FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
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June 18, 2007

BELL COUNTY COAL CORPORATION,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. KENT 2004-317-R
	:	Citation No. 7538674; 08/18/2004
v.	:	
	:	Docket No. KENT 2004-318-R
	:	Citation No. 7538675;08/18/2004
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 2004-319-R
MINE SAFETY AND HEALTH	:	Citation No. 7538676;08/18/2004
ADMINISTRATION, (MSHA),	:	
Respondent	:	Docket No. KENT 2004-320-R
	:	Citation No. 7538677;08/19/2004
	:	
	:	Docket No. KENT 2004-321-R
	:	Citation No. 7538679;08/19/2004
	:	
	:	Docket No. KENT 2004-322-R
	:	Citation No. 7538680;08/19/2004
	:	
	:	Docket No. KENT 2004-323-R
	:	Citation No. 7524384;08/17/2004
	:	
	:	Docket No. KENT 2004-324-R
	:	Order No. 7538681;08/19/2004
	:	
	:	Docket No. KENT 2004-325-R
	:	Order No. 7538678;09/19/2004
	:	
	:	Docket No. KENT 2004-326-R
	:	Order No. 7524383;08/17/2004
	:	
	:	Coal Creek
	:	Mine ID 15-18058

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2005-46
Petitioner	:	A.C. No. 15-18058-40625
	:	
v.	:	Docket No. KENT 2005-264
	:	A.C. No. 15-18058-45668
BELL COUNTY COAL CORPORATION,	:	
Respondent	:	Coal Creek Mine
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2005-401
Petitioner	:	A.C. No. 15-18058-63530A
	:	
v.	:	Docket No. KENT 2005-402
	:	A.C. No. 15-18058-63528A
CRAIG DAVIS, DARRYL BAILEY,	:	
JERRY D. BELCHER, JIMMY	:	Docket No. KENT 2005-409
MURRAY and DONNIE WRIGHT,	:	A.C. No. 15-18058-63529A
Respondents	:	
	:	Docket No. KENT 2005-411
	:	A.C. No. 15-18058-63531A
	:	
	:	Docket No. KENT 2005-416
	:	A.C. No. 15-18058-63532A

DECISION

Appearances: Marybeth Zamer Bernui, Esq., Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, on behalf of Bell County Coal Corporation, Jimmy Murray and Donnie Wright;
Charles E. Ricketts, Jr., Esq., Ricketts & Platt, PLLC, Louisville, Kentucky, on behalf of Craig Davis, Darryl Bailey and Jerry D. Belcher.

Before: Judge Zielinski

These cases are before me on Notices of Contest and Petitions for Assessment of Civil Penalties filed by the Secretary of Labor ("Secretary"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 ("Act"). The petitions allege that

Bell County Coal Corporation ("Bell County") is liable for 11violations of the Secretary's regulations applicable to underground coal mines, and propose the imposition of civil penalties totaling $153,836.00. One Notice of Contest involves Bell County's contest of an imminent danger order. Petitions were also filed against five supervisors at the mine, alleging that they are each personally liable for two of the violations, and seeking the imposition of civil penalties against them in their individual capacities. Several of the alleged violations, for which substantial penalties are sought, are the outgrowth of an investigation of a massive roof fall at Bell County's Coal Creek mine, that occurred on June 16, 2004, and resulted in a fatal injury to a miner.

A hearing was held in London, Kentucky. Prior to the hearing, Bell County was permitted to withdraw its contest of four of the alleged violations and proposed penalties. At the close of the evidence, the citations as to individual Respondents Donnie Wright, the mine superintendent, and Jimmy Murray, the mine foreman, were vacated. The remaining parties filed briefs after receipt of the transcript. For the reasons set forth below, four of the alleged violations and the imminent danger order are vacated, and I find that Bell County committed three of the alleged violations and impose civil penalties totaling $6,900.00. I also find that the three section foremen are each liable for one violation, and impose civil penalties in the amount of $200.00 against each of them.

Findings of Fact - Conclusions of Law

Bell County Coal operated the Coal Creek mine, which was located near Middlesboro, Kentucky. The mine was accessed by five drift openings into the 60-inch thick Buckeye Springs coal seam, and had been producing coal since October, 1998. Coal was produced using the room and pillar method, and remote controlled continuous mining machines. The mine employed 42 underground and two surface workers. In addition, four surface and two underground contract workers were employed. Coal was produced on the 004/003 MMU super-section, essentially two four-entry sections operating side-by-side. The 004 MMU mined the Nos. 1 through 4 entries and the 003 MMU mined the Nos. 5 through 8 entries.

On June 16, 2004, retreat mining was being performed on the sections. The area which was being mined had been driven on advance a few weeks earlier. The second shift foreman was Jerry D. Belcher. Upon arriving on the section, Belcher traveled across the pillar line to conduct an examination. He noticed cracks or joints in the roof in the #5 entry, which he later referred to as seams. Ex. G-24.[1] He checked test holes, which indicated no separations in the roof, and felt that the joints did not pose a hazard. He had concerns about other aspects of the roof, and warned the crew to watch the roof and move out if anything out of the ordinary happened. David Scott Goins, the continuous miner operator, took one cut from the pillar on the right side of the entry, and pulled back so that timbers could be set. Belcher then left and went over to the 004

[1] The Secretary's exhibits are designated "G-#," and Respondent's exhibits are designated "R-#."

section. Timbers were being set by James Ford and Donnie Lemarr, with the help of Edwin Pennington, a shuttle car operator, whose equipment had broken down.

Pennington, a contract worker, had brought a video camera into the mine in his lunchbox. He intended to record a roof fall to show his wife. He began recording after a cut had been taken from the left pillar in the #5 entry. Lemarr noticed a crack in the roof in a crosscut to the left of the #5 entry. He did not think it posed any immediate danger because it ran into and was supported by the pillars. Tr. 107. He inserted some cap wedges into the opening, to monitor any movement. If the wedges had dropped out, he would have watched the top more closely and pulled out of the entry faster. Tr. 66-67. The videotape, which was recovered after the accident, shows that some of the timbers set further inby had taken weight and were bent and/or broken. The miners talked about "slips" in the roof, referring to cracks or joints, and speculated that the roof would fall up to the timbers, or even further outby through the crosscut intersection. Ex. G-2 (6:54 p.m.).

After taking the third cut, the roof started "working" and the continuous miner operator, Goins, decided to back the miner outby to the crosscut. The top continued to work, with small pieces of rock falling from the roof. The miner was then moved back to the next crosscut intersection. Tr. 69. The crew moved back near the miner to watch the roof. The roof in the #5 entry then fell. The fall apparently started near the pillar line and proceeded more than 200 feet out the #5 entry. Pennington shouted "here it comes," and he and Lemarr started running. Tr. 71. Lemarr, who was six-to-eight feet in front of Pennington, made it around the corner into the next crosscut. Pennington did not. He was struck and killed by the falling rock. The roof fall was massive. It ranged from four to more than six feet thick, 12 to 20 feet in width and approximately 210 feet in length, running from the cave point at the pillar line up the #5 entry for more than two breaks. Ex. G-11 at 1, 6.

State and federal officials immediately commenced recovery efforts, and assembled investigation teams. MSHA concluded that the roof fell between two parallel joints that ran up the #5 entry, that the joints were "hillseams," and that they had not been supported as required by Bell County's Roof Control Plan. MSHA also determined that there were other hillseams in the area that had not been identified or properly supported. Citations and orders were issued for those and related alleged violations, and for alleged violations for the use of nonpermissible electrical equipment within 150 feet of the pillar line. In addition to citing Bell County, the Secretary also assessed proposed civil penalties against five individual managers for two of the alleged violations, pursuant to section 110(c) of the Act. Mine superintendent Wright, mine foreman Murray, and three section foremen, Craig Davis, Darryl Bailey and Belcher, are alleged to have knowingly authorized the violations alleged in Citation Nos. 7538674 (failure to comply with the Roof Control Plan with respect to hillseams in the #5 entry), and 7538678 (use of a nonpermissible chain saw within 150 feet of the active pillar line).

Part I – Violations Related to the Fatality[2]

MSHA's Report of Investigation of the June 16 fatal roof fall accident was issued on August 17, 2004. Ex. G-11. The violations related to the fatality were issued on August 18 and 19, 2004.

Citation No. 7538674

Citation No. 7538674 was issued on August 18, 2004, pursuant to section 104(d)(1) of the Act, and alleges a violation of 30 C.F.R. § 75.220(a)(1), which requires that mine operators "develop and follow a Roof Control Plan, approved by the [MSHA] District Manager that is suitable to the prevailing geological conditions, and the mining system to be used at the mine." The violation is described in the "Condition or Practice" section of the citation as follows:

> An investigation of the fatal fall of roof accident which occurred on June 16, 2004, determined that the approved Roof Control Plan, dated June 6, 2001, was not being complied with in the No. 5 entry on the 003 MMU. The roof fall ranged from 4 to 6+ feet in thickness, 12 to 20 feet in width, and approximately 210 feet in length from the pillar gob line. Parallel hillseams (vertical open joints) were present in the roof of the No. 5 entry that was supported during development with thin steel straps. The approved plan required that hillseams be supported with steel channels and the entry width be narrowed to 18 feet or less. Other hillseams were supported with thin steel straps which were present at various locations on the 004/003 MMU supersection. Additional safety precautions for retreat mining (pillaring) as stipulated in the plan also require that a roof evaluation shall be made when entering a previously mined area for the purpose of pillar recovery. When inadequate roof support is encountered the necessary corrective action shall be taken.[3]

Ex. G-6.

MSHA determined that the fatal accident occurred as a result of the violation, that it was significant and substantial, that one employee was affected and that the operator's negligence was high. As noted above, the citation was issued pursuant to section 104(d) of the Act, because it is alleged that the violation was the result of Bell County's unwarrantable failure to comply with the regulation. A civil penalty in the amount of $58,000.00 has been proposed for this

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[2] The hearing was conducted in two parts. Part I involved Bell County and the individual Respondents, and addressed violations related to the fatality. Part II involved only Bell County, and alleged violations that were issued during a subsequent inspection and are not related to the fatality.

[3] Text taken from citations and orders has been edited to correct spelling, punctuation and other errors.

violation.

The Violation

> In order to prove a violation of a mine plan provision, the Secretary:
>
> must first establish that the provision allegedly violated is part of the approved and adopted plan. *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). She must then prove that the cited condition or practice violated the provision. *Id*. When a plan provision is ambiguous, the Secretary may establish the meaning intended by the parties by presenting credible evidence as to the history and purpose of the provision, or evidence of consistent enforcement. *Id*.

Harlan Cumberland Coal Co., 20 FMSHRC 1275, 1280 (Dec. 1998). This standard recognizes that due process entitles an operator to fair notice of the Secretary's interpretation of plan provisions. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (Aug. 1995). "The ultimate goal of the [plan] approval and adoption process is a mine-specific plan with provisions understood by both the Secretary and the operator and with which they are in full accord. . . . '[A]fter a plan has been implemented (having gone through the adoption/approval process) it should not be presumed lightly that terms in the plan do not have an agreed upon meaning.'" *Jim Walter*, 9 FMSHRC at 907 (quoting from *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981)).

The Secretary established that the plan provisions referenced in the citation were included in Bell County's approved Roof Control Plan at the time of the accident. It required that "pots, slips, horsebacks or hillseams" be supported either with crossbars and posts, or steel channels installed with roof bolts, if the roof structure provided adequate anchorage for roof bolts.[4] Ex. G-10 at 5. It also provided that, where "subnormal roof conditions" were encountered, entries would be narrowed to 18 feet or less, which could be accomplished by mining entries less than the normally allowed 20-foot width or by setting posts or cribs on five-foot centers along an entry that had been mined wider than 18 feet. Ex. G-10 at 5.

MSHA's Report of Investigation of the accident explains that the roof fell between "near vertical joint systems." Ex. G-11 at 6. That much does not appear to be in dispute. What is disputed is whether those joints or joint systems were hillseams and/or whether they should have been recognized as hillseams prior to the accident. For the sake of clarity, the subject imperfections in the roof will be referred to herein as "joints." It is undisputed that the joints in

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[4] Steel channels are made of 3/16 inch thick material, bent to form roughly a "U" shaped beam approximately five inches wide and two inches deep. They are typically about four feet long, with pre-drilled holes for roof bolts at each end. Bell County also used thin steel straps, made of 16-gauge material, also about four feet long and pre-drilled. The Roof Control Plan provided that straps were to be used "for the sole purpose of controlling 'draw rock' or small isolated pots." Ex. G-10 at 5.

the roof of the #5 entry, between which the roof fall occurred, had not been supported with beams or steel channels, and the width of the entry had not been reduced to 18 feet.[5] Consequently, the question of whether the plan was violated turns on whether the joints were hillseams.[6] The Secretary contends that the joints were obvious hillseams. Bell County contends that the joints were not hillseams, and that MSHA's definition of the term "hillseam" changed dramatically after the accident.

The term "hillseam" is not defined in the Roof Control Plan, or in the Secretary's regulations. Nor does the American Geological Institute's Dictionary of Mining Mineral and Related Terms (2d ed. 1997) contain a definition. It is a term used by eastern Kentucky miners to describe a certain type of joint found in that region.[7] Despite the absence of an authoritative written definition, it appears that prior to the accident, Bell County and MSHA were in agreement on what was meant by the term.

Bell County's senior managers, who had extensive mining experience in the region, understood a hillseam to be a vertical weathered joint, near a coalbed outcrop, that had mud, water or some form of material that is not native to the strata of the top imbedded in it. Mine superintendent Wright, who had 33 years of mining experience, testified that a hillseam was an opening that "universally" had "mud or water, or some combination of both, or some form of material that's not that native to the strata of the top, embedded in it." Tr. 633, 702. He further explained that hillseams were encountered close to the outcrop and under low cover. Tr. 634. Mine foreman Murray, with over 25 years of experience, testified that hillseams were "mud, water, displacement, foreign material not of your normal roof conditions." Tr. 754. He explained that hillseams had been encountered near the outcrop in another section of the mine, and they were supported with Heintzmann Beams, which are superior to wooden crossbeams. Tr. 754. Pictures of one such hillseam, an obviously weathered joint, were introduced by Respondent. Ex. R-26, R-27, R-28, R-29.

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[5] Straps had been installed in many areas in the vicinity of the accident. Several photographs depict straps running from roof bolt to roof bolt apparently across the width of the entry and into adjoining crosscuts. Ex. G-3 at 2, 16-19, G-16, G-20. Some of the straps spanned the joints involved in the roof fall.

[6] No party contends that the joints were pots, slips or horsebacks, which Cox described as isolated formations in a mine roof. Tr. 473-74.

[7] The term has arisen infrequently in Commission litigation. *See Gilbert v. Sandy Fork Mining Co.*, 9 FMSHRC 1327, 1329 n.2 (Aug. 1987) ("A 'hill seam' is a crack or fault in a mine roof that generally has mud or water emanating from it."); *Shamrock Coal Co.*, 5 FMSHRC 845, 847 n. 3 (May 1983) ("There was some disagreement at the hearing as to the exact definition of a 'hillseam.' Everyone agreed that, basically, it is a crack in the roof, often filled with earth or mud. Some witnesses described it as a crack extending all the way to the surface.").

Bell County introduced several publications discussing hillseams that are consistent with its understanding of the term. A U.S. Dept. of Interior, Bureau of Mines report, published about 1989, entitled "Hillseam Geology and Roof Instability Near Outcrop in Eastern Kentucky Drift Mines" contained several references to hillseams. Ex. R-31. "Hillseam is the eastern Kentucky miners term for weather-enlarged tension joints that occur in shallow mine overburden where surface slopes are steep. Hillseams are most conspicuous within 200 feet laterally of a coalbed outcrop and under 300 feet or less of overburden." Ex. R-31 at 1. "Some evidence of weathering is necessary to distinguish hillseams from mining-induced cracks in the roof." Ex. R-31 at 6. "In general, the hillseams occur mostly within 200 ft of coal outcrop and, therefore, under about 77 to 116 ft of overburden, given the hillside slope conditions of the district, which range from 21-30 degrees." Ex. R-31 at 17. "Hillseams in eastern Kentucky are weather-enlarged tension joints that occur in shallow mine overburden where surface slopes are steep. They occur with the greatest frequency and severity within 200 ft laterally of the coalbed outcrop, then decrease in frequency and severity to about 700 ft inby outcrop under 300 ft or less of overburden . . . . Hillseams generally extend to the surface as indicated by the initial flow of mud and water into mines." Ex. R-31 at 31.

An Information Circular published in 2003 by the National Institute for Occupational Safety and Health ("NIOSH") described hillseams as "Systematic joint sets near outcrop" and noted that "[m]ost hilltop mines must leave at least 150 ft of barrier between the mine and outcrop." Ex. R-32 at 20. A 2003 Report to Congress by MSHA's Office of Surface Mining, dealing with coal waste impoundments, stated that "'hillseam' is a term used by miners for highly weathered joints that may be found near an outcrop." Ex. R-39 at 11.

The joints in the roof of the #5 entry were not weathered; they had no mud, water or other foreign substance in them.[8] Furthermore, they were some 1,500 feet from the outcrop, where the overburden was about 500 feet, i.e., a location where hillseams would not be expected. Under Bell County's experience and understanding, the joints were not hillseams. Tr. 635. Prior to the accident, MSHA officials apparently agreed. An inspector and a field office supervisor had inspected the area where the alleged hillseams were located, and did not identify them as hillseams or raise any other issues with respect to Bell County's compliance with its Roof Control Plan.

Mine maps, on which mining progress was recorded, show that the area where the accident occurred was mined on advance between May 16 and May 20, 2004, one month before the fatal accident. Bell County's engineering department conducted surveys of the mine every second day, to assure that entries were driven straight, crosscuts were made at proper locations, and to get accurate figures on the amount of coal mined. Tr. 623-24. Spads, numbered markers driven into the roof of the mine, were set at various survey points, and the distances from the spads to the crosscuts and faces were recorded in the survey book. Tr. 714-15. Wright used the survey book to determine the locations of the faces on May 18 and 20, and drew them on a copy

[8] All witnesses who offered a description of the joints in the #5 entry testified that there was no mud or water in them. Tr. 107, 204, 271, 281-84, 595, 796-97; ex. G-15.

of an exhibit introduced by the Secretary showing the locations of various hillseams. Tr. 624-29; ex. R-23.

John Sizemore, an MSHA inspector, had inspected the 004/003 section on May 18 and 20, 2004. On the 18th he was accompanied by Murray and on the 20th by Murray and MSHA Field Office supervisor Jim Langley. On his inspections, Sizemore paid careful attention to roof conditions, and compliance with the Roof Control Plan. Tr. 731, 737, 743. His field notes from May 18 were consulted to determine where he traveled when he inspected the faces, power center, loadout point and belt line. Exhibit R-23 shows that, on May 18, Sizemore and Murray traveled through several critical areas of the mine where the Secretary contends that there were open and obvious hillseams. According to the map, Sizemore and Murray should have encountered hillseams in the #3 entry near the face, in the #5 entry near the face, in the #6 entry near the face, in the crosscut between the #6 and #7 entries, in the #7 entry outby as they traveled to the power center, in the #5 entry outby and in the #4 entry.[9] Ex. R-23. Neither Sizemore nor Murray identified any hillseams, or any deviations from Respondent's Roof Control Plan on May 18.[10] Tr. 524, 530-31, 731, 742.

Wright performed the same process for May 20. He drew the locations of the faces, and indicated a route of travel that Murray, Sizemore and Langley would have followed that day. Sizemore, Langley and Murray should have encountered a hillseam in the #7 entry and, possibly, the parallel hillseams in the #5 entry that eventually resulted in the roof fall. Ex. R-23. Langley had come to the mine on May 20 with a specific concern about hillseams, and was focusing on hillseams and compliance with the Roof Control Plan when he traveled on May 20. Tr. 523. Neither Sizemore nor Langley identified any hillseams, or any deviations from Respondent's Roof Control Plan on May 20. Tr. 524, 530-31, 731, 742. Langley testified that the displacement on a hillseam will be wider than the displacement on a stress crack, and hillseams will "often" have mud and water in them. Tr. 532. He agreed that, in the absence of mud or water, it is "sometimes" not obvious that a crack is a hillseam. Tr. 532.

There is substantial evidence that MSHA's definition of hillseams changed after the accident, at least as to the field office personnel who were responsible for enforcement at Bell

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[9] Hillseams are preexisting conditions, not caused by mining activity. Consequently, the hillseams would have been present when the entries were mined on advance, and would have been present on May 18 and May 20. Tr. 439, 443, 459, 576.

[10] The Secretary elicited only limited evidence to challenge Wright's analysis. She argued that it was not accurate because it was "double hearsay," and posited that Bell County did not call Sizemore as a witness to confirm the information because it "did not reflect the true route[s] that he traveled." Sec'y Br. at 4. However, as Bell County pointed out in its Reply Brief, the business records and notes were not hearsay, which, in any event, is admissible in Commission hearings. 29 C.F.R. § 2700.63(a). Moreover, I find more indicative of the accuracy of the information, the fact that the Secretary did not attempt to elicit from Sizemore, either on cross-examination or by calling him as a witness on rebuttal, any testimony to counter Wright's.

County's mine. Following the accident, Sizemore issued additional citations for improperly supported hillseams. Wright disagreed that the cracks were hillseams, and asked Sizemore for a definition of the term. Tr. 645-46. Sizemore did not provide one, but made a phone call and asked to speak to someone in technical support. He asked for a definition of the term hillseam. When he got off the phone, Sizemore told Wright that he had been told that they " wouldn't touch that one with a ten foot pole." Tr. 646-47. A couple of days later, Sizemore gave Wright a note that had three words written on it, "displacement, mud, water," and told Wright that that was a hillseam. Later, after citations were issued in August, Wright told Sizemore that he had never considered anything like a hairline crack to be a hillseam, and Sizemore responded that everything had changed because of the fatality and that every crack in the top had to be considered a hillseam.[11] Tr. 648.

Michael Guana, a mining engineer employed in the roof control division of MSHA's Tridelphia Safety and Health Technology Center, testified as an expert witness in the field of ground/roof control. He defined a hillseam as "a term used in the eastern mining region, eastern Kentucky, to describe an open joint." Tr. 558. Hillseams are formed over geologic time as a result of regional stresses, and are not caused by the mining process. Tr. 558. Guana explained that by "open joint" he meant a joint in the rock strata that "you could put your finger tips in or we could actually see up into . . . the roof a short distance in the order of six inches." Tr. 571. Guana distinguished a "crack" from a hillseam by explaining, that in MSHA's roof control division, a crack is a fault caused by the mining process. Tr. 559.

Guana disagreed with a number of statements in the Bureau of Mines publication. Tr. 580, 581, 584. He believes that hillseams do not have to be weathered joints, and do not have to occur near a coalbed outcrop or under shallow cover. Rather, they could occur anywhere in a mine. Tr. 579. He believes that the definition of hillseam has changed since 1989. Tr. 590. However, statements in the NIOSH and especially the MSHA publications, both from 2003, were essentially consistent with the 1989 publication, and he disagreed with the description in the MSHA publication. Tr. 586. Guana also testified that "there is no published definition" of the term "hillseam," and acknowledged that there is "no definition that's accepted across all aspects of academia." Tr. 596.

Lester Cox, Jr., the lead inspector on MSHA's investigative team, had 18 years of mining experience and 13 years of MSHA experience at the time of the investigation, and testified about hillseams. Tr. 371-74. He defined a hillseam as "a vertical fracture in the mine roof . . . that existed prior to the mining process . . . and . . . can extend to the surface area." Tr. 381. A hillseam is a type of crack and is "obvious." Tr. 381-82. "Most of the time the fracture crack can be jagged, like something that's been ripped, and a hillseam will be more or less smooth lines, straight lines." Tr. 382. He testified that a photograph taken during the investigation depicted a hillseam in the #5 entry that was not involved in the fall. Tr. 403-04; ex. G-19.

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[11] The Secretary did not call Sizemore as a witness either in her case in chief, or on rebuttal. He was called as witness by Respondents. The Secretary did not cross-examine him with respect to these conversations, and I conclude that Wright's descriptions are accurate.

He agreed that hillseams usually extend all the way to the surface, that there are cracks that are not created by the mining process that are not hillseams, and that hillseams are more likely to occur near the outcrop and under shallow depth of cover. Tr. 438-43. He also agreed that it would be important to know what the roof looked like before the rock fell in order to say whether or not a crack was a hillseam, and that use of the term hillseam may vary depending upon the locality and mining culture in which mining is done. Tr. 444. Cox did not agree that the Bureau of Mines publication could be interpreted to mean that hillseams would not occur more than 700 feet away from the outcrop or where there is more than 300 feet of overburden. Tr. 441-43. He saw hillseams in the videotape taken by Pennington, and observed hillseams outby the fall and in other areas during the investigation. Tr. 392-93. They were "obvious." Tr. 393.

The Secretary's broad definition of the term "hillseam," i.e., an open joint anywhere in a mine, was not disclosed until after the accident. No publication or other documentation was offered to support the definition. The Secretary also did not offer any evidence in an attempt to prove that her definition was, or should have been, understood by Bell County because of either the history and purpose of the use of the term in the Roof Control Plan, or consistent enforcement. In fact, the only evidence as to enforcement prior to the accident is inconsistent with her definition. I find that Bell County's Roof Control Plan was not ambiguous as to the term "hillseam," and that the joints in the #5 entry, between which the roof fall occurred, were not hillseams within the meaning of the Plan. Consequently the Roof Control Plan was not violated, as alleged in Citation No. 7538674. The Secretary does not argue that any other plan or regulatory provision was violated.

The Secretary introduced significant evidence in support of her argument. However, ultimately, I find it unpersuasive. Both Guana and Cox testified that hillseams in the #5 entry were evident in the video tape taken by Pennington. As noted above, however, the joints in the #5 entry had no mud or water in them, and were not hillseams within the meaning of the Roof Control Plan. Moreover, it is highly likely that displacement, which Guana opined is the critical element in determining whether a joint is a hillseam, had been altered by mining done that evening prior to the depiction of the joints in the video. Retreat mining had begun in the #5 entry, and portions of the supporting pillars had been removed. The roof had been "working," and dribbling had occurred along the joints, i.e., small pieces of rock had fallen out. By the time it was depicted in the video, the joint may well have appeared more dangerous than it had prior to the start of the shift.

The Secretary also relies heavily on a statement given by Belcher, in which he relates that prior to the accident, he "wasn't aware of the requirements of the Roof Control Plan when hillseams were encountered." Ex. G-24. He also stated that he "was aware of the two seams running down the #5 entry," had "checked the test holes" and "didn't have any reason for concern," although he did have concerns about the roof where the crew was mining and "warned them to keep an eye" on it and move on if anything unusual happened. Ex. G-24. I do not find this statement to be as damaging as the Secretary urges. Belcher's statement was reduced to writing on March 5, 2005, more than eight months after the accident. However, it appears to have been the product of an interview that was conducted during the investigation, which is

referred to in the narrative of another violation. Ex. G-8. There is no other evidence as to the substance of the interview. The timing and circumstances under which the interview was conducted are unknown. It is clear that MSHA was applying a very broad interpretation of the term hillseam during and after its investigation. While it is apparent that Belcher was aware of some features of the roof in the #5 entry prior to the accident, it is not so clear that, at that time, he recognized the features to have been hillseams. Belcher apparently was shown several photographs of cracks or joints and stated that, with one exception, he did not consider that any of them depicted a hillseam. The photos were not included with the statement, and it unclear exactly what he considered a hillseam, even at the time he gave the statement. In addition, he believed that one reason that the joints in the #5 entry were not treated as hillseams was because the "people on the section" did not think that the joints were hillseams. Ex. G-24 at 3.

Several miners testified that there were seams or hillseams in the #5 entry. Don Thomas, who installed roof bolts in some portion of the #5 entry, testified that the entry had cracks, hillseams or some combination of the two, because they were visible.[12] There was no mud or water in them. Tr. 281-84. Jonathan Shelton, who had at least five years of experience, testified that a hillseam is a "separation in rock, not like a hairline crack, that you could see up into, and goes through the whole coal seam, rock seam, roof and floor." Tr. 263. He saw hillseams in the #5 entry in the area where the accident happened, a couple of feet off the rib. Tr. 262, 264. There was no mud or water in them. Tr. 271. However, he was also sure that an MSHA inspector had been in that area and had not identified any hillseams. Tr. 270. Bill Wilder ran a shuttle car in the #5 entry on June 16, 2004. He testified that the top was bad, because there were two seams running up the entry for two to three breaks. Tr. 185-86. Hillseams are bad because they tend to drop out. Tr. 208. He learned the term hillseam in Tennessee, where hillseams have a crystaline or glassy substance in them. Tr. 209-10. He observed no mud or water in the seams, but offered that "everything was a hillseam," which Bell County contends is a post-accident definition. Tr. 206. Lemarr identified what "looks like a hill seam crack" in the Pennington videotape, pretty close to where the accident happened.[13] Tr. 98-99. He recalled that the joint ran between two pillars and he did not see any immediate danger because it was supported by the two pillars. Tr. 107. The primary joints involved in the fall ran up the entry. However, it appears that the one on the left may have been slightly within the pillar line in the area of the first open crosscut.

Conversely, Bailey saw a crack in entry #5 on the left side, but determined that it was not a hillseam because it had no mud or water in it. Ex. G-25. He also was sure that an MSHA inspector had been in the area, and had not cited or called attention to improperly supported hillseams. Ex. G-25. Bailey identified pictures of hillseams that had been encountered in another part of the mine. Tr. 777-78; ex. R-26, R-27, R-28, R-29. David Cinnamon, a roof bolter with 29 years of experience at several mines, testified that a hillseam was "anything that had mud and water coming out of it." Tr. 225, 246. Hillseams were large openings, "some as

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[12] Thomas is incorrectly identified in the hearing transcript as John Thomas.

[13] My concerns about the condition of the joint at that time have been previously noted.

big as your hand." Tr. 246. He had never encountered one except within 200 to 300 feet of the outcrop, and would not expect to see one where there was 500 to 550 feet of overburden. Tr. 225, 245. Tr. 225, 237, 247. Anthony McCullough, with 17 years of experience, also testified that hillseams had mud or water running out of them. Tr. 830. Renee Smith drove a shuttle car on the section and traversed the #5 entry about 30 times shortly before the accident, paying particular attention to the roof. He testified that there was a crack in the #5 entry that did not have mud or water in it and was not a hillseam, 796-97. There was no discoloration around the crack, and he was confident that he knew the difference between a hillseam and a crack. Tr. 813. He also described a picture of a weathered joint in another part of the mine as an "obvious" hillseam. Tr. 813; ex. R-27.

These conflicting views, some of which may have been altered by post-accident events, illustrate how the term hillseam may be understood differently, even within the same mining community. The fact that some miners may have thought that the joints in the #5 entry were hillseams does not alter the fact that neither Bell County nor MSHA considered them hillseams prior to June 16, 2004.[14]

Citation No. 7538675

Citation No. 7538675 was issued on August 18, 2004, pursuant to section 104(a) of the Act, and alleges a violation of 30 C.F.R. § 75.360(b)(3), which requires that preshift examinations be made of all areas where any miner is scheduled to work and shall include ventilation controls and tests of the roof, face and rib conditions. The violation is described in the "Condition or Practice" section of the citation as follows:

> An investigation of the fatal fall of roof accident which occurred on June 16, 2004, determined that the pre-shift examiner, for the on-coming second shift, failed to properly examine the 004/003 MMU supersection. Hillseams (vertical open joints) were present at various locations on the 004/003 MMU that were not adequately supported as required in the approved Roof Control Plan, dated June 6, 2001. The extensiveness of these hillseams should have prompted identification

[14] Even if the joints had been treated as hillseams under the Roof Control Plan, it is questionable that the accident would have been prevented. Cox conceded that had steel channels been used, they would not have stopped the massive roof fall. Tr. 476. He also agreed that narrowing the entry width to 18 feet may, or may not have had an effect on the fall. The joints between which the fall occurred ran about two feet off the right side of the entry and five feet off the left side, looking inby. Tr. 478, 488. Had cribs or posts been installed on the left side of the entry, they would have had no effect on the fall. If they had been installed on the right side, they may have been partially under the fallen material, and might have impeded the fall somewhat and/or provided some warning. Tr. 476-77, 491. He did not rely upon any studies or engineering analysis designed to determine if cribs or posts could have supported the fallen material. Cribs or posts also could have presented obstructions for the fleeing miners, forcing them out further into the entry. Tr. 482.

> as being hazardous roof conditions and corrective actions should have been taken. Due to the hazards associated with mining, and specifically with pillar mining, measures should have been implemented to adequately support the mine roof to correct the hazardous conditions or the area should have been dangered off and the section pulled back. The pre-shift record book did not contain any entries identifying the roof cracks or adverse roof conditions.

Ex. G-7.

MSHA determined that a fatal accident occurred as a result of the violation, that it was significant and substantial, that one employee was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $34,000.00 has been proposed for this violation.

The Violation

While the citation's narrative contains broader wording, the assertion that a fatal accident occurred as a result, and the Secretary's Brief make clear that this violation is also predicated upon the Secretary's position that the near vertical joint systems in #5 entry were obvious hillseams. Sec'y Br. at 42-43. Bailey conducted the preshift examination at issue. He did not believe that there were any hillseams in the #5 entry or anywhere else on the section. As explained in the discussion of the previous violation, his belief was justified under Bell County's and MSHA's understanding of the definition of the term hillseam at the time. He was also aware that an MSHA inspector, apparently Sizemore, had traveled the area when it had been mined on advance, and did not identify any hillseams or violations of the Roof Control Plan. The Secretary has not carried her burden of proof as to this violation.

Citation No. 7538676

Citation No. 7538676 was issued on August 18, 2004, pursuant to section 104(a) of the Act, and alleges a violation of 30 C.F.R. § 75.363(a), which requires, in part, that hazardous conditions identified during an examination of working areas be posted with a conspicuous danger sign where anyone entering the areas would pass. The violation is described in the "Condition or Practice" section of the citation as follows:

> An investigation of the fatal fall of roof accident, which occurred on June 16, 2004, determined that a hazardous roof condition identified by the second shift section foreman was not posted with a conspicuous danger sign where anyone entering the area would pass, and the hazardous condition was not corrected. The section foreman stated during an interview that while he was making his safety checks of the 004/003 MMU, he observed hillseams in the No. 4 and 5 entries outby the active pillar line. He stated he observed one hillseam in the No. 5 entry,

> located on the left side, two crosscuts long, and which widened out in the crosscut outby the active pillar row, where the fatal fall of roof accident occurred.

Ex. G-8.

MSHA determined that a fatal accident occurred as a result of the violation, that it was significant and substantial, that one employee was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $34,000.00 has been proposed for this violation.

The Violation

The Secretary relies exclusively upon the Belcher statement, exhibit G-24, for proof of this alleged violation. Sec'y Br. at 43-44. As noted in the previous discussion of that statement, which was apparently a truncated portion of an interview taken several months earlier, it is not so clear that, at the time Belcher did his examination on June 16, 2004, he recognized the features or joints in the roof of the #5 entry as hillseams. See discussion, *supra,* at 11-12. I find that the Secretary has failed to carry her burden of proof with respect to this violation.

Order No. 7538678

Order No. 7538678 was issued on August 19, 2004, pursuant to section 104(d)(1) of the Act, and alleges a violation of 30 C.F.R. § 75.1002(a), which requires that "Electric equipment must be permissible and maintained in a permissible condition when such equipment is located within 150 feet of pillar workings or longwall faces." The violation is described in the "Condition or Practice" section of the citation as follows:

> An investigation of the fatal fall of roof accident which occurred on June 16, 2004, determined that a non-permissible electric-powered chain saw and a non-permissible Quasar Model VM-L153 Digital Video Camera were being used within 150 feet of the active pillar line. During the viewing of the videotape that was recovered from the roof fall that was filmed at the time retreat mining was being conducted in the No. 5 entry of the 003 MMU the chain saw was heard in the audio portion of the videotape. During interviews of workers it was disclosed that a non-permissible electric chain saw was used to cut timbers on the pillar line. The electric saw was also observed by members of MSHA's recovery team during recovery efforts. A separate citation was issued for methane tests not being conducted at twenty minute intervals or more often while coal was being mined.

Ex. P-9.

MSHA determined that it was highly likely that an injury resulting in lost work days or restricted duty would occur as a result of the violation, that it was significant and substantial, that five employees were affected and that the operator's negligence was high. The Secretary alleges that the violation was the result of the operator's unwarrantable failure to comply with the

regulation. A civil penalty in the amount of $5,300.00 has been proposed for this violation.

The Violation

The two pieces of equipment that are the subject of this citation, the video camera and the electric chain saw, were not permissible. Tr. 424-26, 448, 510. The electrical plugs that were located on the scoops, which were used to supply power to the chain saws, were also nonpermissible. Tr. 803. The video tape recovered from the camera conclusively establishes that it was used within 150 feet of the pillar line. Ex. G-2. Testimony of witnesses confirms that fact. Tr. 65-68, 146. There was conflicting evidence on whether an electric chain saw was used within 150 feet of the pillar line. Several Bell County employees testified that it was a common practice to use electric chain saws within 150 feet of the pillar line to cut timbers, and that power was supplied to the saws by extension cords that were plugged into the scoops. Tr. 80-81, 141-45, 166-67, 170-71, 201-03, 215, 264, 282-84. An electric chain saw was found within 150 feet of the pillar line during the recovery effort, and the scoops were found to have had nonpermissible electric plugs installed on them. Other Bell County employees testified that they had not seen electric chain saws used within 150 feet of the pillar line. Tr. 228, 643, 786-87, 800-02, 831.

The most telling evidence is provided by statements given by two of the section foremen as a result of the investigation of the fatal accident. Bailey and Belcher both reported that it was common knowledge that electric chain saws were used within 150 feet of the pillar line. Ex. G-24, G-25. These were statements against interest. They were not repeated during the hearing because the foremen invoked their Fifth Amendment rights and refused to testify about the presence of electric chain saws. Several miners testified that they actually used the chain saws, and would have done so in the presence of management officials, but not MSHA inspectors. Tr. 176, 215, 268, 284.

Using a chain saw near the location that the timbers were actually being placed would have been considerably more convenient than taking measurements, proceeding more than 150 feet outby to the power center to cut timbers, and then transporting them back to the pillar line. Any timbers that had to be trimmed further would also not have to be cut by hand with a bow saw or brought back to the area of the power center, but could easily be trimmed and installed .

I find that the nonpermissible electric chain saw was used within 150 feet of the pillar line. This practice most likely was allowed to develop because of the virtual absence of methane in the mine. Cox testified that nonpermissible equipment could ignite methane, and that methane can come out of a coal seam, accumulate in a roof cavity, and be forced out by roof falls that occur during retreat mining. Tr. 428-29, 471-73. However, he conceded that his testing revealed no methane and that there was no record of any tests showing the presence of methane at any point in the subject area. Tr. 471-73. Several witnesses testified that methane checks done during imminent danger runs and preshift examinations always showed that no methane was present in the mine. Tr. 238, 346, 353, 644, 802, 820, 832-33. In addition, the continuous miners were equipped with methane monitors that were set to alarm if methane concentrations

reached 1%, and they never alarmed. Tr. 644-45, 821, 832-33. There is no evidence that methane in any concentration, much less approaching an explosive concentration of 5%, was ever found in the mine.

I find that the impermissible video camera and electric chain saw were used within 150 feet of the pillar line, and that the regulation was violated. The practice was long standing and was known and permitted by section foremen. The negligence of foremen, agents of the operator, is imputable to Respondent. *Martin Marietta Aggregates*, 22 FMSHRC 633, 636 (May 2000) (*citing Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997)). The characterization of Respondent's negligence with respect to this violation as "high" was clearly accurate.

Significant and Substantial

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

The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> 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 Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In analyzing whether a potential methane hazard is S&S, the critical question is whether there is any likelihood of explosive concentrations of methane coming into contact with an ignition source. *See Texasgulf, Inc.*, 10 FMSHRC at 501. Here the impermissible equipment provided readily available ignition sources for any methane that might have been present at explosive concentrations. However, as noted above, there is no evidence that even low concentrations of methane were ever found in the mine. The possibility of methane coming out of a coal seam and accumulating in a roof cavity, that Cox testified to, was purely theoretical on the facts of this case. While, as Cox also observed, Respondent was not testing the atmosphere for methane every twenty minutes, all of the tests that were performed showed an absence of methane. MSHA's Report of Investigation noted that "the mine liberates negligible methane." Ex. G-11 at 2.

There is no evidence to establish that there was any likelihood of explosive levels of methane coming into contact with one of the ignition sources. I find that the Secretary has failed to carry her burden of proving that the violation was S&S.

Unwarrantable Failure - Negligence

Section 104(d)(1) of the Act, pursuant to which the order was entered, addresses violations that are both significant and substantial and the result of an unwarrantable failure to comply with the particular standard. Because this violation was not S&S, it is unnecessary to determine whether it was also the result of an unwarrantable failure. As previously noted, Respondent's negligence was high.

Individual Liability

The Secretary assessed civil penalties against five managers of Bell County, in their individual capacities, mine superintendent Donnie Wright, mine foreman Jimmy Murray, and section foremen Craig Davis, Darryl Bailey and Jerry Belcher. Each is alleged to have knowingly authorized the violations alleged in Citation Nos. 7538674 (failure to comply with the Roof Control Plan with respect to hillseams in the #5 entry) and 7538678 (use of an

nonpermissible chain saw within 150 feet of active pillaring).[15]

The Act provides that a director, officer or agent of a corporate operator may be subject to civil penalties in his individual capacity for knowingly authorizing, ordering or carrying out a violation of the Act. 30 U.S.C. § 820(c). The legal standards governing individual liability were summarized in *Maple Creek Mining, Inc.,* 27 FMSHRC 555, 566-67 (Aug. 2005):

> Section 110(c) of the Mine Act provides that whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C.Cir. 1997). To establish section 110(c) liability, the Secretary must prove that an individual knew or had reason to know of the violative condition, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy* [*Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992)].

Wright and Murray - Docket Nos. KENT 2005-416 and KENT 2005-411

The Roof Control Plan Violation - Citation No. 7538674

The finding that Bell County did not violate its Roof Control Plan, as alleged in Citation No. 7538674, precludes a finding of liability against the individual Respondents. However, at the close of the evidence, motions for entry of judgment on behalf of Wright and Murray were granted, and the citations, as to them, were vacated. Tr. 845-57. The following discussion explains the bases of those rulings.

As made clear in *Kenny Richardson* and *BethEnergy*, as a predicate to individual liability, an operator's agent must be privy to knowledge or information that gives him reason to know of the existence of a violative condition under circumstances that his failure to act amounts to

[15] The Secretary conceded that none of the individual respondents could be charged with knowledge of the presence of the video camera that the victim "smuggled" into the mine. Tr. 21, 462-63.

aggravated conduct constituting more than ordinary negligence.

The Secretary failed to carry her burden of proof as to both of these high level managers. Wright, the mine superintendent, had responsibility for three mines at the time. Tr. 614. He had not been underground in the Coal Creek Mine since at least May 5, 2004, well before the area of the roof fall was mined on advance. Tr. 293, 712. Consequently, he was not in a position to have personally observed the alleged hillseams. While the Secretary contends that the alleged hillseams were obvious, there is little disagreement on the fact that, prior to the accident, neither Bell County nor MSHA believed that cracks in the roof of the #5 entry were hazardous unsupported hillseams, or thought that there was any other noncompliance with the Roof Control Plan. There was also no evidence that anyone informed Wright of a problem with hillseams or noncompliance with the Roof Control Plan. Hillseams had been encountered in another area near the outcrop, and had been appropriately dealt with. Heintzmann beams and channel straps were available, if needed. There was no information known to Wright, or of which he reasonably should have known, that should have put him on notice of a violative condition as to the Roof Control Plan.

The same holds true for Murray, except that on May 18 and 20, he was actually on the section in the vicinity of where the roof fall later occurred while it was being mined on advance. Consequently, he was in a position from which he arguably could have noted the existence of what the Secretary contends were hillseams in the #5 entry, and that they had not been addressed as required in the Roof Control Plan. However, Murray traveled with MSHA inspector Sizemore on May 18 and with Sizemore and MSHA field office supervisor Langley on May 20. Both of those experienced MSHA personnel were paying careful attention to roof conditions and compliance with the Roof Control Plan, with emphasis on hillseams on May 20. Neither Sizemore nor Langley observed any hillseams, or noted any other problems with roof conditions or possible violations of the Roof Control Plan. Tr. 521-31, 735, 742. Under such circumstances, any failure by Murray to observe hillseams and alleged violations of the Roof Control Plan could not have risen to the level of aggravated conduct constituting more than ordinary negligence.

Use of Nonpermissible Electric Chain Saw – Citation No. 7538678

The allegations with respect to the nonpermissible chain saw presented closer questions. As noted above, it was a common practice to use a nonpermissible electric chain saw within 150 feet of the pillar line. The practice was known to, and permitted by, section foremen. There was a permissible inference that Murray and Wright were aware of the practice, which was the Secretary's argument on these allegations.[16] The difficulty with the argument was that it was perfectly legal to use nonpermissible electric chain saws in most areas of the mine. The chain saws were typically used to cut timbers in the track and belt entries. Consequently, procurement and availability of electric chain saws would provide no indication that violations of regulations

[16] The Secretary argued that "If the foremen knew, then both the mine superintendent and the mine foreman had to know." Tr. 606.

were occurring. It is only use of such nonpermissible equipment within 150 feet of the active pillar line that is prohibited by the regulation.

There was no evidence that Wright or Murray were present when the chain saws were used at the pillar line, and there is no evidence that they were informed of such use. While it is possible that it might have been mentioned, perhaps by one of the section foremen, it appears to have been such a common practice that it could easily have been viewed as unremarkable. Miners using the chain saws at the pillar line were well-aware that the practice violated MSHA regulations. Tr. 176, 215, 268, 284. It strikes me as unlikely that a miner or section foreman would inform Wright or Murray that MSHA regulations were being routinely violated. Nor did the fact that several miners stated that they most likely would not have stopped their illegal use of the chain saws in Wright's or Murray's presence lend much strength to the inference. It could merely have reflected their assumption that the foremen's tolerance of the practice extended to higher levels of mine management.

In opposing the motions made at the close of the Secretary's case and renewed after all parties rested, the Secretary argued that, as high management officials, Wright and Murray had "an absolute duty to ensure that the Roof Control Plan . . . was being followed, " and that they were obligated to go underground "as often as necessary to ensure that the Roof Control Plan is being followed, and that the regulations are being followed" even if that meant "every day." Tr. 603, 608, 854. The core of the argument is that individual high-level managers are strictly liable for violations at mines over which they exercise authority. I rejected that argument as being inconsistent with the Act's provisions on personal liability.

The Secretary failed to carry her burden of proof with respect to the allegations against Wright and Murray. She failed to establish that they were privy to information that gave them knowledge or reason to know of the existence of the allegedly violative conditions, and that their failure to act amounted to aggravated conduct constituting more than ordinary negligence. I declined to draw the inferences that the Secretary urged, because I found them unpersuasive, and clearly not strong enough to justify a finding of aggravated conduct.

Davis, Bailey and Belcher - Docket Nos. KENT 2005-401, KENT 2005-402 and KENT 2005-409

The cases against the section foremen rest upon an entirely different footing. They were in the subject area of the mine virtually every working day, and had the responsibility to perform on-shift inspections to identify hazardous conditions. They were in a position to have had actual knowledge of conditions and practices occurring during the development and retreat mining phases of the subject sections. As to Citation No. 7538674, the finding that the Roof Control Plan was not violated precludes findings of liability against the individual Respondents.

However, there is ample evidence to justify a conclusion that the use of nonpermissible electric chain saws within 150 feet of the pillar line was a common practice, and that the section foremen knew of, and permitted, it. *See* the discussion of Citation No. 7538678. Bailey and

Belcher admitted knowledge of the practice in their written statements.[17] Ex. G-24, G-25. While there is no direct evidence that Davis permitted the practice, I find that he also must have been aware of and allowed the use of electric chain saws within 150 feet of the pillar line. While Davis' third shift normally performed maintenance and similar functions, coal was occasionally produced when the other work was done. Tr. 309-11. Davis also occasionally filled in on other shifts, if one of the foremen was off. Tr. 788. Consequently, he was most likely aware of the common practice.

I find that Davis, Bailey and Belcher knowingly authorized the violation alleged in Citation No. 7538678, within the meaning of section 110(c) of the Act. However, as noted in the discussion of that citation, the violation was not S&S and the gravity was low. Civil penalties in the amount of $500.00 were proposed as to each of these Respondents for this violation. Considering that the violation was non-S&S and the lower gravity, and upon consideration of the factors enumerated in section 110(i) of the Act, I impose civil penalties upon Davis, Baily and Belcher in the amount of $200.00 each.

Part II – Violations Unrelated to the Fatality

Sizemore returned to the mine on August 17, 2004, to conduct a regular quarterly inspection. Several orders and citations were issued in the course of the inspection. After all parties rested their cases on the violations related to the fatality, the individual Respondents were excused. Evidence admitted during Part I of the hearing forms part of the record as to the alleged violations discussed below. Evidence admitted during Part II of the hearing does not form a part of the record upon which the alleged violations related to the fatality were decided. Tr. 833-34.

Citation No. 7524384 and Imminent Danger Order No. 7524383

On August 17, 2004, Sizemore entered the mine with Murray and two state inspectors, traveling to the 004 section down the track entry, the #3 entry.[18] Bell County was retreat mining at the time. About 10 crosscuts from the pillar line, Sizemore observed what he believed to be a hillseam on the right side of the entry. It ran down the entry for about two crosscuts, gradually crossing it, and entering the rib on the left side. Tr. 871; ex. G-40. About one crosscut further in from the start of the first hillseam, he noticed another hillseam running parallel to the first one, also extending about two crosscuts down the entry before entering the left rib. Tr. 872. One

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[17] The Secretary requested that negative inferences be drawn because Belcher and Bailey asserted the Fifth Amendment and refused to testify regarding the use of electric chain saws within 150 feet of the pillar line. Sec'y Br. at 45-46,48. I decline to do so. Both individuals provided statements in which they admitted knowledge of the use of electric chain saws within 150 feet of the pillar line. The findings against them on this violation have ample evidentiary support without such inferences.

[18] The 004 section was located in an area of the mine different from where it had been at the time of the June 16 fatality. Tr. 871.

crosscut further inby, he found two more hillseams. Tr. 874. Steel channels had been installed on a portion of one of the hillseams, but only straps were used on the remainder. Tr. 873-74. Sizemore described the hillseams as being "no less than one-half inch wide," with smooth edges. Tr. 874. He agreed that there was no mud, water or other foreign substance in the openings, and that he had not traced the conditions to the surface. Tr. 890. Sizemore determined that the conditions violated Bell County's Roof Control Plan, and that they presented an imminent danger. He cited the conditions and issued an imminent danger order.

Murray disagreed with Sizemore. He did not believe that the conditions were hillseams, and called Langley, the field office supervisor, to complain. Tr. 897. Langley, and Roger Dingess, a roof control specialist, went to the mine that afternoon and traveled with Murray to the scene. Tr. 899. Langley couldn't remember what the conditions looked like, but recalled that he and Dingess agreed that the conditions had been properly cited. Tr. 900.

Bailey testified that the conditions cited were not hillseams, just cracks, with no mud, water or foreign substance in them. Tr. 925-26. Nevertheless, in order to terminate the citation and order, he directed two miners to timber the area off. The miners went to the area, but were unable to find the cited conditions, and Bailey had to go and point them out. Tr. 926. Benny Capps was one of the miners, and he corroborated Bailey's testimony. Tr. 907. Capps believed that they were just stress cracks, only as wide as the thickness of a piece of paper, and he did not consider them to be bad conditions. Tr. 907-08. Murray had also asked Wright to look at the conditions. Wright went to the area, but he, too, was unable to find the alleged hillseams. Murray pointed out what Sizemore had cited. Wright testified that he could only see one small crack, that looked like a pencil line had been drawn on the mine roof. There was no displacement, and it was "nothing like a hillseam." Tr. 944-46.

Citation No. 7524384 was issued pursuant to section 104(a) of the Act, and alleges a violation of 30 C.F.R. § 75.220(a)(1), which requires that mine operators develop and follow a Roof Control Plan approved by the MSHA District Manager. The violation is described in the "Condition or Practice" section of the citation as follows:

> The operator has not followed the approved Roof Control Plan.
> 1. Steel straps were used in lieu of the required steel channels or wooden crossbars, to support hillseams and parallel hillseams in the No. 3 entry beginning at the approx. 10th crosscut outby the pillar line on the 004 section and extending parallel with the no. 3 entry to the approx. 7th crosscut inby.
> 2. The entry width had not been reduced to the required 18 feet when subnormal roof conditions are encountered.

Ex. G-33.

Sizemore determined that a fatal accident was highly likely to occur as a result of the violation, that it was significant and substantial, that one employee was affected and that the operator's negligence was high. A civil penalty in the amount of $6,000.00 has been proposed

for this violation.

Order No. 7524383 was issued pursuant to section 107(a) of the Act, based upon Sizemore's finding that the cited conditions constituted an imminent danger. It required the removal of miners from "The no. 3 entry, beginning at the approx 10th crosscut outby the pillar line and extending to the approx. 7th crosscut inby." Ex. P-34.

The Citation

Sizemore and Langley were somewhat uncertain in their descriptions of how wide the alleged hillseams were. Langley did not recall, and Sizemore stated that they were "no less than one-half inch wide." Tr. 873-74, 900. In describing similar conditions that he cited on August 31, he used the same terminology. Tr. 883. As to those alleged hillseams, he acknowledged that he couldn't remember the exact width, and one-half inch was "just a guess." Tr. 883, 892-93. There are no recorded measurements, or other descriptions of the alleged hillseams in Sizemore's notes. Ex. P-40. The descriptions offered by Murray, Wright, Bailey and Capps were consistent. I find that the conditions were crack-like openings, with very limited displacement, i.e., approximately one-sixteenth of an inch. It is undisputed that they had no water, mud or other foreign substance in them.

As noted in the discussion of Citation No. 7538674, at least up to June 15, 2004, MSHA and Bell County were largely in agreement as to the definition of the term "hillseams" in the Roof Control Plan. It did not include conditions like those that were the subject of Citation No. 7524384. MSHA's Report of Investigation of the June 16 fatality was not issued until August 17, 2004, and the citations associated with it were issued on August 18 and 19. Because the conditions cited were not hillseams within the meaning of Bell County's Roof Control Plan, support with steel channels and narrowing of the entry were not required. Bell County did not violate its Roof Control Plan by failing to properly address hillseams.[19]

While Sizemore had issued citations for Roof Control Plan violations involving hillseams on June 21 and July 12, 2004, there is no description of those conditions in the record.[20] Consequently, there is no evidence that, prior to August 17, Bell County had been put on notice that cracks or joints, without water, mud or some foreign substance in them, had to be treated like hillseams under its Roof Control Plan, i.e., the June and July citations did not establish notice of

[19] There was no evidence of a conclusive method for determining whether a crack-like opening in a mine roof is a near vertical joint or a stress crack. Witnesses described differences in appearance, i.e., joints tend to be relatively straight and have significant displacement, whereas cracks caused by mining would be smaller and more jagged. Guana also stated that joints typically would be open for a depth of six inches or more.

[20] The citations were issued under section 104(a) of the Act. Ex. G-37, G-38.

MSHA's new interpretation through consistent enforcement.[21]

The Imminent Danger Order

Section 3(j) of the Act defines "imminent danger" as the "existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). Section 107(a) of the Act provides, in pertinent part:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

30 U.S.C. § 817(a).

"Imminent danger orders permit an inspector to remove miners immediately from a dangerous situation, without affording the operator the right of prior review, even where the mine operator did not create the danger and where the danger does not violate the Mine Act or the Secretary's regulations. This is an extraordinary power that is available only when the 'seriousness of the situation demands such immediate action.'" *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991) (quoting from the legislative history of the Coal Act). An imminent danger exists "when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (quoting from *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989)). Inspectors must determine whether a hazard presents an imminent danger quickly and without delay, and a finding of an imminent danger must be supported "unless there is evidence that [the inspector] had abused his discretion or authority." 11 FMSHRC at 2164. An inspector must make a reasonable investigation of the facts, under the circumstances, and must make his determination on the basis of the facts known, or reasonably available to him. An inspector may abuse his discretion if he issues a section 107(a) order

[21] As of August 17, Sizemore was aware that MSHA was considering revisions to Bell County's Roof Control Plan. He ascertained by phone that no changes had been made. A change was later issued on August 20, 2004. Tr. 869, 888; ex. G-46. The post-fatality amendment to the plan did not redefine the term hillseams, or require that cracks or joints be treated as hillseams. It provided that "Areas where near vertical joints are parallel within the same entry or crosscut will not be second mined."

without determining that the condition or practice presents an impending hazard requiring the immediate withdrawal of miners. 13 FMSHRC at 1622-23.

While an inspector has considerable discretion in determining whether an imminent danger exists, that discretion is not without limits. As the Commission explained in *Island Creek Coal Co.*, 15 FMSHRC 339, 347-48 (March 1993):

> While the crucial question in imminent danger cases is whether the inspector abused his discretion or authority, the judge is not required to accept an inspector's subjective "perception" that an imminent danger existed. Rather, the judge must evaluate whether, given the particular circumstances, it was reasonable for the inspector to conclude that an imminent danger existed. The Secretary still bears the burden of proving [her] case by a preponderance of the evidence. Although an inspector is granted wide discretion because he must act quickly to remove miners from a situation that he believes to be hazardous, the reasonableness of an inspector's imminent danger finding is subject to subsequent examination at the evidentiary hearing.

The fact that the cited conditions were not a violation of Bell County's Roof Control Plan is not dispositive of whether the imminent danger order was properly issued, because an imminent danger may exist in the absence of a violation of a mandatory health or safety standard. *Utah Power & Light, supra*. Although MSHA's report on the investigation of the fatality was not issued until August 17, both Sizemore and Langley were aware of the conclusion that the fall had started at the pillar line and extended up the #5 entry between two parallel joint systems. They believed that the conditions that Sizemore found on August 17 were joints that presented a similar potential for a roof fall. Tr. 875-76, 900. As Langley stated, "I took into consideration that there was pulling down and they would soon be in that area and it would be the same situation that we had before, the roof could drop out suddenly." Tr. 900.

While Sizemore and Langley had legitimate concerns about the potential for a roof fall similar to that that had occurred on June 16, there are several significant differences between the two situations that cast considerable doubt on whether the conditions that existed on August 17 constituted an imminent danger. The June 16 incident involved parallel joint systems that were typically less than 15 feet apart, and ran within and parallel to the entry up to the pillar line. The cave that started at the pillar line pulled down rock from between the joints until a secondary joint was encountered. Assuming that the conditions that Sizemore saw on August 17 were "near vertical joints," they ran diagonally across the entry and were most likely about 20 feet apart.[22] They did not run, unsupported, all the way to the pillar/cave line. Rather, they ran from rib to rib, where they were supported by the pillars, and were seven to ten breaks away from the pillar line.

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[22] Sizemore described the joints as running at an angle between the ribs of the 20-foot wide entry, crossing it in roughly two breaks. The second joint started about 50 feet inby the first. Estimating from a rough diagram, the joints would have been slightly less than 20 feet apart.

While Sizemore was concerned that the retreat mining process put stress on the roof, he did not explain how any such stress could affect the roof in the cited area. It was a considerable distance from where mining was being done, and the joints were supported by several rows of pillars. Guana, MSHA's expert, had testified that offsetting entries, so that joint lines ran into pillars rather than continuing up entries, would have been a reasonable way to lessen the dangers posed by parallel joint systems. Tr. 565-66. Langley was concerned because "they would soon be in that area." Tr. 900. He did not explain what he meant by "soon," but it appears that it would have been more a matter of days, than hours, before the retreat mining process would have approached that area. The condition was abated, i.e., timbered off, before Sizemore left. Ex. G-40.

The cracks may have been joints, like those involved in the fatal roof fall. However, they were supported by pillars and did not run up to the cave line. They were the type of conditions that had not been cited by MSHA prior to the fatality. I find that they did not present an impending hazard at that time.

As noted above, the extraordinary power to remove miners immediately, without prior review, is available only when the seriousness of the situation demands such immediate action. I find that the Secretary has not carried her burden of proof with respect to the imminent danger order, i.e., that the conditions could reasonably be expected to cause death or serious injury before they could be abated.

The August 31, 2004, Orders

By August 31, 2004, Bell County had taken Sizemore's articulation of MSHA's expanded definition of hillseams to heart. Its foremen had been instructed that "everything was a hillseam." Davis conducted the preshift examination for the day shift on August 31, and noted in entries #3 and #6 the presence of hillseams that had not been properly supported as required in the Roof Control Plan. Tr. 918-19. He identified cracks with no mud or water in them as hillseams because his supervisors had told him that "everything was a hillseam." Tr. 919. He testified that the entries were timbered off, effectively prohibiting travel, and that he then called out the results of the examination and the corrective action to Bailey, who recorded it in the preshift report book. Tr. 920. A copy of the preshift report is consistent with his testimony, as was testimony by Bailey. Tr. 926-28; ex. G-39. Bailey stated that he had written all of the notations on the preshift report, including the corrective action, before Sizemore saw it. Tr. 933.

On August 31, 2004, Sizemore and MSHA inspector Peggy Langley were continuing the regular quarterly inspection, and were conducting a dust survey. Sizemore testified that when he examined the preshift report for the day shift, hillseams had been noted in the #6 and #7 entries (not the #3 entry), and that no corrective action had been entered. Tr. 879. He then went underground, accompanied by Bailey and Murray. After he installed a dust monitor on the intake side and issued a citation for a violation at the power center, he did an imminent danger run across the section. When he reached the #7 entry, he found what he believed to be a hillseam running across the last open crosscut. Tr. 883. It was not properly supported as required by the

Roof Control Plan, and had not been posted with warning signs. He told Murray that the area was "shut down, and it wasn't dangered off or anything." Tr. 883-84. He decided to issue an Order closing the area, pursuant to section 104(d)(2) of the Act, citing a violation of the Roof Control Plan. He then crawled over to the #6 entry, found a similar condition, and added it to the Order. Tr. 884. He stayed in the area until the conditions were timbered off, thereby abating the violation. He also issued an order citing a violation of the regulation governing preshift examinations.[23] Sizemore's contemporaneously recorded field notes are consistent with his testimony. Ex. P-41.

There are substantial conflicts in the evidence with respect to these alleged violations. The copy of the preshift report for the day shift, Petitioner's exhibit G-39, was moved into evidence by Respondent. Tr. 948-49. It shows that a hillseam was reported in the #3 and #6 entries (not the #7 entry), and that corrective action had been taken. Both Davis and Bailey testified that the report was accurate, and that all of the entries, including the corrective action, were made at the time Davis called the report out. Sizemore testified that he saw a partially completed report that showed hillseams in the #6 and #7 entries, and an absence of corrective action. He believed that changes had been made to the report after he first saw it. Tr. 878.

These conflicts pose difficult issues. However, a comment by Bailey in his written statement suggests that some of the conflicts can be reconciled. For the reasons that follow, I find that Sizemore was mistaken about the preshift report entries, but that there were unsupported hillseams in the #7 and #6 entries.

I find that the copy of the preshift report is accurate. The exhibit purports to be a copy of a page from a record book, and was submitted as a proposed exhibit by the Secretary. Presumably, the Secretary had access to the actual record book during the investigation and prehearing discovery. Had a page been removed from the book, it is highly likely that the removal could have been detected. There are also no indications that the entries on the report were altered. The Secretary advanced no objection to admission of the exhibit on grounds that it had been fabricated. In addition, both Davis and Bailey were highly experienced foremen, who were well aware of the proper procedures for reporting the results of preshift examinations. It is highly unlikely that Davis would have reported hazardous conditions and not taken, or reported corrective action. It is also highly unlikely that Bailey would have recorded a reported hazardous condition, without assuring that corrective action was reported as well.

Bailey testified that he remembered the events of August 31 well, because he strongly disagreed with the cited violations and attempted to discuss them with Sizemore, and because he remembered that the #6 entry had been timbered off, which complicated removal of the continuous miner. Tr. 926, 930-35. Bailey's written statement discusses the August 31 violations, and notes that the area that Sizemore cited was outby the area that Davis had

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[23] When Bailey saw the order citing the Roof Control Plan violation, he was surprised. He did not believe the conditions were hillseams, and followed Sizemore out to his vehicle to protest. He didn't see the order citing the preshift violation until he returned. Tr. 932-35.

identified in his report. Ex. G-25. I find that Davis found what he believed to be hillseams, under the new expanded definition of that term in the #3 and #6 entries, that he had those areas timbered off, and reported the results of his preshift examination to Bailey, who made the entries in the record book.

I also find that Sizemore discovered an improperly supported hillseam in the #7 entry, and that Davis had not identified, reported, or corrected it. When Sizemore discovered the condition, he pointed it out to Murray. Murray did not testify as to these alleged violations. Bailey also examined the condition. After issuing the order and requiring corrective action, Sizemore proceeded to the #6 entry and discovered that the hillseam ran through the pillar into the #6 entry. He then added that condition to the order. Davis had not discovered that condition in the #6 entry during his preshift examination, and did not report or correct it.

Order No. 7524394

Order No. 7524394 was issued on August 31, 2004, pursuant to section 104(d)(2) of the Act, and alleges a violation of 30 C.F.R. § 75.220(a)(1), which requires that mine operators develop and follow a Roof Control Plan approved by the MSHA District Manager. The violation is described in the "Condition or Practice" section of the citation as follows:

> The operator has failed to follow the approved Roof Control Plan.
> 1. Steel channels or wooden crossbars were not used to support hillseams that ran diagonally across the intersections of the #6 and #7 entries, in the last open crosscut outby the pillar line on the 003 retreating section.
> 2. The entry widths had not been reduced to the required 18 feet when subnormal roof conditions (hillseams) were encountered in the intersections of the #6 and #7 entries, in the last open crosscut outby the pillar line, on the 003 retreating section.

Ex. G-35.

Sizemore determined that it was highly likely that a permanently disabling injury would occur as a result of the violation, that it was significant and substantial, that one employee was affected, and that the operator's negligence was high. The Secretary alleges that the violation was the result of Respondent's unwarrantable failure to comply with the standard. A civil penalty in the amount of $4,800.00 has been proposed for this violation.

The Violation

Davis testified that he conducted the preshift examination for the oncoming day shift on August 31, 2004, and that he did not see a hillseam in the #7 entry. Tr. 918-19, 922. He had discovered a hillseam in the #6 entry, and assured that it had been timbered off. However, that condition was further inby the condition cited by Sizemore. Bailey described the condition in the #7 entry as a small crack that ran a few feet into the rib. It was thinner than a knife blade, and had no mud or water in it. He did not believe it was a hillseam, or that corrective action was

needed. Tr. 931-32. Smith testified that, in response to Sizemore's issuance of the orders, he was assigned to timber off the #6 and #7 entries, which he did. Tr. 912. He saw one thin crack across entries #6 and #7, which he did not believe was a hillseam. Tr. 913-17.

It is apparent from Bailey's and Smith's testimony that there was a thin crack or joint in the #7 entry that emerged in the #6 entry on the other side of the pillar. Neither Smith nor Bailey described any differences between the cracks in the #6 and #7 entries. While the joint had very limited displacement, and no mud or water in it, it apparently ran in a relatively straight line, and was not a mining-induced stress crack. I accept Sizemore's testimony, and find that the crack or joint in the #6 and #7 entries was a hillseam that was not supported as required in the Roof Control Plan. Consequently, the regulation was violated as alleged in the order.

S&S

The Secretary has proven the violation of the standard. It is also clear that the violation contributed to a discrete safety hazard, i.e., the possibility that a miner would have encountered the conditions under continued mining operations, and have been subjected to a risk of an unplanned roof fall. Any injury caused by the hazard would have been serious. Consequently, the analysis of whether the violation was S&S focuses upon the likelihood that the hazard would have resulted in an injury. *Mathies*, *supra*.

Respondent was retreat mining at the time, and the cited conditions were at the location where mining was being done, i.e., the last open crosscut. The presence of a near vertical joint in the roof's rock strata could render the planned roof falls of the retreat mining process less predictable, raising the possibility of a fall outside the intended area. While the presence of unsupported parallel joints would have presented an obvious hazard in light of the June 16 accident, it is doubtful that this single joint posed as much danger, particularly since it was supported by the pillar between entries #6 and #7. I find that it was reasonably likely, not highly likely, that the hazard would result in an injury. Consequently, the violation was S&S.

Unwarrantable Failure - Negligence

In *Lopke Quarries, Inc.,* 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir.

1995)] (approving Commission's unwarrantable failure test).

> Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

The Secretary argues that the August 31 orders were the result of unwarrantable failures because Sizemore had "already issued three violations for the same or similar conditions between June 2004 and August 31, 2004," and he had "found two sets of hillseams within one crosscut of the active pillar line." Sec'y Br. at 50, 51. The evidence does not support either prong of her argument. Sizemore did not find two "sets" of hillseams. He found one hillseam in each of the entries, which appears to have been the same crack or joint. Tr. 883-84. The reference to violations for the "same or similar conditions" is most likely to the citations/orders issued on June 21, July 12, and August 17. While the August 17 violation involved conditions similar to those cited on August 31, there is no evidence in the record describing the conditions that were the subjects of the June and July violations. While those citations were addressed to hillseams, in the absence of some description of those conditions, it is unclear how much, if any, guidance those citations provided on MSHA's new interpretation of the term.

Bell County argues that the cracks in the #6 and #7 entries were very thin, had no mud or water in them, were not hillseams, "and there certainly was no justification for high negligence, unwarrantable failure." Resp. Br. at 27. The "no hillseam" argument has been rejected in the above discussion. However, the argument on negligence has merit.

Bell County was adjusting to MSHA's newly expanded definition of the term hillseam. Cracks that had previously been treated as part of normal roof conditions, by both Bell County and MSHA, were treated as hazardous conditions on August 31, 2004. While the change may

have begun earlier, after the August 17 release of MSHA's Report of Investigation of the fatal roof fall and Sizemore's issuance of a citation and imminent danger order, the new definition was in place. Sizemore's statement to Murray, that "everything is a hillseam," was relayed to the mine foremen as a directive on interpretation of the Roof Control Plan.

Had the area been mined only a day or two earlier, and adequate roof support not been installed, the Secretary would have had a good argument that the violation was the result of an unwarrantable failure. However, the entries were mined on advance much earlier, at a time when the roof support was considered to be in compliance with the Roof Control Plan by both MSHA and Bell County.[24] The conditions became non-compliant with the plan only after MSHA changed the plan's definition of hillseams and established a record of consistent enforcement sufficient to put Bell County on notice that the term hillseam included such conditions. That occurred no earlier than August 18, 2004. I find that Bell County's negligence in failing to have supported the hillseam, as specified in the Roof Control Plan, was no more than moderate. It was not the result of an unwarrantable failure to comply with the standard.

Order No. 7524395

Order No. 7524395 was issued on August 31, 2004, pursuant to section 104(d)(2) of the Act, and alleges a violation of 30 C.F.R. § 75.363(a), which requires, in part, that hazardous conditions identified during an examination of working areas be posted with a conspicuous danger sign where anyone entering the areas would pass. The violation is described in the "Condition or Practice" section of the citation as follows:

> The operator did not conduct a proper preshift examination. Hazardous conditions (inadequately supported hillseams that ran diagonally across the intersections of the #6 and #7 entries in the last open crosscut outby the pillar line on the 003 retreating section) were recorded in the preshift book, but were not corrected or posted with danger signs.

Ex. G-36.

Sizemore determined that it was highly likely that a permanently disabling injury would occur as a result of the violation, that it was significant and substantial, that one employee was affected, and that the operator's negligence was high. The Secretary alleges that the violation was the result of Respondent's unwarrantable failure to comply with the standard. A civil penalty in the amount of $4,800.00 has been proposed for this violation.

The Violation

The purpose of required preshift and onshift examinations is to identify hazardous conditions and ensure that they are corrected. Hillseams that have not been supported, as

[24] Bailey noted that the area had been mined about three years earlier. Ex. G-25.

required by the Roof Control Plan, are hazardous conditions that should have been discovered in a preshift examination, noted in the report, and immediately corrected or posted with conspicuous danger signs until they were corrected.

As noted in the discussion of the prior order, there was a hillseam that ran across the #6 and #7 entries that had not been supported as required in the Roof Control Plan. Davis failed to identify it as a hillseam when he conducted the preshift examination. This particular condition was not reported, and was not noted on the preshift examination report. Nor was it corrected or posted with warning signs. I find that the regulation was violated.

S&S

For the same reasons that the previous violation was found to have been S&S, I find this violation to be S&S. However, it was reasonably likely, rather than highly likely, that the hazard would result in an injury.

Unwarrantable Failure – Negligence

As noted above, as of August 31, Bell County was adjusting to MSHA's newly expanded definition of the term hillseam in the Roof Control Plan. Davis was attempting to anticipate the breadth with which MSHA would interpret the term as he performed the preshift examination for the day shift on August 31. He identified such conditions in the #3 and #6 entries. He had them timbered off and reported them, even though he believed that they were "hairline cracks," and should not have been regarded as hillseams. Tr. 919. He did not identify the thin joint in the #7 entry that extended into the #6 entry as a hillseam. Bailey and Smith did not believe that the crack in the #6 and #7 entries was a hillseam.

The Secretary argues that two witnesses called by Bell County to describe the conditions hadn't examined the area closely.[25] Sec'y Br. at 51. However, Bailey testified that he "walked all the way over there and looked up underneath it, and looked at it that way as in from one side to the other." Tr. 936. He described it as thin crack that he did not believe was a hillseam. Smith stated that he was about eight feet away from the crack when he made his observations. Tr. 916. Sizemore, whose recollection of the condition was admittedly vague, had stated that his estimate of the opening width being one-half inch was "just a guess." Tr. 883, 892-93.

I find that the failure to identify the crack in the #6 and #7 entries as a hillseam reflected an honest disagreement over whether the condition fell within the newly expanded definition. Sizemore was most likely applying the definition broadly, erring on the side of inclusion. As Langley acknowledged, in light of the fatality he would look at suspect conditions "stronger than [he] normally would." Tr. 904. Sizemore may well have taken an even more expansive view of

[25] Sizemore explained the basis for his assessment of "high" negligence as to this order, i.e., he "had issued the same type of violation previously for improper pre-shift examination." Tr. 887. No further explanation was offered.

hillseams, since he had actually seen the conditions that later resulted in the fatality, and had not taken steps to address them.

Many of the factors typically used in evaluating whether a violation was the result of an unwarrantable failure have little application here. The condition existed for as long as three years. However, it had only recently become a violation, as MSHA's expanded definition of the term hillseams became enforceable. It was not extensive. It was S&S, but it did not pose a high degree of danger. Because of its nature, the condition itself was not obvious, nor was it obviously a violation. While a supervisor was involved, and there had been other similar violations issued, the difficulty of differentiating between a common crack and a near vertical joint that was not weathered and did not have a foreign substance in it is a significant mitigating factor.

I find that Bell County's negligence with respect to this violation was no more than moderate. The violation was not the result of an unwarrantable failure to comply with the standard.

The Appropriate Civil Penalties

Bell County is a medium-sized mine, and its controlling entity, James River Coal Company, is a large mining entity. The Secretary introduced a printout from MSHA's computer database, an Assessed Violation History Report, showing that Respondent had 185 paid violations in the 24 month period from August 31, 2002, to August 30, 2004. Ex. G-43. Of those violations, 79 were single penalty assessments, 97 were regularly assessed, and 9 were specially assessed. The Proposed Assessment mailed to Respondent showed slightly different numbers. However, it appears that Respondent's relevant violation history was moderate, or average. Bell County does not contend that payment of the penalties would impair its ability to continue in business. All of the violations were promptly abated in good faith. The gravity and negligence associated with the alleged violations have been discussed above.

Order No. 7538678 was affirmed. However, it was found not to have been S&S or the result of the operator's unwarrantable failure. The violation was unlikely to result in an injury, and the operator's negligence was found to have been high. Consequently, the order will be modified to a citation issued under section 104(a) of the Act. A civil penalty of $5,300.00 was proposed by the Secretary. Upon consideration of the above, and the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of $2,500.00.

Order No. 7524394 was affirmed as an S&S violation. However, the gravity was slightly lower than alleged, because a reasonably serious injury was reasonably likely, rather than highly likely, to occur. It was also found not to be the result of the operator's unwarrantable failure, and the operator's negligence was moderate. Consequently, the order will be modified to a citation issued under section 104(a) of the Act. A civil penalty of $4,800.00 was proposed by the Secretary. In light of the slightly lower gravity and the lower negligence finding, and upon consideration of the factors enumerated in section 110(i) of the Act, I impose a penalty in the

amount of $2,000.00.

Order No. 7524395 was affirmed as an S&S violation. However, the gravity was slightly lower than alleged, because a reasonably serious injury was reasonably likely, rather than highly likely, to occur. It was also found not to have been the result of the operator's unwarrantable failure. The operator's negligence was moderate. Consequently, the order will be modified to a citation issued under section 104(a) of the Act. A civil penalty of $4,800.00 was proposed by the Secretary. In light of the slightly lower gravity and the lower negligence finding, and upon consideration of the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of $2,400.00.

Respondent Bell County withdrew its Notices of Contest and requests for hearing with respect to Citation Nos. 7538677, 7538679 and 7538680, and Order No. 7538681. It agreed to pay the proposed penalties for those violations, a total of $6,336.00. The Secretary concurred with the proposed settlement of those alleged violations. I have considered the representations and evidence submitted and conclude that the proffered resolution is appropriate under the criteria set forth in section 110(i) of the Act. Accordingly, the related Contest Proceedings will be dismissed and Bell County will be ordered to pay civil penalties in the amount of $6,336.00 for those violations.

ORDER

Citation Nos. 7538674, 7538675, 7538676 and 7524384, and Order No. 7524383 are hereby **VACATED** and the petitions as to those citations are hereby **DISMISSED**.

Order Nos. 7538678, 7524394 and 7524395 are **AFFIRMED**, as modified, and are further modified to citations issued pursuant to section 104(a) of the Act. Respondent Bell County Coal is directed to pay civil penalties totaling $6,900.00 for those violations. Respondents Davis, Bailey and Belcher are directed to pay civil penalties in the amount of $200.00 each. Payment shall be made within 45 days.

With respect to the three citations and one order as to which Respondent Bell County withdrew its Notices of Contest and requests for hearing, Docket Nos. KENT 2004-320-R, KENT 2004-321-R; KENT 2004-322-R and KENT 2004-324-R are hereby **DISMISSED**, and Bell County is ordered to pay civil penalties totaling $6,336.00 within 45 days.

Michael E. Zielinski
Administrative Law Judge

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