

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

December 19, 2008

ROCKHOUSE ENERGY MINING CO.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. KENT 2008-1483-R
	:	Citation No. 8216019; 07/23/2008
	:	
	:	Docket No. KENT 2008-1484-R
	:	Citation No. 8216020; 07/23/2008
	:	
	:	Docket No. KENT 2008-1485-R
	:	Citation No. 8216024; 07/24/2008
	:	
	:	Docket No. KENT 2008-1486-R
	:	Citation No. 8216025; 07/24/2008
	:	
	:	Docket No. KENT 2008-1487-R
	:	Citation No. 8216033; 07/25/2008
	:	
	:	Docket No. KENT 2008-1488-R
v.	:	Citation No. 8216034; 07/25/2008
	:	
	:	Docket No. KENT 2008-1489-R
	:	Citation No. 6660866; 07/31/2008
	:	
	:	Docket No. KENT 2008-1496-R
	:	Citation No. 6660752; 07/02/2008
	:	
	:	Docket No. KENT 2008-1497-R
	:	Citation No. 6660753; 07/02/2008
	:	
	:	Docket No. KENT 2008-1498-R
	:	Citation No. 6657617; 07/11/2008
	:	
	:	Docket No. KENT 2008-1499-R
	:	Citation No. 6657618; 07/11/2008
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY & HEALTH	:	Docket No. KENT 2008-1500-R
ADMINISTRATION, (MSHA),	:	Citation No. 6657619; 07/11/2008
Respondent	:	

: Docket No. KENT 2008-1501-R
: Citation No. 8216001; 07/11/2008
:
: Docket No. KENT 2008-1552-R
: Citation No. 8216067; 08/25/2008
:
: Docket No. KENT 2008-1553-R
: Citation No. 8216068; 08/25/2008
:
: Docket No. KENT 2008-1554-R
: Citation No. 8216072; 08/25/2008
:
: Docket No. KENT 2008-1555-R
: Citation No. 8216073; 08/25/2008
:
: Docket No. KENT 2008-1556-R
: Citation No. 8216075; 08/25/2008
:
: Docket No. KENT 2008-1557-R
: Citation No. 8216082; 09/02/2008
:
: Docket No. KENT 2008-1558-R
: Citation No. 8216083; 09/02/2008
:
: Docket No. KENT 2008-1559-R
: Citation No. 8216084; 09/03/2008
:
: Docket No. KENT 2008-1616-R
: Citation No. 8216088; 09/08/2008
:
: Docket No. KENT 2008-1617-R
: Citation No. 8216089; 09/08/2008
:
: Mine No. 1
: Mine ID 15-17651

DECISION

Appearances: Brian W. Dougherty, Esq., U.S. Department of Labor, Nashville, Tennessee,
on behalf of the Respondent
Carol Ann Marunich, Esq., Dinsmore & Shohl, LLP, Morgantown, West Virginia,
on behalf of the Contestant

Before: Judge Barbour

These cases are before me on Notices of Contest filed by Rockhouse Energy Mining Co. (“Rockhouse”) against the Secretary of Labor, acting on behalf of her Mine Safety and Health Administration (“MSHA”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Act”) (30 U.S.C. § 815(d)). In the contests, Rockhouse challenged the validity of 23 citations issued pursuant to section 104(a) of the Act at its Mine No. 1, an underground bituminous coal mine located in Pike County, Kentucky.¹ In each of the citations MSHA alleged a particular safety standard had been violated and each alleged violation was a significant and substantial contribution to a mine safety hazard (S&S). The Secretary answered, asserting the citations were properly issued in all respects.

Because of the potential consequences resulting from the inspectors’ S&S findings – consequences described below – Rockhouse moved its contests be heard on an expedited basis.² The contests were assigned to me, and I denied the motion. Order (September 19, 2007).

¹Section 104(a) provides if an inspector:

believes that an operator of a coal . . . mine
. . . has violated . . . any mandatory health or
safety standard . . . promulgated pursuant to
this Act, he [or she] shall, with reasonable
promptness, issue a citation to the operator.
Each citation shall be in writing and shall
describe with particularity the nature of the
violation.

30 U.S.C. § 814(d).

Section 104(d)(1) of the Act provides, in describing the nature of the violation, an inspector may find the violation is “of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.” 30 U.S.C. § 814 (d)(1).

²Commission Rule 52 states that a party may request expedition of proceedings, and if the request is granted, the hearing on the merits of the case shall be held not less than four days thereafter. 29 C.F.R. 2700.52.

However, in denying expedited review, I stated I believed Rockhouse was nevertheless entitled to as speedy a hearing as was consistent with orderly proceedings. Accordingly, and with agreement of counsels, I scheduled the matters to be heard on October 7, 2008, in Pikeville, Kentucky. (Most of the contests were received in the Commission's Docket Office on August 21, 2008, and were assigned to me on September 15 and 19, 2008.) The matters needed to be heard and decided promptly because the S&S findings contained in the contested citations were a key factor in the Administrator of MSHA's pending decision whether or not to designate Rockhouse and its Mine No. 1 as exhibiting a "pattern of violations" ("POV"), a designation with potentially onerous consequences for the company.³

THE POSSIBLE "PATTERN" DESIGNATION AND ITS RELATIONSHIP TO THE CONTESTED CITATIONS

In contesting the citations, Rockhouse maintained it was subject to initial screening pursuant to 30 C.F.R. § 104.2 and § 104.3 for a POV designation, and MSHA would base its final POV determination in part on the validity of the contested citations and their S&S findings.⁴ Timeliness Motion 1.

³Section 104(e) of the Act states in part:

If an operator has a pattern of violations of mandatory health or safety standards in the . . . mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal . . . mine health or safety hazards, he shall be given written notice that such pattern exists.

Once given a POV notice, an operator is subject to an order of withdrawal each time an inspector cites it for an S&S violation until a complete inspection of the mine has revealed no further S&S violations. 30 U.S.C. § 814(e).

⁴The agency's procedures for determining whether an operator has exhibited a POV are set forth at 30 C.F.R. § 104.1, *et seq.* Section 104.2 specifies the information MSHA reviews in its annual initial screening process, including information regarding "The mine's history of . . . [S&S] violations." 30 C.F.R. § 104.2(1). Section 104.3 specifies the information MSHA uses to identify mines with a potential pattern of violations. It states:

(a) The criteria of this section shall be used to identify those mines with a potential pattern of violations. These criteria shall be applied only after initial screening conducted in accordance with § 104.2 . . . reveals that the operator

Rockhouse's contentions and concerns raised questions about how to proceed. Neither I nor counsels knew of any guiding precedents. In part this was because while MSHA has had the statutory authority to put mines under a POV designation since the passage of the Act, the agency only recently has begun to exercise that authority by promulgating and by implementing 30 C.F.R. § 104, *et seq.* I think it fair to state these procedures and the policy behind them are little understood by many in industry and the bar, and I include myself among those who have had difficulty comprehending the POV process.⁵

may habitually allow the recurrence of violations of mandatory safety or health standards which . . . [are S&S]. These criteria are:

- (1) A history of repeated [S&S] violations of a particular standard;
 - (2) A history of repeated [S&S] violations of standards related to the same hazard; or
 - (3) A history of repeated [S&S] violations caused by unwarrantable failure to comply.
- (b) Only citations and orders issued after October 1, 1990, and that have become final shall be used to identify mines with a potential [POV].

⁵30 C.F.R. § 104 establishes a four-step POV designation and termination procedure: (1) Initial screening (section 104.2); (2) Identification by MSHA of mines with a potential POV through application of the regulatory criteria (section 104.3); (3) Designation of POV status and issuance of the designation to the operator (section 104.4); and (4) Termination of POV status (section 104.5). For operators the critical steps in the process are: (1) The initial screening; (2) Identification as having a potential POV; and (3) The designation of POV status.

With regard to S&S violations, in steps 1 and 2, MSHA's Office of Assessments reviews a 24-month violation history of a mine to determine if it exhibits a potential POV. Among the criteria for making a potential POV determination are all alleged S&S violations cited at the mine in the previous 24 months. According to section 104.3(b), "[O]nly citations and orders . . . **that have become final** shall be used to identify mines with a potential pattern of violations" (emphasis added). Thus, an operator may be notified its mine exhibits a potential POV only on the basis of final S&S allegations. If an operator is issued a notification its mine exhibits a potential POV, the operator has not more than 20 days within which to do the following: (1) Review all documents on which it has been evaluated for the designation and provide additional

Rockhouse's position, as I understood it, was that its Mine No. 1 had been identified by MSHA as having a potential POV, and the company had been given written notification to that effect. In response, Rockhouse had submitted a corrective action plan to avoid repeated S&S violations. Following implementation of the plan, MSHA had conducted a complete inspection of the mine to determine whether or not pursuant to the plan Rockhouse had achieved a 30% reduction in its S&S rate or whether its S&S rate was at or below the industry average. During the inspection, 32 S&S citations were issued, of which the subject 23 were contested. Given issuance of the 32 citations, the company had not achieved a 30 % reduction, and its average rate of S&S violations was above the industry's rate. However, if four of the contested S&S allegations were found to be invalid, the mine would meet the 30% reduction goal.

According to MSHA's procedures summary, once the inspection was completed and the calculation was made, the District Manager would report to the Administrator, and the calculation would be one of the bases upon which the Administrator would decide whether to issue a Notice of POV to Rockhouse. In this instance, the District Manager's report had to be sent to the Administrator by September 25, 2008. In turn, the Administrator had to decide whether or not to issue a Notice of POV within 30 days of his receipt of the Report. Pattern of Violations Procedures Summary³⁻⁴; www.MSHA.gov/POV/POV_procedures. It, therefore, seemed reasonable to expect the Administrator's decision to be made on or shortly after October 27, 2008 (October 26 was a Saturday).

information to MSHA; (2) Submit a written request for a conference with the MSHA District Manager; and/or (3) Provide a written corrective action plan to institute a program to avoid repeated S&S violations. See Pattern of Violations Procedures Summary, www.MSHA.gov/POV/POV_procedures.pdf. If an operator chooses not to submit an improvement plan to MSHA within 60 days of the operator's receipt of notification of a potential POV designation, MSHA will conduct a complete inspection of the mine and the District Manager will analyze the results of the inspection to determine whether the operator has reduced the frequency rate of S&S violations by 30% or has achieved a frequency rate for S&S violations that is at or below the industry average. (If the operator chooses to submit an improvement plan, MSHA will conduct the complete inspection no later than 90 days from the date the operator submitted the plan, and the District Manager will analyze the results of the inspection to determine whether the operator has reduced the frequency rate of S&S violations by 30% or has achieved a frequency rate for S&S violations that is at or below the industry average.) The frequency rates for S&S violations will be based on the S&S designation in all citations and orders issued since the receipt of notification or since the receipt of the improvement plan. **The citations and orders need not be final orders of the Commission.** *Id.* Based on a report he or she receives from the District Manager concerning the results of the complete inspection, MSHA's Administrator will then decide whether to issue a Notice of Pattern of Violations to the operator. Such a notice officially places the operator under the strictures of section 104(e). *Id.*

This was the primary reason Rockhouse's counsel moved for an expedited hearing. Although counsel for the Secretary opposed an expedited hearing, he did not oppose one that was convened expeditiously. Because I believed Rockhouse had an compelling interest in determining whether it would be faced with the repeated closures inherent in a Notice of POV, and because it was likely a POV decision would be made on or shortly after October 27, I accelerated the trial schedule so the cases could be heard and at least informally decided before the time the Administrator had to act on the District Manager's POV recommendation. With the concurrence of counsels, I scheduled the hearing to commence on October 7, and I advised counsels I would issue bench decisions on the issues at the close of the taking of the evidence on each contested citation. I further advised them the bench decisions would not be final until they were confirmed in writing. Counsel for the Secretary stated MSHA's POV considerations would be bound by the oral bench decisions. Whether or not this was the best way to proceed is certainly open to question. Other counsels and judges may well find different approaches more satisfactory.

For these reasons the contests were tried and orally decided October 7 - October 9, 2008. The results of the trial follow. Editorial changes have been made in some of the oral decisions.

KENT 2008-1483-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8216019	July 23, 2008	75.1725(a)

The citation states in part:

The roof bolter . . . being used on the 008-0 MMU is not being maintained in a safe operating condition. The tram levers in the operator[']s compartment will "over-lap" each other by one inch. This condition exposes miners on a daily basis to hazards of being crushed against the mine rib when the wrong lever is activated. Miners work in close proximity to this machine while it is operated and often place themselves between the machine and the mine rib during the "normal mining cycle."

Gov't Exh. 1.

Section 75.1725(a) requires, "Mobile equipment . . . [to] be maintained in safe operating condition and . . . equipment in unsafe condition shall be removed from service immediately."

With regard to the citation, I stated:

Based on the testimony of . . . [I]nspector [Kenny Fleming], which I credit[,], I find the tram levers in

fact overlapped as described in the citation. I note the testimony establishe[d] the equipment [i]s manufactured with a two-inch space between the levers[,] . . .[a]nd I find it improbabl[e] that the inspector knowing this would have been mistaken about a condition that was otherwise.

I also find it unlikely, as Rockhouse's foreman John Adams believed, that Fleming . . . pushed the levers together so they overlapped. Certainly[,] no one has suggested a motive for him to cause the citation condition.

Having found the levers overlap[ped], the next question is whether the overlapping levers created an unsafe condition. I conclude the answer is [“]yes[”], because I accept the testimony of Inspector Fleming that overlapping levers can result in the roof bolter operator causing the equipment to suddenly move in an unintended direction through a mistaken activation of the wrong lever. Mr. Adams testified believably that roof bolter operators can use one hand to push levers and thus retain full control. But there was no showing all roof bolter operators always use one hand, and it is clear the tramming mechanism is designed for two hands.

Certainly, at least some of the roof bolter operators must operate the roof bolter as designed. Sudden unintended movement of large equipment like a roof bolter is unsafe. And I therefore find the overlapping tram levers represented an unsafe condition within the meaning of the standard.

A violation is properly designated S&S if based on the particular facts surrounding the violation there exists a reasonable likelihood the hazard contributed to will result in an injury of a reasonably serious nature. All agreed the feared hazard was of a miner being caught between the rib and the roof bolter by a sudden and unexpected movement. I accept Inspector Fleming's testimony that miners sometimes walk beside the roof bolter

when it's being trammed. And even if miners are not supposed to, sometimes [they] place themselves on the offside [of the roof bolter (the side opposite the roof bolter operator)], between the ribs and the roof bolter. Inspector Fleming believably testified he has seen . . . miners where they were not supposed to be. Indeed, Rockhouse recognizes the hazard and warns its miners . . . [about] it. But the sad fact is that miners, like all of us, do what they shouldn't do at times and [they] subject themselves to danger.

Given the fact the roof bolter operator's vision of the offside is frequently at least partially obstructed, and given the fact miners occasionally place themselves between the ribs and the roof bolter, I conclude the violation directly contributed to the hazard of miners being struck and injured by a sudden and unexpected movement of the roof bolter . . . [a]nd that such an injury was reasonably likely [to occur] as mining continued.

If such an accident happened . . . [the result] was . . . reasonably likely to be serious, even deadly. And for these reasons, I find the violation was S&S. The violation also was serious; and, as counsel for Rockhouse agreed, if the violation existed the operator was[,] as found by Inspector Fleming[,] moderately negligent.

Tr. 396-399.

KENT 2008-1484-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8216020	July 23, 2008	75.517

The citation states in part:

The energized . . . cable supplying power to the roof bolter . . . being used on the 008-0 MMU has an opening in the outer jacket exposing the inside, insulated, phase conductors. The MMU floor is wet at various locations and the cable is frequently

handled by the miners on a regular basis. This condition exposes them to hazards associated with electrical shock. This condition is evident approximately 100 feet from the roof bolting machine.

Given these “confluence of factors” and “continued normal mining operations” along with the rugged abuse that these cables are exposed to, this condition is at least reasonably likely to result in a lost time injury.

Gov’t Exh. 2.

Section 75.517 requires trailing cables to be: “insulated adequately and fully protected.”

With regard to the citation, I stated:

The citation alleges Rockhouse violated 30 [C.F.R. §] 75.517 wherein an energized cable to the roof bolter . . . was found to have an opening in its outer jacket, thus exposing the inside insulated conductors. In her closing argument, [c]ounsel [for Rockhouse] conceded the violation[, a]nd I find . . . it occurred as alleged [T]he next question . . . is whether the citation was S&S, and I find it was. While location of the fingernail-size opening is disputed, I find Inspector Fleming’s testimony more credible in this regard. He unequivocally stated the opening he found was 100 feet from the roof bolter. This meant[,] and I find[,] the opening was on the floor as he testified, and I also find as he testified that the floor was moist and wet and muddy.

Inspector Fleming believed as mining continu[ed] miners would handle the cable to suspend it since it is prohibited to run over the cable. Moreover, he testified that continuing stress and strain on the cable subjected the insulation of the phase conductors to damage, and that something as small as a pinhole could subject those handling the cable to severe shock injury or even to electrocution. I credit all of . . . [his] testimony [in this regard].

I do not accept the Secretary's argument that the increased daily inspections Rockhouse instituted as a result of being under scrutiny for a . . . [POV designation] are irrelevant. It strikes me that it would be strange indeed if meeting one of the goals of the . . . [POV] provision of the Act – that is, heightened . . . [vigilance] to ensure compliance . . . [were] found . . . irrelevant. Certainly, at least in my view, such . . . [vigilance] should be considered when determining the reasonable likelihood [of whether] the hazard created . . . [will] result in an injury. However, here the testimony reveals . . . [the company's vigilance] was defective. At the beginning the shift, Rockhouse personnel visually examined the cable by walking it. Given the small size of the opening, given the mud and the water on the mine floor, I find there was little chance the inspection would have decreased the likelihood of an injury.

Therefore, . . . [in view of] this and the fact that as Inspector Fleming testified the opening was likely to grow larger as mining continued and the interior conductors and the insulation would be subject[ed] to even more stress, I [find] . . . there was a reasonable likelihood the opening would result in a miner being subjected to a shock injury.

In addition, I find the injury was reasonably likely to be severe, even to be fatal[, a]nd that the wet conditions increased this likelihood[.] [T]herefore, the violation was serious. I also note [c]ounsel for Rockhouse's agreement that should I find . . . [a] violation, the inspector[']s finding of moderate negligence . . . [on] the company's part should stand[, a]nd I therefore so find.

Tr. 399-400.

KENT 2008-1485-R

CITATION NO.

8216024

DATE

July 24, 2008

30 C.F.R. §

75.1403

The citation states in part:

Extraneous materials in the form of 4, 3 inch, 20 [foot] long sections of water-line have been allowed to exist at the outby scoop charging station at the # 8 belt drive. This material exists lying on the mine floor, parallel with the scoop that is being charged, with one end near the operator[']s compartment. This condition exposes the scoop operator to hazards associated with being imp[ailed] or struck by this debris when [the debris is run] over. This scoop is readily available for use to the miners in the outby air courses. Given the “vagaries of human conduct” in [the] context of “continued normal mining operations” [and] absent the intervention of an MSHA official, this condition is reasonably likely to result in a lost time accident.

Gov't Exh. 5.

The citation alleges the cited condition is a violation of Notice to Provide Safeguards No. 7415705, issued at the mine on March 30, 2005. *Id.* Section 75.1403 provides “[o]ther safeguards . . . to minimize hazards with respect to transportation of men and materials shall be provided.” Once a safeguard has been required, it is enforceable as a mandatory safety standard at the subject mine. *See Southern Ohio Coal Company*, 14 FMSHRC 1, 8 (January 1992); *Jim Walter Resources, Inc.*, 7 FMSHRC 493, 496 (April 1985).

With regard to the contested citation, I stated:

If I take as a given that an S&S finding can be lawfully made for an alleged violation of Section 75.1403, and this is an issue that is currently before Commission Administrative Law Judge Michael Zielinski, [6] . . . to find a violation [of section

⁶On November 4, 2008, Judge Zielinski ruled an S&S finding could not be made for an alleged violation of section 75.1403 (*Order Granting Respondent's Motion For Partial Summary Decision, Big Ridge, Inc.* 30 FMSHRC ____ (November 2008), Docket No. Lake 2008-68, etc.), and on December 24, 2008, he issued a similar ruling. *Order Granting Respondent's Motion*

75.1403] I must conclude the facts of the citation fit squarely within the notice to provide safeguards. Because I do not believe the Secretary has born[e] her burden of proof in this regard, I find she has not established a violation.

* * *

The notice to provide safeguard was issued when a fatal accident occurred. The accident involved a battery tractor backing into a crosscut and the right rear tire of the tractor running over a 14-foot length of metal channel, causing the channel to enter the [tractor] operator's compartment and kill the operator.

The notice [to provide safeguard] makes clear [that] extraneous material was observed along the roadway in addition to the metal channel. This extraneous material included jacks, belt structures, crib blocks, concrete blocks and track ties. The notice requires . . . all roadways where mobile equipment [is] operated to be maintained free from such extraneous materials causing a hazard to equipment operators. The wording of the notice . . . on its face seems clearly to relate to material[s] that are not supposed to be in a roadway; in other words[,] materials that are extraneous. While Inspector Fleming convinced me the cited scoop was indeed in a roadway, he did not convince me . . . the waterlines were the type of material covered by the safeguard. Rather than being where they were not supposed to be, I credit Mr. Ward's testimony . . . the lines were placed in the charging station area purposefully. The charging station was . . . a staging area for supplies[,] [a]nd Mr. Ward testified without [dispute] that the waterlines were purposefully placed there to be moved by the scoop. They were not in[,] other words, [“]extraneous material.[”]

Moreover, even if the facts fit the safeguard, there was no reasonable likelihood that the hazard to which they contributed would have caused an injury. The waterlines were placed on the ground next to the scoop after the scoop had entered the area. They [had not] been driven over[;] nor were they likely to be driven over since the testimony established

. . . they were to be moved by the scoop. And even if they [were not] moved, the scoop operator had to step on them to enter the operator's compartment. He or she would, therefore, have been fully aware of the lines and their location. [It is] reasonable to assume that he or she would have taken steps to avoid them as he or she backed out from the charging station. Also[,] if other equipment came in to the charging station, the equipment would, as Mr. Ward credibly testified . . . [have to enter] slowly. And the waterlines were readily visible. For these reasons . . . if I found that a violation existed, I would not find it [was] S&S.

However, I would find it serious[,] because I agree with the inspector that if one of the pipes had been run over and was somehow in some way propelled or moved in a fashion that would cause it to strike the operator, the injury the operator would suffer would range from concussions[,] to fractures[,] to even death.

Finally, if I found a violation, I would find, based on the agreement of counsel for Rockhouse, that the company's negligence in allowing . . . [the violation] to exist was moderate.

Tr. 405-409.

KENT 2008-1486-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8216025	July 24, 2008	75.503

The citation states in part:

The scoop . . . being used in the outby air ways is not being maintained in permissible condition as per 30 C.F.R., Part 18.31. An opening in excess of .003 of an inch is present beneath the plane flange joint cover of the "Ocenco" brand light on the operator[']s side, bucket end of the scoop. The empty internal volume of the explosion proof enclosure measures less than 45 cubic inches. This mine is on a [section] 103(i), 15 day spot inspection and has a history of liberating methane. [This] "confluence of factors" expose the miners to hazards associated with a methane ignition

such as smoke inhalation or burns.

Gov't Exh. 8.⁷

Section 75.503 requires the operator “to maintain in permissible condition all electric face equipment required . . . to be permissible which is taken into or used in by the last open crosscut” of the mine.

With regard to the citation, I stated:

The citation alleges . . . a scoop was not being maintained in a permissible condition, in that there was an opening in excess of .003 of an inch beneath the flange joint cover of the side light at the bucket end of the scoop.

As I understand Rockhouse’s closing argument, [c]ounsel concedes the violation[,] in that she agrees the opening was in excess of the permissible limit. I’ll add here that I conclude the proper standard – that is [s]ection 75.503 – was in fact cited. The scoop was manufactured in permissible condition so that it could be used in face areas of the mine. This is enough[,] in my opinion, to require it to be so maintained. I also credit Inspector Fleming’s contemporaneous notes that the scoop was used in . . . return [air]. Fleming wrote the notes when his memory was fresh[,] [a]nd his testimony fully supports what he wrote.

Despite Rockhouse’s protest that the logistics of getting the scoop into the return were prohibit[ive] . . . in my opinion the statement Fleming recorded is entitled to more weight than Mr. Ward’s later testimony that having to go through the stoppings to get into the return represented a prohibit[ive] challenge. I also note the testimony reveals it was possible, albeit inconvenient, to transport the scoop to the nearest working section.

I[,] therefore[,] conclude as mining continue[d], . . . [it was] reasonably likely . . . the scoop would have been used either in the next working section or in the [return]. As [Inspector] Fleming testified, there was an ignition source, . . . [it] being the internal electrical [components]

⁷Section 103(i) mandates, *inter alia*, the Secretary require a minimum of one spot inspection of all or part of a mine when the Secretary finds the mine liberates more than two hundred thousand cubic feet of methane during a 24-hour period. 30 U.S.C. § 813(i).

of the light. Moreover the mine clearly was subject to . . . large methane releases. Therefore, I find . . . as mining continue[d], it was reasonably likely an ignition or explosion [could have] occurred that could have [seriously] injured [or killed] the scoop operator.

In addition to being S&S, the violation was also serious. [T]he least serious consequences . . . suffered from an ignition or an explosion would have been . . . a flashburn, but the most serious . . . [would] have been death. And finally, for the reasons stated with regard to the previous citations, I find the violation [was due] to Rockhouse[’s] negligence.

Tr. 409-411.

KENT 2008-1487-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8216033	July 25, 2008	75.517

The citation states in part:

The energized #2 . . . cable supplying power to the roof bolter . . . being used on the 010-0 MMU has two . . . openings in the outer jacket exposing the inside, insulated phase conductors. The MMU floor is wet at various locations and the cable is frequently handled by the miners on a regular basis. This condition exposes them to hazards associated with electrical shock. This condition is evident approximately 100 and 200 feet from the roof bolting machine.

Given these “confluence of factors” and “continuing normal mining operations[,]” along with the rugged abuse that these cables are exposed to, this condition is at least reasonably likely to result in a lost time injury.

[⁸]

As noted above, section 75.517 requires trailing cables to be: “insulated adequately and

⁸The citation, which inadvertently was not admitted as an exhibit, is nonetheless part of the record and is found as an attachment to Rockhouse’s Notice of Contest, Docket No. KENT 08-1487-R.

fully protected.”

With regard to the citation I stated [⁹]:

The citation was issued when the inspector found two openings in the outer jacket of . . . a roof bolt[ing machine’s] trailing cable. [T]he opening[s] exposed the insulated phase conductors, and the floor in which the roof bolt[ing machine] was located was wet and muddy.

The standard [cited] required the trailing cable to be insulated adequately. Everyone agreed . . . the openings existed [, that t]he damage to the cable exposed the insulated inner conductors, and that the cable was not adequately insulated. Thus[,] the violation existed as charged.

The next question is whether it was S&S. Here, I find Mr. Ward’s testimony to be credible . . . [Inspector] Fleming and Mr. Ward were at odds over the location of the two defects. I find that the two defects were much closer together than . . . [Inspector] Fleming believed. It strikes me as inherently reasonable and logical that Rockhouse would not have had the cable spliced had the defects in fact been . . . [one] hundred feet apart as . . . [Inspector] Fleming maintained. Mr. Ward recalled them as ten to 15 feet apart[,] [a]nd while they may . . . in fact [have] been somewhat more [apart], I . . . [conclude] that [Mr.] Ward’s testimony was accurate. I also find, as Mr. Ward testified, that because the power center had recently been moved up, the defects in the cable would have been on the [cable] reel, not on the floor for the next shift, and perhaps for up to two shifts beyond.

I agree with Mr. Ward that under these circumstances, miners would not be likely to handle the cable anywhere near the defects. I note parenthetically, however, that the fact . . . rubber gloves were available to miners if they wanted to wear them has no bearing . . . on the S&S issue.

It is also important, in my opinion, that Rockhouse changed its [trailing cable] inspection procedures. [P]rior to a shift[,] the

⁹In delivering the bench decision[,] I incorrectly stated the citation number as 8216300 rather than 8216033. Tr. 402.

entire cable was inspected with a hands-on inspection. This means it was being inspected three times every 24 hours [rather] than one time a week. Not only is it likely the damaged parts of the cable would not have been on the wet and muddy mine floor [because they were on the cable reel], it is reasonably likely the damage would have been detected and corrected before the roof bolt[ing machine] moved so far from the power center . . . the damaged places would have been on the floor.

For these reasons [,] I conclude the Secretary has failed to establish it was reasonably likely the damaged cable would have caused a shock injury at the time it was cited[,] or as mining continue[d] and before the defects were corrected.

Despite the fact the violation was not S&S, it was serious. Had an injury occurred[,] a miner would have received [a] serious shock or even . . . been killed.

[Finally, as] the company[']s counsel agreed . . . [the violation was] due to the company's moderate negligence.

Tr. 402-405.

KENT 2008-1488-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8216034	July 25, 2008	75.517

Counsel for Rockhouse stated the company wished to withdraw its contest. I approved the withdrawal and dismissed the case. Tr. 24.

KENT 2008-1489-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
6660866	July 31, 2008	75.1722(a)

The citation states in part:

The speed reducer shafts and drive rollers on the CO # 4 belt [are] not provided with adequate guarding to prevent person[s] from coming into contact with [the moving parts]. The drive rollers and the speed reducer shafts turn at a high rate of speed. The speed reducer shafts are two

feet wide, and easily accessible from either the end of the head drive. This belt is traveled once per shift by the on[-] shift belt examiner and serviced every other day.

Gov't Exh. 10.

Section 75.1722(a) requires in part, "Gears, sprockets, chains, drive, head, tail and takeup pulleys . . . and similar exposed moving machine parts which may be contacted by persons and which may cause injury . . . shall be guarded."

With regard to the citation[,] I stated:

MSHA Inspector James McIntosh cited the company for not providing adequate guarding on the speed reducer shafts and drive rolls of the . . . mine[']s main conveyor belt drive.

Specifically, McIntosh asserted there were two openings through which miners could enter [the area containing the moving parts]; one being 12 inches across, and one being two feet across. The head drive itself was guarded by a fence. However, these two openings, one at either . . . end of the fence, in McIntosh's view justified finding . . . [the] violation. I conclude McIntosh was right. There is really no dispute the 12-inch opening existed. Although a person would have to squeeze . . . to get . . . [through] it, as . . . [Inspector] McIntosh testified, I . . . [find] it could be done.

I further find that once past the opening, contact with the moving parts was possible. True, a person would have to step up on the frame [of the drive] to achieve contact, but it could . . . [be] done.

I [also] accept . . . McIntosh's testimony that once inside the two-foot opening[,] access to the moving parts of the head drive . . . [was] possible. His testimony that some of the moving parts were within arm's . . . [length] was . . . credible. ["A]rm's length["] . . . is a frequently used colloquial unit of measure . . . [a]nd the lack of a more precise measurement . . . does not discredit the inspector's testimony.

As with the other opening, once access [to the moving parts] was gained, a person would have to step up on the

frame to reach the . . . part[s]; but it could be done. For . . . [these] reasons[,] I find the violation existed as charged. I also find it was S&S. The evidence establishes the area of the head drive was traveled two times a day by miners. In addition, miners would from time to time be assigned to service [equipment] and clean up the area. I find it . . . [was] reasonably likely[,] as mining continued a miner would enter the area, and having gained access, would be entangled or otherwise have contact with the head drive's moving parts.

Clearly, miners were not supposed to enter the inadequately guarded area while the hear drive was operating. But as [c]ounsel for the Secretary pointed out [in his closing argument], miners do not always do what they are supposed to do. By this I mean that as mining continued it was reasonably likely the day would come when a miner would decide to enter the inadequately guarded area to better undertake a . . . repair, cleanup or inspection function, would step up on the frame and would become entangled in the moving parts or would otherwise contact them.

When such contact occurred, the results were reasonably likely to be serious . . . [ranging] from cuts[,] to broken bones[,] to dismemberment[,] to death Because of the gravity of the possible resulting injuries, I also . . . conclude . . . [the violation] was serious.

Tr. 810-813.

Finally . . . and with the agreement of counsel for Rockhouse, I find the [inspector] accurately found Rockhouse was moderately negligent.

Tr. 817

KENT 2008-1496-R

CITATION NO.
6660752

DATE
July 2, 2008

30 C.F.R. §
75.340(a)(1)

Counsel for Rockhouse stated the company wished to withdraw its contest. I approved the withdrawal and dismissed the case. Tr. 24.

KENT 2008-1497-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
6660753	July 2, 2008	75. 203(a)

The citation states in part:

[The m]ethod of mining on the 010-0 MMU is exposing miners to the hazards of excessive widths. A five[-]way intersection has been developed in the No. 3 entry 70 feet inby [S]urvey [S]pad # 30903. The intersection measured 32 ft. and 5 inches wide. This condition exposes miners to injuries related to roof falls, excessive rib sloughing and draw rock. This section was not producing at the time but three mechanics were working in the area during this inspection. The foreman endangered off the area until proper roof control could be installed.

Gov't Exh. 11.

Section 75.203(a) requires in part "the method of mining shall not expose any person to hazards caused by excessive widths of rooms, crosscuts and entries Pillar dimensions shall be compatible with effective control of the roof, face and ribs and coal or rock bursts."

With regard to the citation[,] I stated:

MSHA Inspector Billy Meddings cited the company for exposing miners to the hazards of excessive widths at a five-way intersection developed in the number three entry.

The hazards the inspector cited related primarily to draw rock and to rib sloughage. To be frank, I found the evidence . . . hard to follow and confusing. And although this was true of both sides, it was particularly true . . . in the case made by Rockhouse. This stated, I found the argument presented by [the] Secretary's [c]ounsel, the essence of which was to focus on the facts the inspector found when he cited the violation and . . . the concerns he had at that time to be the most helpful in resolving the relatively simple issues presented.

I stated . . . [the issues] are [" relatively simple["] because Rockhouse's [c]ounsel concedes the violation existed. [Thus,] Rockhouse was indeed employing a mining method that resulted in excessive widths, as testified to by Inspector Meddings. And . . . [Inspector Meddings also] testified those

[excessive] widths were accompanied by certain visual [indications] of hazards.

In this regard, I credit Inspector Meddings' testimony that he observed draw rock in the roof. He described what he saw and he identified its location on a map. . . . I also credit his testimony he observed sloughing ribs at two different corners of the odd heading. Again, he described what he saw and he identified where he saw it on a map. . . .

As is well known, sloughing can be an indication the ribs are taking excessive weight. Meddings believed the sloughing reflected this And given the conditions at the five-way intersection, I find his belief was reasonable. I [also] agree with the inspector that the laminated shale roof . . . was subject to increase[d] pressure from the excessive widths [T]his in turn put pressure on the draw rock, making the . . . [draw rock] more likely to fall.

Further, I accept . . . [Inspector] Meddings testimony that his examination of the test hole revealed a horizontal shift in the roof strata . . . and this, in turn, meant the weight from the excessive widths was causing the shift, making draw rock falls and rib rolls more likely.

[T]he measures taken by Rockhouse to help support the entire roof of the entry[- a]nd here I'm referring primarily to leaving two large pillars and to installing cable bolts [-] while . . . commendable and no doubt necessary for overall roof support . . . did not adequately address the more particular hazards that rightfully concerned the inspector.

As the citation states, and as the testimony reveals, three miners worked in the area when the inspection took place. Had the conditions cited by Inspector Meddings continued, I conclude it was reasonably likely one [or more] of . . . [the miners] would have been injured by falling draw rock and/or by a rib roll. I[,] therefore[,] find this violation was S&S. I also find it was serious. Being hit by falling rock can easily cause a disabling injury.

Finally . . . and with the agreement of [c]ounsel for Rockhouse, I find the inspector accurately found Rockhouse was moderately negligent.

Tr. 814-817.

KENT 2008-1498-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
66657617	July 11, 2008	75.1403

Counsel for Rockhouse stated the company wished to withdraw its contest. I approved the withdrawal and dismissed the case. Tr. 24.

KENT 2008-1499-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
66657618	July 11, 2008	75.503

The citation states in part:

The bolter S/N 96057 being used on the 001-0 MMU is not being maintained in permissible condition. The cable and conduit supplying 120 volts AC power to the rear spot lights has been but exposing the energized, bare copper wires. This mine is on a 103(i),15-day spot inspection with a history of liberating methane. Methane concentrations have been found on this MMU on this date of up to .2%. This damaged cable is also covered in hydraulic oil from a ruptured hose. This condition exposes the MMU employees to hazards associated with methane ignition on a daily basis.

Gov't Exh. 9.

Section 75.503 requires the operator "to maintain in permissible condition all electric face equipment required . . . to be permissible which is taken into or used inby the last open crosscut" of the mine.

With regard to the citation[,] I stated:

[I]nspector Kenny Fleming cited the company for exposed energized wires leading to the rear spotlight[s] of an energized roof bolter located on the 001-0 MMU on July 11, 2008. He also found the cited [condition] constituted a[n] . . . [S&S] violation.

While the company concedes the roof bolter was in violation of the standard, it emphatically disagrees with the inspector as to how the roof bolter violated the standard. The inspector maintains the two copper wires conducting electricity to the lights were exposed through a damaged conduit. The company, relying on the testimony of Dan Blackburn, [its] . . . superintendent and the company official who traveled with Inspector Fleming, maintains only the neutral ground wire was exposed.

The way the conflicting testimony is resolved is important, because[,] in my view, it [is] critical to the inspector's S&S finding. Having listened carefully to the testimony of both Inspector Fleming and Mr. Blackburn, I credit the . . . superintendent's version of the state of the cited wires. In so doing, I am in no way implying Inspector Fleming was less than truthful and forthright. Clearly[,] the inspector is a well-qualified representative of the Secretary[,] . . . [a person] committed to carrying out his duties in a fair and impartial manner.

This stated[,] experience has repeatedly shown that two very competent[,] knowledgeable people can look at the same situation and see and remember very different things. Inspector Fleming repeatedly testified he viewed the conductors and that both were exposed. Mr. Blackburn was equally adamant that only the neutral ground wire was exposed. [Blackburn, like Fleming] . . . had viewed the damaged wires, and . . . [Blackburn] emphasized the ground wire was green. Inspector Fleming did not indicate in his [testimony or his] notes the color of the wires that were [exposed]. He did agree neutral ground wire and the conductors were twisted inside the conduit.

It seems reasonable to me that what I view as the inspector's misidentification of the severed wire[s] may have been facilitated by the twisted nature of the wires. Without a particular identifying feature, the twisting of the wires [made] confusion more likely. Mr. Blackburn was certain that the neutral ground wire was the only one exposed. Why[?] [B]ecause he could easily identify it [by its green color]. More than that[,] Mr. Blackburn unhesitatingly affirmed that the rear spotlights . . . [of] the scoop were turned on before the damage was repaired.

*

*

*

I accept Mr. Blackburn's testimony . . . [that] the lights

were turned on before the violation was abated. Mr. Blackburn was clear and unequivocal about this, and he was convincing. Moreover, the fact the lights were illuminated . . . before abatement means the conductors were not . . . severed. [T]hus, it is my belief Mr. Blackburn was right when he testified it was the neutral ground wire that was exposed.

Inspector Fleming agreed, and I find that[,] standing alone, an exposed ground wire would not be an ignition source. [W]ithout an ignition source there could be no reasonable likelihood of a hazard coming to fruition. In making this finding I am not disregarding the Secretary's observation that damage to the conduit [might] have weakened the conductors . . . [a]nd the conductors might[,] therefore[,] act as an ignition source as mining continued.

However, I view the possibility of future damage [to the conductors making them an ignition source] as too speculative. The situation with the spotlight conductors is not analogous to the situation . . . [of] . . . trailing cable conductors . . . in that there . . . [was] no showing the spotlight conductors were subject to the repeated stresses and strains endured by . . . trailing [cable conductors]. For all of these reasons, I find the violation was not S&S.

I also find the violation was non-serious. The exposed neutral ground wire did not pose an ignition hazard or a shock hazard either for that matter.^[10]

Tr. 806-810.

KENT 2008-1500-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
66657619	July 11, 2008	75.400

The citation alleged accumulations of combustible material in the form of float coal dust soaked with hydraulic oil existed on the same roof bolting machine involved in the preceding citation (Citation No. 6657618). Following my finding that an ignition source did not exist with regard to Citation No. 6657618, counsel for the Secretary stated the Secretary would modify

¹⁰I neglected to state as part of the bench decision that counsel for Rockhouse agreed the violation was due to the company's moderate negligence as found by Inspector Fleming, and I now so find.

Citation No. 6657619 “to a non[-]S&S citation.”¹¹ Tr. 826. Counsel for Rockhouse then agreed to withdraw the company’s contest of Citation No. 6657619. I approved the withdrawal and dismissed the contest. Tr. 826-827.

KENT 2008-1501-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8216001	July 11, 2008	75.507

Counsel for Rockhouse stated the company wished to withdraw its contest. I approved the withdrawal and dismissed the case. Tr. 24.

KENT 2008-1552-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8216067	August 25, 2008	75.1725(a)

The citation states in part:

The . . . # 12 belt conveyor is not being maintained in a safe operating condition. The bottom belt is rubbing hard against eight . . . return side bottom roller hangers [one] cross cut out by the belt conveyor tailpiece. These bottom roller hangers are hot to touch with an ungloved hand and . . . [the rubbing] has discolored the metal hangers from frictional heat. Fine pieces of dry belt string are present around the mid axle of the bottom rollers. This belt has also been cited during today’s inspection for allowing accumulations and not having the required 50 [feet per minute] [FPM] of air. [This] confluence of factors expose[s] miners to hazards associated with fire and smoke inhalation on [a] daily basis.

Gov’t Exh. 14 at 2.

Section 75.1725 requires in part “mobile and stationary machinery and equipment shall be maintained in safe operating condition.”

¹¹Prior to this, counsel for Rockhouse had agreed that should a violation exist, it was caused by the company’s moderate negligence as indicated by the inspector, and I so find. Tr. 805-806.

KENT 2008-1553-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8216068	August 25, 2008	75.400

The citation states in part:

Accumulations of combustible material in the form of black float coal dust [have] been allowed to accumulate along the . . . #12 belt conveyor. These accumulations are paper-thin and exist in the belt entry, extending into both adjacent entry cross cuts, for an approximate distance of 490 feet. This belt conveyor has been [c]ited on this date for the unsafe operating condition of allowing the bottom belt to rub hard against the bottom roller hangers[,] creating frictional heat and not having the required 50 FPM of air. [This] confluence of factors exposes miners to hazards associated with fire and smoke inhalation on a daily basis.

Gov't Exh. 14 at 1.

Section 75.400 prohibits accumulations of "coal dust, float coal dust . . . loose coal and other combustible materials . . . in active workings . . . or on electric equipment therein."

With regard to the two citations[,] I stated:

Citations [No.] 86216068 and 6216067 are closely linked factually and issue-wise, and I'll decide them together. Citation [No.] 8316068 alleges extensive accumulations of float coal dust were allowed to accumulate along the [No.] 12 belt conveyor and into adjoining crosscuts. Citation [No.] 8216067 alleges the belt conveyor itself was not maintained in safe operating condition, in that the bottom belt was rubbing against eight return roller hangers, one crosscut outby the tail piece. It additionally charges . . . fine pieces of . . . ["string?"], which were really shredded pieces of belt[,] were present along the mid-axle of the bottom rollers. Inspector Fleming, who issued the citations, found the cited conditions . . . [were S&S].

Having heard the testimony, I fully agree with the inspector

on every finding he made. I conclude from the testimony the inspector indeed smelled rubber and oil getting hot as he approached the belt. His testimony in this regard was unequivocal. I likewise conclude he saw all eight places where the belt was rubbing the belt hangers, and he touched [the hangers] and confirmed . . . [they] were hot. Even Mr. Thacker[,] [the company's chief electrician,] agreed the hangers were warm. Moreover, there was no showing Mr. Thacker touched the same hangers as . . . [Inspector] Fleming The hangers [were] hot enough to burn . . . [Inspector] Fleming's ungloved hand had he touched the hangers for a longer time[.] [This establishes] them as ignition sources, in my opinion.

The hangers did not need to be glowing to present a reasonably likely hazard. The hot hangers existed in the immediate vicinity of float coal dust accumulations about which . . . [Inspector] Fleming . . . persuasively testified. Not only did he describe the color and the location of the float coal dust, he noted he was able to put it into suspension by kicking it or otherwise by touching it. His testimony was not refuted in this regard.

The accumulated float coal dust was a violation of [s]ection 75.400; and in combination with the hot hangers, created a reasonably likely scenario for a mine fire or explosion. Moreover, the lack of ventilation in the cited area ensured any mine fire might not be detected by the CO sensors until it had gotten out of control. And if the float coal dust propagated an explosion, the result would . . . [have been] even more severe than a fire.

I agree with the inspector; all miners [on] the section were endangered as were the belt examiners and the scoop operators who traveled by or through the area. As mining continued, I believe burns and smoke inhalation were a reasonably likely result for these miners. Thus . . . the violations were not only S&S, they were [also] serious.

In reaching this conclusion I have given no consideration to the strings of shredded belt material embedded around the rollers, nor have I considered the testimony of Mr. Thacker that a pin might have . . . come out of a defective

belt splice and . . . thus[,] stopped the belt. As [c]ross [e]xamination revealed, it might [or it might not] have done so before the reasonably likely result of the violations There is really no way to know.

Finally, I do not find the fact Rockhouse had miners monitoring the belt and the ventilation to be . . . [determinative]. The men might have detected the conditions in time or . . . [they] might not. [Again,] there is . . . no way to know. And in the event of an explosion or fire[,] the [miners] . . . would only be able to try to contain an already extremely dangerous situation.

For all of these reasons, I affirm the inspector's findings of violation [and] his S&S findings, and I conclude the violations were serious. I also find, pursuant to [c]ounsel[']s agreement, that they were the result of [Rockhouse's] moderate negligence.

Tr. 1105-1109.

KENT 2008-1554-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8216072	August 25, 2008	75.1725(a)

Counsel for Rockhouse stated the company wished to withdraw its contest. I approved the withdrawal and dismissed the case. Tr. 23-24.

KENT 2008-1556-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8216073	August 25, 2008	75.400

Counsel for Rockhouse stated the company wished to withdraw its contest. I approved the withdrawal and dismissed the case. Tr. 24.

KENT 2008-1556-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8216075	August 25, 2008	75.1725(a)

Counsel for Rockhouse stated the company wished to withdraw its contest. I approved the withdrawal and dismissed the case. Tr. 24.

KENT 2008-1557-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8216082	September 2, 2008	75.503

Counsel for Rockhouse stated the company wished to withdraw its contest. I approved the withdrawal and dismissed the case. Tr. 412-413.

KENT 2008-1558-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8216083	September 2, 2008	75.202(a)

Counsel for Rockhouse stated the company wished to withdraw its contest.¹² Tr. 828.

KENT 2008-1559-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8216084	September 3, 2008	75.1403

The citation states in part:

The sanding devices provided for the . . . # 14 rail mounted mantrip . . . are not being maintained in an operative condition. When tested, [two] of the sanding mechanisms failed to operate on the end facing the outside. The track travelway this equipment is operated on has steep terrain, sharp turns, and is frequently wet from moisture due to the humidity during this time of year. This condition exposes the occupants of this mantrip to hazards associated with not maintaining traction and/or control while in operation 3 shifts per day.

Gov't Exh. 16.

The citation alleges the cited condition was a violation of Notice to Provide Safeguards No. 4509445, issued at the mine on February 27, 1996. *Id.* The requirements of section 75.1403 have been set forth above.

With regard to the citation, I stated:

¹²I neglected to approve the withdrawal and dismiss the case on the record. I will do so at the end of this decision.

Inspector Fleming allege[s] two [sanding] devices . . . [on a mantrip] . . . were not maintained in opera[ble] condition; [in] that the holes in the bottom of the sand reservoirs were packed with mud and wet sand. Assuming that an S&S violation may be cited for a violation of [s]ection 75.1403, I conclude Inspector Fleming's testimony regarding the manner in which he asked the chief electrician to activate the cited sanders and the [sanders'] resulting malfunction [-] testimony that was not refuted [-] establishes the violation.

I also find the violation was S&S. Inspector Fleming's testimony was simply more credible to me than that offered by Rockhouse.

Mr. Williamson, Rockhouse's safety director, agreed with Inspector Fleming that there were two pronounced dips in the track bed . . . [t]he mantrip had to travel . . . as well as at least once pronounced S curve. I do not find Mr. Williamson's testimony[,] that in most instances the sanders were used only when the track was wet[,] to be determinative . . . because it is clear to me wet track was not an uncommon occurrence at this mine.

Moreover, while I believe increased efforts to achieve compliance in response to a potential notice . . . of pattern of violations can be relevant when determining the S&S nature of [a] violation, I [find] Rockhouse's efforts to establish its heightened compliance deficient. It would have been much more persuasive . . . if Rockhouse had a miner who actually carried out the [asserted increased] inspections of the sanders . . . testif[y].

The mantrip was energized [when the inspector saw it]. It was reasonable for Mr. Fleming to assume it would be used . . . [in the condition] he found it as mining continued. And as mining continued, the mantrip would have encountered places where the outby sanders were required [to be used]; most likely . . . wet rails in the dips . . . [or] on an S curve [where] the track was wet.

The lack of operable sanders subjected those then riding in the mantrip to injuries from a derailment or a collision. Contusions and/or fractures were likely to result. For all of

these reasons I find the violation was both S&S and serious. I also find, pursuant to [the] agreement of [counsels], that Rockhouse's negligence in causing the violation was low.

Tr. 1109-1112.

KENT 2008-1616-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8216088	September 8, 2008	75.202(a)

The citation states in part:

The roof and ribs of areas where persons work and travel are not being supported or otherwise controlled to protect persons from hazards related to falls of the roof, ribs or coal/rock bursts along the track travel way on the . . . # 2 belt conveyor. Portions of loose ribs are present along this track travelway (Southeast Mains) beginning at Break # 25 (near the dip) and extending inby to the . . . #2 belt conveyor belt drive approximately 15 crosscuts inby. These loose portions of ribs are at various locations and are gapped away from the coal/rib line, leaning out toward the track. The average height of these areas . . . [is] 6 feet, with the top half being predominantly rock. This condition exposes employees who travel these areas to hazards associated with falls of the roof and ribs on a daily basis.

Gov't Exh. 13; Gov't Exh. 16.

Section 75.202(a) requires "[t]he roof, face and ribs of areas where persons work or travel" to be "supported or otherwise controlled to protect persons from hazards related to falls of the roof, face and ribs and coal or rock bursts."

With regard to the citation, I stated:

The loose ribs [along the track] were at intermittent locations where the ribs had gapped away from the coal rib line. The inspector found the condition constituted a violation of . . . [s]ection 75.202(a), which requires [in part that the] ribs . . . where persons work or travel . . . be supported to protect those persons from falls of the ribs. The inspector also found that the [condition was an] . . . [S&S] contribution

to a mine safety hazard.

I accept the inspector's description of the cited ribs as in places being gapped and leaning out. I also accept his testimony that the leaning ribs could pitch [out] and fall. And[,] in fact, a fall in a portion of the cited area could create a domino effect, pulling down the entire gapped rib. I conclude from the inspector's testimony the violation existed as charged. I further find the violation was . . . [S&S] and was serious.

I believe [the testimony of Rockhouse's belt foreman, Benjamin Workman, that] . . . he tried manually to pull down some of the ribs with a slate bar after the violation was cited. And when this failed . . . [he and his crew] had to resort to using a forklift. But while this perhaps indicates the stability of the portions of the ribs on which . . . [Mr. Workman] worked, it does not speak to all of the cited and gapped ribs Mr. Workman [did not] testify he tried to pull down all of the cited ribs. Further Mr. Workman's testimony does not take account of the . . . [effect of] time on the ribs as mining continue[d].

The most reasonable assumption to make – and [it is] one I . . . make – is that without further support, the ribs would have continued to deteriorate until they fell. In making this finding[,] I note the grill work or fencing installed on the . . . [roof and ribs] to prevent the fall of . . . draw rock[,] . . . [but the grill work and fencing] did not cover all areas of the gapped ribs. Indeed, it covered very little. The testimony revealed the cited area was traveled by miners both on foot and in vehicles. These miners, especially those on foot, were, in my opinion, reasonably likely to be struck by falling pieces of the rib.

I . . . find [compelling] Inspector Fleming's testimony that belt examiners who walked the cited area would walk . . . as the inspector put it, [in areas] of [“]least resistance[”]. This observation reflects a truism of human nature. And since some of [the] areas of . . . [“]least resistance[”] . . . were bound to be close to the ribs, I find the belt examiners in particular were reasonably likely to be injured.

I will add that while those riding in vehicles were protected by canopies to a certain extent, they were also subject to a hazard. As I understand the testimony, not all vehicles traveling in the cited area were equipped with canopies. And even those that were

had open sides.

Finally, being hit by falling ribs was reasonably likely to cause a serious injury, including cuts and broken bones. I also will note . . . the violation was the result of the operator's low negligence.

Tr. 1024-1027.

KENT 2008-1617-R

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8216089	September 8, 2008	75.202(a)

Counsel for Rockhouse stated the company wished to withdraw its contest. I approved the withdrawal and dismissed the case. Tr.829, 831.

ORDER

The foregoing considered, it **IS ORDERED** that Citations No. 8216019, 8216020, 8216025, 6660866, 6660753, 8216067, 8216068, 8216084 and 8216088 **ARE AFFIRMED**. The contests **ARE DENIED** and the cases **ARE DISMISSED**.

It **IS FURTHER ORDERED** that Citations No. 8216084 and 8216033 **ARE MODIFIED** to delete the S&S findings. The contests **ARE GRANTED IN PART** and the cases **ARE DISMISSED**.

It **IS FURTHER ORDERED** that Citation No. 66657618 **IS MODIFIED** to delete the S&S finding and to change the injury or illness finding to "unlikely." The contest **IS GRANTED IN PART** and the case **IS DISMISSED**.

Further, the Secretary **IS ORDERED** to modify Citation No. 66657619 to a "non-S&S citation" as agreed to at the hearing. The contest **IS GRANTED IN PART**, and upon modification of the citation, the case **IS DISMISSED**. Tr. 826.

Finally, based on the approved withdrawal of Rockhouse's contests for Citations No. 8216034, 6660752, 66657617, 8216001, 8216072, 8216073, 8216075, 8216082, 8216083 and 8216089, the contests **ARE DENIED** and the cases **ARE DISMISSED**.

David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail)

Brian W. Dougherty, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street,
Suite 230, Nashville, TN 37219-2456

Carol Ann Marunich, Esq., Dinsmore & Shohl, LLP, 215 Don Knotts Blvd., Suite 310,
Morgantown, WV 26501

/ej