). Clay was not asked whether he believed the roof conditions he observed existed when the weekly examiner traveled through the area and I can find a sufficient basis in the record to infer they did. The factors that caused the roof to deteriorate were not static and neither was the state of the roof.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>
4250653	5/21/96	75.202(a)	\$252

Citation No. 4250653 states:

The mine roof is not adequately supported in the return entry where the 1st right panel is located. Broken drawrock is present and 4 dislodged roof supports in the form of timbers. This area is required to be examined weekly (Gov. Exh. P-52).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

The requirements of section 75.202(a) are set forth above.

Clay testified that during an inspection on May 28, 1996, he observed four dislodged and broken roof timbers in the first right panel of the immediate main return entry. The involved area measured between 20 and 30 feet (Tr. 211-212). The area was required to be examined weekly, and from the dates and initials of previous examinations, Clay believed the weekly examiner had been in the area within the preceding week (Id.).

To Clay, the broken timbers indicated that there [was] a problem with the ... roof (Tr. 212). Clay also observed a cutter in the same area. It extended down the right-hand rib from where the coal pillar and the roof came together. The cutter indicated the the roof was taking excessive weight (Id.). (There were other cutters, as well, and although Clay did not mention any of the other cutters in the body of the citation, he testified he remembered that they were present (Tr. 215, see also Tr. 217)). Clay noted there was extensive retreat mining in by the area and that this caused excessive weight to be applied to the roof, which in turn caused the dislodging and breaking of the timbers (Tr. 213-214).

Even though the roof was bolted, Clay believed it was in a dangerous condition. He explained that timbers were set every 4 feet and the presence of four dislodged timbers meant that 16 feet of roof C roof that had cutters in it C needed support. For Clay, the cutters were Apretty much an indicator of a pending roof failure (Tr. 216).

Clay saw posted dates and initials indicating that the area was examined weekly (Tr. 213). In his view, the condition of the roof made it reasonably likely the examiner would be injured or even killed by falling roof (Tr. 213).

Because the area had been examined weekly and the conditions were visually obvious (Tr. 214), Clay believed the company was negligent in allowing the conditions to exist (Tr. 215).

Sargent agreed that the general area had been examined weekly, but he maintained that no person traveled through the particular area cited. Rather, the general area was evaluated from a different location in another entry (Tr. 218-219). He testified that the cited area was not an active part of the mine, although air coursed through the area to ventilate other parts of the mine (Tr. 119-220). Miners had no reason to be in the area. He stated, "We don't evaluate anything right there, anything whatsoever. We have no reason to be there. We've got a checkboard hung at a different location and that's where we evaluate" (Tr. 221).

The condition was corrected when a danger sign was posted and travel was prohibited in the area (Tr. 214).

### **THE VIOLATION**

The standard is applicable only "where persons work or travel." Clay's belief that the area was traveled was based upon seeing the posted dates and initials (Tr. 211, 213). Clay did not explain exactly where the postings were located, nor did he testify regarding any other evidence leading him to believe the area was one where persons worked or traveled.

Sargent on the other hand, maintained that the cited area was not in an active part of the mine. He was adamant that miners did not work or travel in the area because miners had no reason to be there (Tr. 118-120). The dates and initials were not located in an area where the examiners would have been required to travel under the cited roof (Tr. 221). The Secretary did not discredit this part of Sargent's testimony, and, as I have noted, did not offer testimony to indicate that Clay's belief in the active nature of the entry was based on more than the dates and initials Clay observed.

Given Sargent's un rebutted testimony regarding the lack of work or travel in the cited area and the paucity of testimony from Clay on the issue, I conclude the Secretary has not established that Harlan violated section 75.202(a).

**APPROVAL OF SETTLEMENTS AND CIVIL PENALTY ASSESSMENTS**

**DOCKET NO. KENT 96-254**

**SETTLEMENTS**

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Settlement</u>
4243458	2/20/96	75.370(a)(1)	\$288	\$288
4243727	2/27/96	75.380(d)(1)	\$288	\$288
4243657	3/11/96	75.400	\$309	\$ 50*
4243660	3/11/96	75.202(a)	\$793	\$309
4243897	3/27/96	75.517	\$288	\$288

\* The Secretary has agreed to modify the citation by deleting the S&S finding (Tr. 8).

These settlements were explained on the record, and they are **APPROVED** (Tr. 8, 69).

**CONTESTED CITATION ASSESSMENTS**

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
42433726	2/27/96	75.1106-3(a)(2)	\$288	\$400

The violation was serious and the company was negligent. Given the company's size at the lower end of large size companies (Tr. 15), its medium history of previous violations (Tr. 225), its good faith abatement (Tr. 15), and the fact that a reasonable penalty will not affect its ability to continue in business (Tr. 14), I conclude that a significant penalty is appropriate.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4243656	3/11/96	75.202(a)	\$309	\$550

The violation was very serious and the company was negligent. Given these factors and the civil penalty criteria set forth above, I conclude that a significant penalty is appropriate.



<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4243658	3/11/96	75.380(d)(1)	\$288	\$250

The violation, although serious, was not as serious as the Secretary alleged. The company was negligent. Given these factors and the civil penalty criteria set forth above, I conclude that a penalty somewhat less than that proposed by the Secretary is appropriate.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4243659	3/11/96	75.202(a)	\$309	\$550

The violation was very serious and the company was negligent. Given these factors and the civil penalty criteria set forth above, I conclude that a significant penalty is appropriate.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4243921	3/11/96	75.220	\$431	\$550

The violation was very serious and the company was negligent. Given this and the civil penalty criteria set forth above, I conclude that a significant penalty is appropriate.

**DOCKET NO. KENT 96-320**

**SETTLEMENTS**

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Settlement</u>
4244152	4/28/96	75.333(b)(3)	\$252	\$ 50*
4244153	4/28/96	75.333(c)(2)	\$252	\$ 50*
4244154	4/28/96	75.400	\$252	\$ 50*
4244155	4/28/96	75.333	\$252	\$ 0**
4244147	4/29/96	75.333(b)(3)	\$252	\$ 50*
4244148	4/29/96	75.333(b)(2)	\$252	\$ 50*
4244149	4/29/96	75.400	\$252	\$252
4244157	5/1/96	75.1104	\$267	\$ 50*
4250661	5/2/96	75.370(a)(1)	\$252	\$ 50*

\* The Secretary has agreed to modify the citations by deleting the S&S findings (Tr. 8-10).

\*\* The Secretary has agreed to vacate the citation on the grounds that it is duplicative of Citation No. 4244152 (Tr. 9).

These settlements were explained on the record, and they are **APPROVED** (Tr. 8-10).

**CONTESTED CITATION ASSESSMENTS**

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4244151	4/28/96	75.202(a)	\$252	\$550

The violation was very serious and the company was negligent. Given these factors and the civil penalty criteria set forth above, I conclude that a significant penalty is appropriate.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4244150	4/29/96	75.202	\$252	\$550

The violation was very serious and the company was negligent. Given these factors and the civil penalty criteria set forth above, I conclude that a significant penalty is appropriate.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4250669	5/8/96	75.604(b)	\$252	\$550

The violation was very serious and the company was negligent. Given these factors and the civil penalty criteria set forth above, I conclude that a significant penalty is appropriate.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4250670	5/8/96	75.517	\$252	\$300

The violation was very serious, but the company was not negligent. Given these factors and the civil penalty criteria set forth above, I conclude that a civil penalty slightly more than that proposed by the Secretary is appropriate.

**DOCKET NO. KENT 96-321**  
**SETTLEMENTS**

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Settlement</u>
4250671	5/8/96	75.514	\$252	\$252
4250673	5/8/96	75.340(a)	\$252	\$ 50*
4250674	5/8/96	75.1107-16(b)	\$252	\$252
4250675	5/8/96	75.1107	\$252	\$252
4250676	5/8/96	75.804(b)	\$252	\$252
4250625	5/14/96	75.514	\$252	\$252
4250626	5/14/96	75.400	\$252	\$252
4250627	5/14/96	75.503	\$252	\$ 50*
4250630	5/15/96	75.333(b)(5)	\$252	\$252

\* The Secretary has agreed to modify the citations by deleting the S&S findings (Tr. 10-11).

These settlements were explained on the record, and they are **APPROVED** (Tr. 10-11).

**CONTESTED CITATION ASSESSMENTS**

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4250672	5/18/96	75.400	\$252	\$300

The violation was very serious, but the company was not negligent. Given these factors and the civil penalty criteria set forth above, I conclude that a civil penalty slightly more than that proposed by the Secretary is appropriate.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4250623	5/13/96	75.1713-7(b)	\$252	\$ 50

The violation was not serious and the company was not negligent. Given these factors and the civil penalty criteria set forth above, I conclude that a minimal civil penalty is appropriate.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4250624	5/14/96	75.604(b)	\$252	\$550

The violation was very serious and the company was negligent. Given these factors and the civil penalty criteria set forth above, I conclude that a significant penalty is appropriate.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4250628	5/14/96	75.518	\$252	\$ 0

There was no violation of the cited standard.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4250629	5/14/96	75.518	\$252	\$ 0

There was no violation of the cited standard.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4250631	5/16/96	75.804(b)	\$252	\$ 0

A motion to vacate the citation was granted (Tr. 192).

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4250632	5/16/96	75.1720(a)	\$267	\$267

The company agreed to pay in full the proposed penalty (Tr. 194).

**DOCKET NO. KENT 96-322  
SETTLEMENTS**

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Settlement</u>
4250633	5/16/96	75.402	\$252	\$ 0**
4250634	5/16/96	75.370(a)(1)	\$252	\$252
4250635	5/16/96	75.400	\$252	\$ 50*
4250650	5/16/96	75.360(a)(3)	\$252	\$252
4250654	5/28/96	75.370(a)(1)	\$252	\$ 50
4250655	5/28/96	75.370(a)(1)	\$252	\$ 50*
4250656	5/28/96	75.370(a)(1)	\$252	\$ 50*
4250657	5/28/96	75.370(a)(1)	\$252	\$ 50*

\* The Secretary has agreed to modify the citations by deleting the S&S findings (Tr. 11-12).)

\*\* The Secretary has agreed to vacate the citation on the grounds that the proof will not establish a violation of the standard (Tr. 11).)

These settlements were explained on the record, and they are **APPROVED** (Tr. 11, 221-222).

**CONTESTED CITATION ASSESSMENTS**

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4250646	5/21/96	75.202(a)	\$252	\$300

The violation was very serious, but the company was not negligent. Given this and the civil penalty criteria set forth above, I conclude that a penalty slightly more than that proposed by the Secretary is appropriate.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4250649	5/21/96	75.202(a)	\$252	\$0

There was no violation of the cited standard.

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Assessment</u>
4250653	5/21/96	75.202(a)	\$252	\$ 0

There was no violation of the cited standard.

**DOCKET NO. KENT 96-333**

**SETTLEMENTS**

<u>Citation</u>	<u>Date</u>	<u>30 C.R.F. '</u>	<u>Proposed Penalty</u>	<u>Settlement</u>
4250658	5/29/96	75.1722(b)	\$252	\$252
4250709	6/3/96	75.1722(a)	\$252	\$177
4250710	6/3/96	75.202(a)	\$252	\$252
4250712	6/3/96	75.400	\$252	\$ 50*
4250713	6/3/96	75.400	\$252	\$252
4250715	6/4/96	75.202(a)	\$252	\$252
4250717	6/5/96	75.220	\$252	\$177
4250718	6/5/96	75.370(a)(1)	\$267	\$ 50*
4250719	6/5/96	75.370(a)(1)	\$267	\$267
4250726	6/10/96	75.1725(a)	\$252	\$252
4250727	6/10/96	75.1103-9(a)(1)	\$252	\$ 50*
4250729	6/10/96	75.364(a)(2)(iii)	\$252	\$ 0**
4250730	6/10/96	75.400	\$252	\$252
4250731	6/10/96	75.1101-1(b)	\$252	\$ 50*

\* The Secretary has agreed to modify the citations by deleting the S&S findings (Tr. 12-13).)

\*\* The Secretary has agreed to vacate the citation on the grounds that the proof will not establish a violation of the standard (Tr. 13).

These settlements were explained on the record, and they are **APPROVED** (Tr. 12-13, 222-224).

**ORDER**

It is **ORDERED** that within 30 days of the date of this decision, Harlan pay civil penalties as follows:

Docket No. KENT 96-254 C \$ 3,523

Docket No. KENT 96-320 C \$ 2,552

Docket No. KENT 96-321 C \$ 3,031

Docket No. KENT 96-322 C \$ 1,054

Docket No. KENT 96-333 C \$ 2,333

Total amount due: \$12,493

It is further **ORDERED** that within the same 30 days the Secretary shall modify and vacate the relevant citations as set forth above.

Upon payment of the penalties and modification and vacation of the citations, these proceedings are **DISMISSED**.

David Barbour  
Administrative Law Judge  
(703) 756-5232

Distribution:

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