FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 17, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-136
Petitioner	:	A.C. No. 15-16666-03547
	:	
v.	:	Docket No. KENT 2001-137
	:	A.C. No. 15-16666-03548
WILLIAMS BROTHERS COAL CO., INC.,	:	
Respondent	:	No. 3 Mine

DECISION

Appearances: J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Hufford Williams, President, William Brothers Coal Company Incorporated, Mouthcard, Kentucky, for the Respondent.

Before: Judge Feldman

This proceeding concerns petitions for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Williams Brothers Coal Company Incorporated (Williams). The petitions seek to impose a total civil penalty of $923.00 for ten alleged violations of the mandatory safety standards in 30 C.F.R. Part 75 of the Secretary's regulations governing underground coal mines. Three of the ten alleged violative conditions were characterized as significant and substantial (S&S) in nature.[1] These matters were heard on August 28, 2001, in Pineville, Kentucky.

At the beginning of the hearing, the parties were advised that I would defer my ruling on the citations pending post-hearing briefs, or, issue a bench decision if the parties waived their right to file post-hearing briefs. Williams waived the filing of post-hearing briefs. The Secretary waived the filing of post-hearing briefs with respect to Citation Nos. 7368778 and 7368080. Consequently, these two citations were disposed of by a bench decision.

[1] A violation is properly designated as significant and substantial "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to [by that violation] will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

This written decision formalizes the bench decision issued for Citation No. 7368778 and 7368080. At the hearing, the Secretary moved to vacate Citation No. 4509739. The Secretary elected to file briefs with respect to the remaining seven citations. The Secretary's brief has been considered in the disposition of these matters.

I. Pertinent Case Law and Penalty Criteria

This decision applies the Commission's standards with respect to what constitutes a significant and substantial violation. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

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

6 FMSHRC at 3-4; *see also Austin Power Co. v. Secretary*, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission explained its *Mathies* criteria as follows:

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

The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

With respect to the imposition of penalties, this decision applies the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. In this regard, section 110(i) provides, in pertinent part:

> The Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Applying the general statutory penalty criteria, Williams is a small mine operator with 11 employees that is subject to the jurisdiction of the Mine Act. (Gov. Ex. 1; Tr. 20). Williams has a good compliance history in that the vast majority of violative conditions cited during the two year period preceding the issuance of the citations in issue were designated as non-S&S. (Gov. Ex. 3; Tr. 21-24). It is not contended that the $923.00 civil penalty initially proposed by the Secretary will negatively impact Williams' ability to continue in business. (Gov. Ex. 1). Finally, Williams abated the cited conditions in a timely manner.

II. Findings and Conclusions

A. Docket No. KENT 2001-137

1. Citation No. 7368778

Mine Safety and Health Administration Inspector Danny P. Curry conducted a routine AAA inspection of Williams' No. 3 Mine facility on October 26, 2000. Curry was accompanied by his supervisor, Ken Murray, and Williams' Mine foreman, Terry Williams. The inspection party traveled the No. 3 beltline. The No. 3 Mine is a low seam mine with entry heights ranging between approximately 35 to 37 inches. (Tr. 40). The mandatory safety standard in section 75.1100-2(b), 30 C.F.R. § 75.1100-2(b), governing the location of fire fighting equipment at belt conveyors requires fire hose outlets along each belt conveyor at a minimum of 300-foot intervals and at tailpieces. Although fire hose outlets were installed at 300-foot intervals, Curry noted there was no fire hose outlet at the No. 3 conveyor tailpiece as required by section 75.1100-2(b). The closest fire hose outlet was approximately 50 feet outby the No. 3 tailpiece. (Gov. 5; Tr. 36). Consequently, Curry issued Citation No. 7368778 for a non-S&S violation of this mandatory safety standard.[2] (Gov. Ex. 4). Although Curry was concerned that a lack of a tailpiece water outlet would inhibit the capacity to fight a fire caused by over-heated bearings at the tailpiece, Curry did not consider the cited condition to be a serious hazard because there were

[2] Curry erroneously cited the No. 4 conveyor tailpiece instead of the No. 3 tailpiece in Citation No. 7368778. At the hearing the Secretary made an unopposed motion to amend the citation to reflect the No. 3 tailpiece. The Secretary's motion was granted because Terry Williams had accompanied Curry during the inspection and Williams does not contend that it was surprised or otherwise prejudiced by the Secretary's amendment. (Tr. 32-35).

adequate fire hose outlets along the full length of the beltline. The Secretary proposed a $55.00 civil penalty for this violation.

On cross examination, Curry conceded that he did not measure the distance from the tailpiece to the closest hose outlet and that the distance may have been closer to 40 feet. (Tr. 47-48). Curry also conceded there may have been a water deluge system that sprayed water at the point where the No. 4 beltline dumped onto the No. 3 tailpiece. (Tr. 46, 50-52). Hufford Williams testified that the fire deluge system is heat activated and serves as a sprinkler system in the event of a tailpiece fire. In addition, Williams opined that it is safer and more effective to locate the tailpiece hose outlet a short distance away from the tailpiece so that the hose connection can be safely made away from the heat of a fire, and so that the hose can be extended from the outlet to a safe distance from the fire location. (Tr. 57-59). In this regard, Williams testified that fire hoses are as long as 500 feet in length. (Tr. 58).

As previously noted, the parties waived their filing of post-hearing briefs with respect to Citation No. 7368778. Consequently, the following is the edited version of the bench decision issued at the hearing:

> The Mine Act is a strict liability statute. Thus, mine operators are liable without regard to fault. *Sewell Coal Co. v. FMSHRC*, 686 F. 2d 1066, 1071 (4th Cir. 1982); *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988), *aff'd on other grounds*, 870 F.2d 711 (D.C. Cir. 1989); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (November 1986), aff'd, 868 F.2d 1195 (10th Cir. 1989).
>
> In this instance, Williams concedes that there was no water hose outlet at the No. 3 tailpiece as required by section 75.1100-2(b). Thus, the Secretary has demonstrated the fact of occurrence of the cited violation. However, while it is true that the water deluge system does not satisfy the cited mandatory safety standard, the heat activated water sprinkler system is a mitigating factor. It is also noteworthy that Williams had complied with the 300-foot interval for water outlets along the beltline that resulted in an outlet within 40 to 50 feet of the tailpiece.
>
> Finally, although the standard literally requires a fire hose outlet "at the tailpiece," it is clear that section 75.1100-2(b) contemplates that the outlet should be located within a reasonably short distance of the tailpiece to allow firefighters to safely connect the fire hose as well as to permit the hose to be extended and positioned to safely extinguish a fire. While the closest water outlet located approximately 40 feet away from the tailpiece does not strictly comply with the "at the tailpiece" terms of section 75.1100-2(b), the negligence associated with the cited condition is, at best, minimal. Accordingly, given the strict liability nature of the Mine Act's enforcement scheme, **a civil penalty of $30.00 shall be imposed for Citation No. 7368778.**

(Tr. 67-71).

B. Docket No. KENT 2001-136

1. Citation No. 7368744

During the course of a routine AAA inspection of Williams' No. 3 Mine on April 25, 2000, Curry observed the No. 3 belt conveyor that is located in the No. 5 entry. The waterline servicing the No. 3 belt was located in the No. 6 entry parallel to the No. 3 belt. Curry noted that two fire valve outlets were located at 300-foot intervals at the waterline in the No. 6 entry approximately 60 feet from the No. 3 belt in the No. 5 entry. (Gov. Ex. 7). The mandatory safety standard in section 75.1100-2(b) requires water valves to be installed at 300-foot intervals along the beltline. Section 75.1100-2(b) further specifies that "[w]aterlines may be installed in entries adjacent to the conveyor entry belt as long as the outlets project into the belt conveyor entry."

As a result of his observations that these two water valves did not project from the waterline in the No. 6 entry into the No. 5 belt entry, Curry issued Citation No. 7368744 citing a non-S&S violation of section 75.1100-2(b). (Gov. Ex. 6). Curry testified the location of the water valves in an adjacent entry would make it difficult for beltmen to connect a fire hose to extinguish a belt fire because of the low seam conditions. (Tr. 78). However, Curry designated the violation as non-S&S because ". . . the [No. 3] beltline was well-cleaned, rock dusted, [and] the entire area was damp, which reduced the likelihood of a fire occurring." (Tr. 79).

Curry attributed the violation to Williams' high degree of negligence because a similar citation had been issued in December 1999 for the same failure to extend 23 water valves into the No. 5 belt entry. (Tr. 103-04). Abatement of that citation was held in abeyance pending Williams' petition for modification. The petition for modification was still pending, and the abatement of the December 1999 citation was suspended, when Curry issued Citation No. 7368744 on April 25, 2000, for two additional water valves that were installed off the waterline in the No. 6 entry as the No. 3 belt advanced. Despite the pending modification petition, and the abeyance of the abatement for the previous citation, Curry established April 28, 2000, as the abatement for the Citation No. 7368744. (Tr. 92-93). Citation No. 7368744 was terminated on May 1, 2000, after the two water outlets were extended into the No. 3 belt entry. (Gov. Ex. 22). The Secretary seeks to impose a $200.00 civil penalty for Citation No. 7368744.

On cross examination, Curry admitted discussing Williams' water outlet locations with Roy Compton, MSHA's Assistant District Manager in District 6 Pikeville, after the December 1999 citation was written. Curry testified Compton instructed him to indefinitely extend the abatement date for the December 1999 citation until the petition for modification was decided. (Tr. 82-83; 132-33). However, Compton was replaced by Acting District Manager Anthony Webb who, shortly before Curry's April 2000 inspection, directed Curry "to take some action" to ensure that the water valves would be extended into the belt entry because "the petition [was] not going to be approved." (Tr. 93). Consequently, Curry issued Citation No. 7368744 on April 25, 2000. Although the Secretary could not provide the date the petition for modification for the 23 water outlets was denied, it was ultimately denied after Citation No. 7368744 was terminated on May 1, 2000, after the subject two water outlets were extended into the No. 3 belt entry. (Gov. Ex. 22; Tr. 150-54).

The Secretary, relying on *C F &I Steel Corp.*, 5 FMSHRC 1376, 1378 (July 1983) (ALJ), asserts that a pending petition for modification does not preclude the Secretary from enforcing the subject mandatory safety standard. In *C F & I*, Judge Carlson noted that, in the absence of an application for temporary relief filed pursuant to section 44.16, 30 C.F.R. § 44.16, there is no administrative suspension of enforcement pending resolution of a petition for modification. *Id.*

However, unlike *C F & I*, in this instance, it is undisputed that Hufford Williams was informed by MSHA's assistant district manager Compton that Compton had decided to suspend enforcement of section 75.1100-2(b) pending the outcome of the modification petition. Although the Secretary contends that Compton afforded Hufford Williams "personal favoritism," it is neither contended nor shown that Compton's suspension of the enforcement of section 75.1100-2(b) was *ultra vires*. (Tr. 132-55). In fact, suspension of abatement was understandable given the non-S&S nature of the cited violative condition. Williams relied on Compton's determination.

Along comes Webb, Compton's successor, who is no longer willing to permit Williams to continue installing the water valves at the waterline in the No. 6 entry. However, equity dictates that Williams had a right to rely on Compton's decision to withhold enforcement pending a decision on the modification petition when Williams installed the two cited water valves. These valves had to be installed as the beltline advanced. These two water valves were installed in the identical manner as the 23 previously installed water valves that were permitted to remain under Compton's watch during the pendency of the petition.

In the final analysis, Compton told Hufford Williams that it was permissible to continue installing hose outlets at the waterline in the No. 6 entry until MSHA advised otherwise. Without advising otherwise, Curry issued Citation No. 7368744 on April 25, 2000.

Webb's decision to, in effect, retroactively reverse Compton's decision by reinstating the abatement requirements despite the continuing pendency of the modification petition, constituted an abuse of discretion. While, at the hearing, I was initially inclined to affirm the citation and reduce the degree of negligence based on Hufford Williams' reliance on Compton's directive, after further deliberation, I have concluded that Webb's abuse of discretion warrants vacating the citation. **Accordingly, Citation No. 7368744 shall be vacated.**

2. Citation No. 4509735

At the hearing, Hufford Williams stipulated that the approved roof control plan for the No. 3 Mine generally required the maximum width of crosscut entries to be 20 feet. (Tr. 164-65). When such entries exceeded 20 feet in width additional roof support consisting of additional roof bolts and conventional supports was required. (Tr. 163-64). However, additional roof support in areas more than 20 feet wide does not negate the fact that the roof control plan has been violated. (Tr. 166-67).

MSHA Inspector Jerry Bellamy, accompanied by MSHA Inspector Michael Pruitt, inspected Williams' No. 3 Mine on August 29, 2000. Bellamy and Pruitt measured the last open crosscut between the No. 1 and No. 2 entries and determined it was 21 to 23 feet wide over a

distance extending approximately 40 feet. (Gov. Exs. 8, 23; Tr. 165-66). Consequently, Bellamy issued Citation No. 4509735 citing a violation of section 75.220, 30 C.F.R. § 75.220, that requires each mine operator to follow its approved roof control plan. (Gov. Ex. 8). Bellamy characterized the violation as S&S because there was a hazard of a sudden roof fall that could result in serious or fatal injuries. (Tr. 166). Bellamy attributed the violation to a moderate degree of negligence because he did not observe any additional roof bolts or additional support. The Secretary seeks to impose a civil penalty of $131.00 for Citation No. 4509735.

Hufford Williams stipulated to the fact of the occurrence of the violation admitting that the crosscut was mistakenly cut too wide. (Tr. 231-32). On cross-examination, Bellamy conceded that the cited area was the last break in the crosscut that had not been scooped or rock dusted. Pruitt gave permission to Terry Williams to scoop the area so that the floor could be cleaned before timbers were set. (Tr. 186).

As noted Williams has stipulated to the fact of the roof control plan violation. Turning to the S&S issue, it is clear that it is reasonably likely that the additional stress caused by the additional 3 feet of width that exceeded the maximum permissible 20 feet would have resulted in a roof fall within the context of continued mining operations. In the event of a roof fall, it is also reasonably likely that serious injury would occur. Thus the Secretary has demonstrated that it is reasonably likely that the hazard contributed to by the violation, *i.e.*, inadequately supported roof, will result in an event, i.e., a roof fall, causing serious injury. Accordingly, **the S&S designation in Citation No. 4509735 shall be affirmed.**

With respect to Williams' degree of negligence, it is a mitigating factor that Williams was prevented from installing additional timbers because the last break in the crosscut had just been completed and the crosscut had not been scooped clean. Consequently, the negligence attributable to Williams is reduced from moderate to low. Although the gravity of the violation remains serious given its S&S nature, the $131.00 **civil penalty proposed by the Secretary for Citation No. 4509735 shall be reduced to $75.00 in recognition of the reduction in the degree of negligence.**

3. Citation No. 4509739

The Secretary initially sought to impose a $55.00 civil penalty for Citation No. 4509739. However, the Secretary agreed to vacate Citation No. 4509739 at the hearing. (Tr. 538). The citation was vacated because of confusion concerning the method of determining which side of a return stopping was the positive pressure side that required plastering or mortared jointing pursuant to the mandatory safety standard in section 75.333(e)(1)(i), 30 C.F.R. § 75.333(e)(1)(i).

4. Citation No. 7368080

During the course of his August 30, 2000, inspection inspector Bellamy noted the weekly examiner had failed to take methane and oxygen level readings at the #1 evaluation point (#1 E.P.) in the bleeder designated in Williams' approved ventilation plan because the roof in the vicinity was unsupported and the area was inaccessible. (Gov. Ex. 13). Consequently, Bellamy

issued Citation No. 7368080 citing a non-S&S violation of section 75.364, 30 C.F.R. § 75.364, that requires weekly methane examinations of worked out areas. (Gov. Ex. 12). The violation was attributed to Williams' moderate degree of negligence. The Secretary proposes a $55.00 civil penalty for Citation No. 7368080.

At the hearing, Hufford Williams stipulated that the location of the #1 E.P. specified in the approved ventilation plan was inaccessible. (Tr. 303). Williams explained that he didn't realize that the area in the vicinity of the #1 E.P. had not been roof-bolted because the coal seam was extremely low when he agreed to designate the area as an evaluation point. (Tr. 306-08). Williams admitted he did not file to modify the mine's ventilation plan by designating a new evaluation point until after Citation No. 7368080 was issued. (314-15).

The parties waived briefing on this citation. Inasmuch as Williams admits the fact of the violation, a bench decision was issued affirming the citation as issued. (Tr. 315-16). **A civil penalty of $55.00 shall be assessed for Citation No. 7368080.**

5. Citation No. 7368081

Bellamy observed the bleeder system during his August 30, 2000, inspection. Bellamy noted five separate areas, or rooms, in the bleeder that were not roof-bolted or otherwise supported. (Gov. Ex. 14-A). However, Bellamy testified that one of the five areas was in fact roof-bolted. (Tr. 332). These unsupported rooms were in the farthest areas of penetration. Section 75.220 requires a mine operator to follow its approved roof control plan. The roof control plan required all mined areas to be roof-bolted unless they were dangered-off. Bellamy testified these rooms should have been roof-bolted because they may have required ventilation curtains to be hung in them. Bellamy stated there was nothing to prevent someone from going back under these areas with the exception of three small timbers with no danger board on them. (Tr. 335).

Bellamy testified the proper way to prevent miners from going under these unsupported areas was to block the entrances with cribs and timbers and to hang a proper danger board. As a result of his observations, Bellamy issued Citation No. 7368081 citing an S&S violation of section 75.220. (Gov. Ex. 15). Bellamy attributed the violation to Williams' moderate degree of negligence. Following a Manager's Safety and Health Conference, the citation was ultimately modified to a non-S&S violation and Williams' negligence was lowered from moderate to low. (Gov. Ex. 15, p.2). The citation was abated after the subject unsupported rooms were dangered-off. (Tr. 339). The Secretary seeks to impose a $55.00 civil penalty.

At the hearing the Secretary attempted to distance herself from Gerald McMasters, the MSHA Conference and Litigation Specialist who was responsible for deleting the S&S designation and reducing the degree of Williams' negligence. The Secretary's belated motion, proffered at the hearing, to modify the citation back to S&S and to increase Williams degree of negligence was denied. (Tr. 342-46).

Hufford Williams testified that the coal seam was approximately 32 inches high with an eight inch layer of jack rock on top. Ordinarily, the jack rock is removed with the coal.

However, in these remote areas of deepest penetration that were not required to be traversed, the coal was removed leaving the jack rock on the roof. In these areas the jack rock had fallen to the floor leaving the unsupported area with approximately 24 inches in height. Williams testified that since these areas were already inaccessible, further actions to danger the areas off were not required. In essence, Williams disputed the Secretary's interpretation of the roof control plan that all mined areas must be roof-bolted even if they are inaccessible.

Under the Mine Act's statutory scheme, the Commission and its judges are required to accord deference to the Secretary's interpretations of the law and regulations provided the interpretations are reasonable. *Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F. 2d 1432, 1435 (D.C. Cir. 1989). Here, the dispositive question is whether the Secretary's application of the broad terms of a roof control plan in a low seam coal mine to require all mined areas to be roof-bolted, even if the very small dimensions of some areas render them physically inaccessible, is reasonable.

In applying broad regulatory provisions, the Commission looks to whether "a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982). Given the circumstances of this case, the Secretary's interpretation is counter-intuitive. Attempting to roof bolt very low, inaccessible areas that are in danger of collapse exposes roof bolting personnel to unnecessary hazards.

Consequently, it is unreasonable to conclude that Williams should have recognized that MSHA required inaccessible areas to be roof-bolted under the roof control plan. This conclusion is consistent with the MSHA's Safety and Health Conference official who deleted the S&S designation in apparent recognition that these unsupported areas were not hazardous in view of their inaccessibility. **Accordingly, Citation No. 7368081 shall be vacated.**

6. Citation No. 7368085

Bellamy and Pruitt traveled the full length of the intake primary escapeway on August 30, 2000. The escapeway is approximately 38 inches in height. Bellamy noted there was a water accumulation of approximately six inches deep for a distance of approximately 120 feet stretching from the No. 3 head drive to outby the fan. Bellamy also noted approximately six inches of fallen draw rock from the No. 3 head all the way out to the surface, a distance of approximately 2,000 feet. (Tr. 413-15). As a result of his observations, Bellamy issued Citation No. 7368085 citing a violation of the mandatory safety standard in section 75.380(d)(1), 30 C.F.R. § 75.380 (d)(1). (Gov. Ex. 16). This mandatory safety standard requires, in pertinent part, that each escapeway must be "maintained in a safe condition to always assure passage of anyone, including disabled persons[.]" Although the violation was designated as S&S in nature, Citation No. 7368085 was subsequently modified to delete the S&S designation. (Gov. Ex. 16, p.2). The Secretary proposed a $55.00 civil penalty for Citation No. 7368085.

Although Hufford Williams asserts the water accumulation was 40 feet in length rather than the 120 feet alleged by Bellamy, Williams does not deny that the primary intake escapeway was cluttered with fallen draw rock. In this regard, Williams admitted:

> The secondary escapeway is a neutral entry that we travel beside the belt. If I had a man injured, that's the way I'd bring him out, the secondary escapeway on the battery-powered personnel carrier. I wouldn't bring him down the intake. Matter of fact, I have had a couple of men with minor injuries and that's the way we bring them down the neutral entry.

(Tr. 416).

With respect to whether the facts support the cited violation, the Commission has determined that the language in section 75.380(d)(1) is "plain and unambiguous" in that it imposes on an operator an obligation to maintain escapeways that pass the general functional test of "passability." *Utah Power and Light*, 11 FMSHRC 1926, 1930 (October 1989). In this regard, escapeways must be passable for everyone, including disabled persons. In this case, Williams has conceded that the neutral secondary escapeway rather than the primary escapeway was relied upon to remove injured personnel. Consequently, the Secretary has satisfied her burden of demonstrating a violation of the cited mandatory standard. **Accordingly, Citation No. 7368085 shall be affirmed and Williams shall pay the $55.00 civil penalty initially proposed by the Secretary.**

7. Citation No. 7368086

Inspector Bellamy examined the weekly examination book on August 31, 2000. Section 75.364(h), 30 C.F.R. § 75.364(h), requires that at the completion of any shift during which a portion of the weekly examination is conducted, all hazardous conditions found during the examination, and the corrective actions, taken must be recorded in the examination book by the examiner. Bellamy examined the record book to determine if the hazardous conditions he observed the previous day were recorded. Bellamy determined the rooms of deepest penetration in the bleeder that were unsupported and not dangered-off that were the subject of Citation No. 7368081 were not noted in the book. In addition, Bellamy noted that mined out rooms in excess of 20 feet that lacked line curtains as required by section 75.333(g), 30 C.F.R. § 75.333(g), were not recorded in the examination book. To maintain adequate ventilation, in the absence of a crosscut, section 75.333(g) requires line curtains in a room where mining has been discontinued and the room extends more than 20 feet from the inby rib. (Tr. 438-39). Bellamy had issued a citation for the section 75.333(g) violations the previous day that was not contested by Williams and is not in issue in these matters.

Based on Bellamy's examination of the weekly record book, Bellamy issued Citation No. 7368086 citing a non-S&S violation of the weekly examination requirements in section 75.364(h). (Gov. Ex. 17). The cited violation was attributable to Williams' moderate negligence. The Secretary seeks to impose a $55.00 civil penalty for this citation.

In defense of the citation, Hufford Williams testified that the weekly examiner did not believe the conditions cited by Bellamy were hazardous with the exception of two rooms which were driven 21 and 22 feet without curtains. As previously noted, Williams stated he did not contest the citation concerning these two rooms and that the civil penalty for that citation had been paid.

Having vacated Citation No. 7368081 in this decision because the unsupported rooms were not hazardous in that they were remote and inaccessible, the weekly examiner was not obliged under section 75.364(h) to note the conditions in the record book. However, the lack of the requisite curtains specified in section 75.333(g), which Williams candidly concedes was a violative condition requiring corrective action, does provide an adequate basis for establishing a section 75.364(h) violation. **Consequently, Citation No. 7368086 shall be affirmed and Williams shall pay the $55.00 civil penalty initially proposed by the Secretary.**

8. Citation No. 7368775

Inspector Curry inspected the No. 3 Mine on October 19, 2000. Curry traveled the No. 001 MMU and noted that the No. 3 right crosscut was being cut from the No. 4 to the No. 3 entry. In driving the crosscut, Williams had left a large area of roof into the No. 3 entry that was left unsupported. (Gov. Ex. 19). Curry was concerned that Williams had failed to post a physical warning device or a physical barrier at the last row of bolts in the No. 3 entry that would have prevented a miner's exposure to this newly mined section of unsupported roof. (Tr. 449-51, 457-58, 465, 468-70, 474-78). At the time Curry observed this condition, the continuous miner was mining in the No. 4 entry and the roof bolting machine was in the No. 5 entry rather than in the vicinity of the unsupported area in the No. 3 entry. (Tr. 456, 463, 465).

As a result of his observations, Curry issued Citation No. 7368775 citing a violation of the mandatory safety standard in section 75.208, 30 C.F.R. § 75.208, that requires "[e]xcept during the installation of roof supports, the end of permanent roof support shall be posted with a readily visible warning, or a physical barrier . . . to impede travel beyond permanent support." (Gov. Ex. 18). Curry attributed the violation to Williams' moderate degree of negligence. Curry considered the violation to be S&S because of the extended period of time the roof had been left unsupported and because of the likelihood of a miner's exposure to a roof fall. (Tr. 466-69). The Secretary seeks to impose a $131.00 civil penalty for Citation No. 7368775.

In defense of the citation, Hufford Williams disputed the unsupported roof condition described by Curry. However, Williams admitted that he had no first hand knowledge of the mining sequence in issue. (486-87). Relying on the account of the events given to him by his foreman, who did not testify, Williams contends the last break in the crosscut penetrated the No. 3 entry that was already roof-bolted. (494-95). Alternatively, Williams asserts the "except during the installation of roof supports" exception to the dangering-off requirement in section 75.208 applies because the continuous miner had just finished his cut when Curry interrupted the mining cycle before the continuous miner could back out to allow the roof bolter to pass into the crosscut. (Tr. 481-83).

In resolving the fact of the violation question, it is significant that Curry is the only person with firsthand knowledge who testified. Thus, Hufford Williams' assertion that the break in the crosscut in the No. 3 entry was already roof-bolted cannot be credited. With respect to Williams alternative argument that Curry interrupted the roof bolting mining sequence, Curry credibly testified that the roof bolter was bolting in the No. 5 entry while the continuous miner was mining in the No. 4 entry. (Tr. 485). Thus, Curry testified that the area beyond permanent roof support was left unmarked for a period of 20 to 25 minutes based on the activities of the continuous miner

in the No. 4 entry. (Tr. 484-85). Consequently, the Secretary has demonstrated the fact of occurrence of the cited section 75.208 violation.

With respect to the S&S issue applying the *Mathies* criteria, it is apparent that the cited violation, *i.e.*, the failure to post warnings to prevent travel under unsupported roof, contributes to the discrete safety hazard of a miner's exposure to unsupported roof. It is also obvious, that if a roof fall were to occur, serious, if not fatal injuries, will occur. Finally, an S&S finding also requires a finding that it is reasonably likely that the hazard contributed to will result in an event, *i.e.*, a roof fall, in which there is a serious injury. *U.S. Steel*, 6 FMSHRC at 1836. Given the fact that the unsupported roof area was located in an active mine area with miners present, the Secretary has demonstrated the S&S nature of the violation in that a serious, if not fatal, injury was reasonably likely to occur.

Williams' violation of section 75.208 is serious in gravity and is attributable to no more than moderate negligence inasmuch as the mining cycle had not been completed and the roof bolter was in the vicinity of the unsupported area. **Accordingly, Citation No. 7368775 shall be affirmed and Williams shall pay the $131.00 civil penalty sought to be imposed by the Secretary.**

9. Citation No. 7368777

Section 75.1722(b), 30 C.F.R. § 75.1722(b), of the Secretary's mandatory safety standards requires that guards at conveyor drives must extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. Inspector Curry observed the No. 4 belt conveyor on October 26, 2000. Curry noted that, although there was adequate guarding of the drive sprockets and the power roller, the guard did not extend in front of the discharge roller which measured approximately 20 inches by 20 inches. (Gov. Ex. 21, p.3). As a consequence, Curry issued Citation No. 7368777 citing an S&S violation of the provisions of section 75.1722(b). (Gov. Ex. 20). Curry considered the violation to be S&S in nature because a beltman or a pre-shift examiner could contact the exposed discharge roller and sustain serious injury. In this regard, Curry explained that low seam coal increased the likelihood of contact with the unguarded roller because a potential victim would be at face level with the exposed roller. (Tr. 519, 527-28). The violation was attributed to Williams' moderate degree of negligence. The Secretary seeks to impose a civil penalty of 131.00 for Citation No. 7368777.

Once again Hufford Williams candidly conceded that he did not actually see the cited condition. However, based on the information provided to him by his foreman, Williams admitted the guard did not extend sufficiently to cover the end of the roller. (Tr. 524-26). Consequently, Williams stipulated to the fact of the violation and only contests the S&S designation. (Tr. 523). Williams contends that low seam coal minimizes the risk of inadvertent contact through stumbling because miners crawl or work from their knees. (Tr. 523-24).

As noted, a violation is properly designated as significant and substantial if it is reasonably likely that the hazard contributed to by the violation will result in an event in which there is serious injury. The commission has emphasized that it is the contribution of a violation to the

cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining,* 6 FMSHRC at 1868. (Emphasis in original). Curry testified that belt personnel are in proximity to the beltline on a daily basis. The beltline is also examined by the weekly examiner.

With regard to the conflicting testimony concerning whether low seam coal increases the risk of contact and injury, I note that the confines of low entries limits maneuverability and the freedom of movement. Under such circumstances, erring on the side of caution, I find that an unguarded roller operating in low seam coal increases the likelihood of inadvertent contact and serious injury. Consequently, on balance, the Secretary has satisfied her burden of demonstrating that the cited violative condition was S&S in nature and serious in gravity.

With regard to the issue of negligence, I note that it is undisputed that the conveyor was guarded although the guard was approximately 20 inches too short. In view of the fact that the conveyor was almost guarded in its entirety, the degree of negligence attributable to Williams shall be reduced from moderate to low. **Accordingly, Citation No. 7368777 shall be affirmed and Williams shall pay a $100.00 civil penalty for this citation in recognition of a reduction in Williams' degree of negligence.**

ORDER

Consistent with this Decision, **IT IS ORDERED** that Citation No. 7368778 in Docket No. KENT 2001-137 **IS AFFIRMED**.

IT IS FURTHER ORDERED that Citation Nos. 4509735, 7368080, 7368085, 7368086, 7368775 and 7368777 in Docket No. KENT 2001-136 **ARE AFFIRMED**.

IT IS FURTHER ORDERED that Citation Nos. 7368744, 4509739 and 7368081 in Docket No. KENT 2001-136 **ARE VACATED**.

IT IS FURTHER ORDERED that Williams Bothers Coal Company Incorporated **shall pay a total civil penalty of $501.00** in satisfaction of Citation Nos. 7368778, 4509735, 7368080, 7368085, 7368086, 7368775 and 7368777. Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, Docket Nos. KENT 2001-136 and KENT 2001-137 **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution:

J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215 (Certified Mail)

Hufford Williams, Williams Brothers Coal Company, Inc., 258 Cantrell Road, Mouthcard, KY 41548 (Certified Mail)

/hs