FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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Washington, DC 20001

October 18, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2004-147
Petitioner	:	A.C. No. 11-00877-34581
	:	
v.	:	
	:	
WABASH MINE HOLDING CO.,	:	Wabash Mine
Respondent	:	

DECISION

Appearances: Christine Kassak Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for the Respondent;

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Wabash Mine Holding Company (Wabash). The petition seeks to impose a total civil penalty of $100,000.00 for two alleged significant and substantial (S&S) violations[1] of mandatory safety standards in 30 C.F.R. Part 75 of the Secretary's regulations governing underground coal mines. The citations were issued following a February 15, 2003, fatal rib fall accident that occurred at the Wabash Mine. The accident occurred when the victim, Jerry W. Neese, a roof bolting machine operator, was in the process of installing rib bolts as required by the existing roof control plan approved by the Mine Safety And Health Administration (MSHA).

I. Statement of the Case

As a result of MSHA's accident investigation, 104(a) Citation No. 7577188 was issued on April 11, 2003, for an alleged violation of the mandatory safety standard in section 75.220(a)(1), 30 C.F.R. § 75.220(a)(1), that requires each mine operator to follow its approved roof control plan. Although the Secretary does not allege a violation of a specific roof control provision, she relies on the language of the general obligation placed on mine operators

[1] A violation is properly designated as significant and substantial if there is a reasonable likelihood that the hazard contributed to by the violation will result in a serious injury. *Nat'l. Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

in section 75.220(a)(1) that, "[a]dditional measures shall be taken to protect persons if unusual hazards are encountered."

Citation No. 7577189 also was issued on April 11, 2003, alleging a violation of the mandatory safety standard in section 75.362(a)(1), 30 C.F.R. § 75.362(a)(1), because adequate on-shift examinations were not conducted in the B-2 working section during the two weeks preceding the fatality. The citation alleges that deteriorating mining conditions, as well as specific conditions prohibited by the roof control plan, were not noted by on-shift examiners. The Secretary proposed a $50,000.00 civil penalty for each citation on August 16, 2004.

With respect to the issue of the timeliness of the proposed penalty, Wabash relies on the Commission's finding of an untimely proposed penalty in *Twentymile Coal Company* (*Twentymile*), although the Commission's decision on the timeliness issue was reversed on appeal. *Twentymile Coal Co.*, 26 FMSHRC 666, 681-88 (August 2004), *rev'd*, 411 F.3d 256 (D.C. Cir. 2005). Wabash contends the D.C. Circuit's decision "[did] not fundamentally affect the Commission's reiteration of the existing law in *Twentymile*." (*Wabash br.* at p.30). Thus, Wabash argues the civil penalty should be vacated if either citation is affirmed because it was not proposed within a reasonable time after the April 11, 2003, issuance of the subject citations.[2]

This matter was heard on May 11 and May 12, 2005, in Evansville, Indiana. The parties' post-hearing briefs and reply briefs have been considered. As discussed below, Citation No. 7577188 shall be vacated because the Secretary has failed to demonstrate the fact of occurrence of the cited violation. Citation No. 7577189 shall be affirmed. As the Court's decision in *Twentymile* is the law of the case, for the reasons discussed below, I shall defer to the Secretary's interpretation of the "reasonable time" provision in section 105(a) of the Mine Act, 30 U.S.C. § 815(a). *See* 411 F.3d at 262, n.1. Moreover, setting aside the Secretary's proposed penalty is inappropriate in this instance where Wabash has failed to demonstrate any meaningful prejudice caused by any delay by the Secretary. *See id.* at 262. Consequently, a civil penalty of $10,000.00 shall be assessed for Citation No. 7577189.

II. Findings of Fact

a. Background

Wabash Mine Holding Company is a subsidiary of RAG Midwest Holding Company. The Wabash Mine is an underground coal mine located in Wabash County in Keensburg, Illinois. The coal seam in this mine is approximately 84 inches thick.

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[2] On February 14, 2005, Wabash filed a Motion to Vacate the civil penalty based on its assertion that it was not proposed within a reasonable period of time as required by the Mine Act. The Secretary opposed Wabash's motion. By Order dated March 4, 2005, the parties were advised that I would defer ruling on the motion until after the hearing. As discussed herein, the motion is denied.

The roof control plan in effect in February 2003 was approved by MSHA on April 24, 2002. (Resp. Ex. 8). The plan required 4-foot mechanical bolts to be installed on a maximum of five-foot centers, with bolts nearest the ribs to be installed a maximum of four feet from the rib. A mechanical bolt has a shell that expands as the bolt is drilled into the roof firmly grabbing the coal and surrounding rock.

An MSHA Safety and Health inspection (an "AAA inspection") of the Wabash Mine that began on January 2, 2003, was in progress at the time of the accident. The previous AAA inspection was completed on December 24, 2002. (Gov. Ex. 10).

In February 2003, Wabash was using 5-foot resin roof bolts instead of 4-foot mechanical bolts. A resin bolt is installed with glue that quickly hardens as the bolt is drilled into the roof. In adverse roof conditions, resin bolts are considered to be superior to mechanical bolts. (Tr. 170-71).

The maximum entry width specified in the roof control plan was 20 feet. Entry centers may be from 50 to 120 feet, and crosscut centers were permissible from 60 to 120 feet. The maximum dimension allowable for a four-way diagonal intersection was 70 feet.

The pre-shift examinations are conducted by hourly United Mine Worker (UMW) member employees. On-shift examinations are performed by the section foreman. (Tr. 260). Adverse rib conditions characterized by rib rashing, also known as sloughing, was common in the Wabash Mine. For example, Joe Hamilton, the hourly examiner who performed the pre-shift for the midnight shift during the weeks preceding the fatal accident, testified:

> "Wabash has got (sic) soft coal, and quite a bit of overburden, and they kind of have that situation all through the mines. . . . [The B-2 section] was probably - - probably a little worse."

(Tr. 255).

In recognition of the mine's adverse rib conditions, Wabash's roof control plan, unlike other mines in MSHA's District 8, included provisions for mine-wide bolting of ribs. A form of the plan's rib bolting requirements had been in effect since the 1970's. Rib bolting was performed until 1995 with a hand-held drill powered off a "work-beside" roof bolter. Since 1995 rib bolting has been performed using hand-held drills beside the roof bolter, or by using the drillhead on a "walk-thru" bolter. As discussed below, the "walk-through" bolting machine provides miners who are bolting ribs superior protection from a rib fall than a "walk-beside" bolter.

The roof control plan's minimum rib bolting requirements varied depending upon the height of the entry. When the entry was less than 8 feet high, the plan required the installation of a minimum of four bolts on five-foot centers on the rib corners. When entry height exceeded 8 feet, full rib bolting around the entire perimeter of the rib was required on five-foot centers.

Rib support was accomplished by using a minimum 48-inch conventional roof bolt and a 36-inch rib board used for bearing surface.

In February 2003 Wabash was developing a panel in the B-2 section in the southern portion of the mine that was located in the vicinity of an old B-2 worked out panel. The active panel initially consisted of eight entries with crosscut centerline spacing of 80 feet. Mining of the No. 1 and No. 8 entries was discontinued in January 2003 due to ventilation problems. Thus, at the time of the fatality, Wabash was advancing six entries, numbered 2 to 7. (Gov. Ex. 2). In an effort to maintain good roof conditions despite proximity to the worked out section, entries initially were driven in a southeasterly direction rather than mining the entries parallel to the worked out entries (in an easterly direction). However, after experiencing adverse roof conditions, mining was redirected in a northeasterly direction.

It is unusual to mine into abandoned or worked-out areas. (Tr. 453). Wabash's purpose of mining towards the worked-out panel was to provide ventilation into the panel to avoid the necessity to seal-off the abandoned area. (Tr. 545-46, 588).

In the weeks preceding the February 15, 2003, fatal accident, rib and roof conditions in the B-2 section became progressively worse as evidenced by the frequency and degree of rib rashing and roof falls, particularly as mining approached the work-out area. (*See, e.g.*, Tr. 149, 151, 159, 197, 237, 255, 455). The deteriorating conditions were attributable to the increased pressure and stress on the ribs from the weight of the overburden on top of the pillars. (Tr. 456). A mined-out area affects stresses on the roof and ribs of an adjoining working section because there is less support on the overburden because of the removal of coal from the abandoned area. (Tr. 456). This phenomenon was exacerbated by a band of draw rock, approximately 18 inches to two feet thick, that was sandwiched between the coal seam and the overburden in the B-2 section. (Gov. Ex. 8; Tr. 150, 337, 413). The pressure of the overburden on the pillars, in proximity to the worked-out area, caused "machine size" chunks of rock to fall in the B-2 section. (Tr. 291, 293). The fatality occurred approximately 140 to 160 feet from the old B-2 worked-out panel. (Tr. 431).

Wabash disputes MSHA's theory that stresses from the abandoned B-2 panel contributed to the adversity of the rib conditions. In this regard, Wabash argues that other panels in the B-1 and B-2 sections were mined in close proximity to worked-out areas without significant degradation of rib conditions. (Tr. 550, 605-06). Rather, Wabash contends the ribs at the Wabash Mine generally are prone to rashing because of the soft nature of the coal deposits.

Regardless of the cause, the overwhelming weight of the evidence reflects that there were adverse rib conditions in the B-2 section in the days preceding the accident. Everyone, including Wabash management, knew the conditions in the B-2 section were bad because coal was sloughing out and rashing. (Tr. 160, 255, 300). For example, Ray Evans, the midnight supervisor, was aware of the conditions through personal observation. (Tr. 311). Evans told the crew to "just keep a watchful eye and work careful." (Tr. 151-52, 238). Wabash kept promising

the miners they would be transferred out of the B-2 section but they kept getting delayed as the next unit was not ready for mining. (Tr. 153, 160, 248). In fact, miners had been told that they would be moving out of the B-2 section since approximately two weeks before the fatality. (Tr. 248).

The B-2 section is divided approximately in half by a belt line located in the No. 5 entry. There were two roof bolting machines in the B-2 section. (Gov. Ex. 2). A "walk-through" bolter was used on the left side of the belt line. The controls on a "walk-through" bolter are on the inside which provides protection to a miner who is rib bolting from rib rolls or falls because the boom is located between the miner and the ribs.

In contrast, the bolting machine on the right side was a Fletcher Roof Ranger ("Roof Ranger"), which was a "work-beside" also known as a "walk-beside" bolter. The Roof Ranger's controls are located on the outside of the bolter exposing the miner who is rib bolting in a position next to the rib. Thus, the "walk-through bolter" on the left side provided superior protection to persons performing rib bolting than the Roof Ranger on the right side. The roof control plan in effect in February 2003 recognized Wabash's use of both the "walk-through" and "walk-beside" bolters. (Resp. Ex. 8, p.3.4).

On Saturday, February 15, 2003, the midnight shift crew for the B-2 working section entered the mine at approximately 12:00 a.m. Evans was the midnight B-2 section foreman. Jerry Neese and Lee McCray normally were the left side roof bolt operators. Janice Davidson and John Garner were the right side roof bolting machine operators. Al Mason was the continuous mining machine operator.

Evans determined that a power move begun on the previous shift was not completed on the left side because additional high voltage cable was needed. Since the left side "walk-through" bolter normally operated by Neese and McCray could not be energized, Evans directed Neese and McCray to help with ventilation, load supplies, and then rib bolt behind the right side Roof Ranger.

When mining operations began on the midnight shift, the No. 7 entry had already been partially cut approximately 15 feet in depth. Mason began operating the continuous miner in the No. 7 entry. Mason cleaned the ribs from the residuals of rib rash and then he resumed driving the entry. As Mason advanced approximately 20 feet, a section of mine roof fell on the mining machine. Mason decided not to advance the full 40-foot cut and he backed out of the entry dragging the head of the continuous miner along the roof and the rib to knock down loose material. Mason then trammed the miner from the No. 7 entry to the No. 6 entry.

The No. 7 entry was driven to a width of 17 feet wide rather than the maximum 20 feet width permitted by the roof control plan. Mason had been instructed to cut the entry no more than 18 feet wide. The entry was cut to a height of "almost 8 feet." (Tr. 366). Mason opined that the conditions in the No. 7 entry looked as good as anywhere in the section after he

completed the cut in the No. 7 entry. (Tr. 325-26).

Garner and Davidson moved the right side Roof Ranger into position in the No. 7 entry to start roof bolting. They surveyed the area and decided to install additional bolts before roof bolting the cut. The mine roof was smooth and the rib line was in good condition. Garner and Davidson continued roof bolting while Neese and McCray started rib bolting behind the bolter on the left inby corner. Neese and McCray were using a hydraulically operated two-person hand drill to drill the rib holes. They had drilled one hole in the rib and were starting to drill a second hole when a small portion of mine roof fell in front of them. At approximately 2:30 a.m., Neese observed a crack that went all the way down the rib. Neese told McCray that he was going to get a pry bar to pull down the rib.

At that time, Garner and Davidson had just completed the fourth row of bolts and they were in the process of advancing the machine to the fifth row. Neese walked between the left rib and the left side of the bolting machine. Garner noticed Neese walking along the left side of the machine when the rib fell, fatally striking Neese as he approached the front of the machine.

b. The Accident Investigation

Shortly after the accident, at approximately 3:25 a.m., Wabash Mine Manger Terry W. Theys advised the MSHA Benton, Illinois Field Office that a fatal rib fall had occurred. Dennis R. Plab, a roof control specialist, and Mark A. Odum, a roof control supervisor, were dispatched to the mine site to secure the accident scene and to initiate the accident investigation. Plab and Odum later were joined by MSHA inspector Michael D. Rennie who arrived at the mine several hours after the fatality. (Tr. 56, 347).

On February 17, 2003, during the course of the accident investigation, Rennie took measurements in the B-2 section that revealed non-compliance with Wabash's roof control plan. For example, he determined locations where there were excessive entry widths ranging from slightly in excess of 20 feet to approximately 25 feet, diagonal measurements exceeding by several feet the maximum permissible 70 foot diagonal, and bolts located approximately 5½ feet from ribs exceeding the 4 foot maximum spacing required by the roof control plan. The violative conditions were attributable to rib rashing. (Gov. Ex. 5). None of these conditions were in close proximity to the accident scene and they did not contribute to the accident. Since the conditions were due to rib rashing, there may have been changes in dimensions between the time of the accident on February 15, 2003, and the measurements taken by Rennie two days later. (Tr. 349).

As a result of the accident investigation, Rennie issued section 104(a) Citation Nos. 7577188 and 7577189 on April 11, 2003. (Gov. Exs. 3, 4). Citation No. 7577188, alleges a significant and substantial (S&S) violation of the mandatory safety standard in section 75.220(a)(1), 30 C.F.R. § 75220(a)(1), that requires mine operators to take additional measures beyond those required by the approved roof control plan if unusual hazards are encountered. Citation No. 7577188 was terminated the same day it was issued as mining in the

B-2 section was discontinued after the February 15, 2003, accident. (Gov. Ex. 3).

The existing April 10, 2002, roof control plan was superseded effective April 8, 2003. (Resp. Exs. 8, 9). The post-accident revised plan addressed the hazards associated with miners walking between ribs and the Range Rover "walk-beside" bolting machine. It also prohibited use of the "walk-beside" bolter to bolt the ribs. The revised plan provides:

> Additional safety precautions when using walk beside roof bolting machines will include: Operators sounding roof and rib before entering the area to be bolted and reducing travel between the rib and the machine while bolting a cut. Other personnel shall restrict entry between the rib and walk beside machine during the bolting operation.
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> * * * * * * * * * * *
>
> With walk beside machines, rib bolting will not be performed between the rib and the machine.

(Resp. Ex. 9, p.3.3, 3.10).

As a result of the deteriorating roof and rib conditions in the B-2 section in the weeks preceding the accident, as well as measurements reflecting non-compliance with roof control specifications not related to the accident, Rennie also issued Citation No. 7577189 on April 11, 2003, alleging an S&S violation of the safety standard in section 75.362(a)(1), 30 C.F.R. § 75.362(a)(1). (Gov. Ex. 4). This mandatory standard requires adequate on-shift examinations by mine management at least once each shift to check for hazardous conditions. Citation No. 7577189 was also terminated on April 11, 2003, as mining had ceased in the B-2 section.

c. Timeliness of the Proposed Civil Penalty

The fatal accident occurred on February 15, 2003. The subject citations were issued on April 11, 2003, upon completion of MSHA's accident investigation. The final accident report was released on April 29, 2003. (Resp. Ex. 10). Wabash received notice of the Secretary's proposed penalty of $50,000 for each of the two citations on August 16, 2004. (Stip. 10). Wabash contested the civil penalty on September 10, 2004. (Stip. 11). The Secretary filed her Petition for Civil Penalty on October 7, 2004. (Stip. 12). Wabash contends that Secretary did not propose the civil penalty within a reasonable period of time after termination of her investigation as required by section 105(a) of the Mine Act because the August 2004 notification of the proposed penalty occurred approximately 16 months after MSHA issued the citations and 15½ months after the release of the accident report.

III. Further Findings and Conclusions

a. Citation No. 7577188 - Fact of Occurrence of Violation

As a result of the accident investigation, Rennie issued section 104(a) Citation No. 7577188 on April 11, 2003. (Gov. Ex. 3). Citation No. 7577188 alleges an S&S violation of the mandatory safety standard in section 75.220(a)(1).

Citation No. 7577188 states:

> During the period of at least two weeks prior to February 15, 2003, unusual and hazardous roof and rib conditions were encountered on the B-2 working section, 022 MMU. During this period excessive rib popping and sloughing occurred due to increased pressures. *Additional measures* beyond the minimum specified in the roof control plan were not taken to protect persons from *the unusual hazards*. The mine experienced a fatal fall of rib accident on the B-2 working section, 022 MMU, on February 15, 2003.

(Gov. Ex. 3) (emphasis added).

Section 75.220(a)(1), the cited safety standard, provides:

> Each Mine operator shall 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. Additional Measures shall be taken to protect persons if unusual hazards are encountered.

Analyzing whether the Secretary has satisfied her burden of proving the fact of occurrence of the cited violation requires an examination of the allegations in the citation. With respect to gravity, Citation No. 7577188 reflects that a fatal injury occurred as a result of the hazard caused by the alleged violation. Significantly, the citation also notes that the alleged violation was not abated as a result of any roof control measures taken by Wabash. The citation was terminated after Wabash ceased mining operations in the B-2 section immediately after the accident.

As a threshold matter, Citation No. 7577188 does not allege that the hazardous roof and rib conditions in the B-2 section were attributable to Wabash's failure to abide by any *specific provision* of its roof control plan. Rather, the Secretary relies on the general provision in section 75.220(a)(1) requiring operators to take "*[a]dditional measures* beyond the minimum specified in the roof control plan to protect persons if *unusual hazards* are encountered." (Emphasis added).

Consequently, we must focus on the operative terms "additional measures" and "unusual

hazards." Here, the unusual hazard identified by the Secretary is not a discrete hazard such as a crack in a rib, or a sag in a particular area of the roof. Rather the Secretary relies on the general poor rib conditions in the B-2 section as the "unusual hazard" to be addressed. While a matter of degree, it is undisputed that rib sloughing was a common condition as evidenced by the rib bolting required by the roof control plan.

Moreover, MSHA inspectors performing AAA inspections were present at the mine on a continuing basis prior to the accident. There is no evidence that they believed that rib conditions in the B-2 section required extraordinary measures beyond that provided in the roof control plan, such as the installation of wire mesh or metal cable around *all* coal pillars. Thus, the "unusual hazard" relied upon by the Secretary was not unusual in the Wabash Mine. As pre-shift examiner Hamilton explained, there was rib rashing "all through the mines." (Tr. 255).

Hamilton's testimony concerning his view, as a pre-shift examiner, of the general mine conditions in the B-2 section is instructive:

> The Court: Now, you didn't note bad roof or bad ribs as a general proposition in the [B-2] area, and essentially why was that? Was that because you didn't consider the area to be poor or what?
>
> Hamilton: Right.
>
> The Court: Okay. But the conditions were generally bad, right? I mean, in other words, they were bad, but they were . . . known to be bad as a general proposition. I guess on a spectrum of perfect to bad, where would you draw the line in terms of when you would note them. That's what I mean, specifically in the context of your testimony that the coal was soft and the ribs would commonly slough off or you'd have rib rash. So at what point would you not[e] in the book and in [the] examination?
>
> Hamilton: If it was out of compliance with the plan, with the law.
>
> The Court: If the bolts - -
>
> Hamilton: It's kind of - - It's kind of like living in a bad neighborhood. If you're there all the time, you get used to it, I guess, or it's home. You know.
>
> The Court: Uh-huh. So you're - -
>
> Hamilton: That's the best I could explain it.

The Court: No, I understand. Things are hard to articulate, so in other words, . . . your examination would be focused on whether or not the bolting and pinning of the ribs were done in compliance with the plan?

Hamilton: Right.

The Court: And that's a good analogy I think you made about the bad neighborhood.

Hamilton: If I see any bad order of roof bolts, you know, I'd write those up, tag them and write them up, or if they'd rashed off where they'd gotten too wide, we would have wrote (sic) that up. Any of the examiners would.

The Court: Okay. Thank you.

(Tr. 280-82).

Even if the general rib conditions were construed as an "unusual hazard," Wabash was taking additional measures such as cutting entries 18 feet rather than the 20 feet width permitted by the roof control plan in anticipation of spalling or rib rashing. Additionally, Wabash was installing additional roof bolts as the need arose. It was only through the benefit of hindsight that these measures proved to be unsuccessful.

While the Secretary has speculated about additional measures that Wabash could have undertaken, she has not adequately articulated the specific "additional measures," short of a cessation of mining operations, that should have been taken to alleviate the hazard. Significantly, none of the roof control measures suggested by the Secretary would have prevented the fatal accident. For example, the Secretary suggests increasing the size of the pillars. However, inspector Rennie conceded that, short of withdrawing from the section, there was no guarantee that any additional measures taken by Wabash could make the section safe given the pressures from the worked-out area. (Tr. 118-19). Although MSHA roof control specialist Dennis Plab opined that there were "many options" that Wabash could have taken, he also conceded, "I don't know that I can specifically explain what they should have done." (Tr. 429).

The Secretary also proffered installation of wire mesh on all ribs, or installation of metal cable around coal pillars, as examples of "additional measures." However, these measures would be undertaken *only after* a miner pinning a rib with a "walk-beside" machine was exposed to a rib fall. Thus, such measures would not have prevented the fatal accident.

Finally, the Secretary's assertion that Citation No. 7577188 concerns general mine conditions rather than the circumstances surrounding the fatality is belied by the fact that the

citation was issued as a result of the Secretary's accident investigation. Moreover, the citation specifically refers to "rib popping" and "sloughing" as factors in the February 15, 2003, fatal rib accident.

In the final analysis, in effect, the Secretary seeks to rely on the general provisions of section 75.220(a)(1) to require mine operators to cease mining when roof and rib conditions become too hazardous. Of course operators should err on the side of caution and withdraw miners when conditions warrant. However, if the Secretary desires to explicitly prohibit continued mining under such circumstances she may wish to initiate a rule making procedure if her mandatory safety standards do not adequately address this issue. While the evidence reflects that cessation of mining in the B-2 section prior to February 15, 2003, may have been prudent, the failure to do so does not support a violation of the provisions of section 75.220(a)(1) governing roof control plans. **Thus, Citation No. 7577188 shall be vacated**.

I note parenthetically, the evidence reflects the primary contributing cause of the accident was not Wabash's failure to take additional measures beyond that required by its roof control plan. Rather, the accident occurred because the "walk-beside" roof bolting machine does not adequately protect miners while they are bolting ribs.[3] That is why the existing roof control plan was superseded shortly after the accident to include safety precautions limiting the exposure of miners walking between the "walk-beside" bolter and the ribs, and to explicitly prohibit using the "walk-beside" machine to bolt ribs. (Resp. Ex. 9, p.3.3, 3.10). However, MSHA does not contend that Wabash was prohibited from using the "walk-beside" Roof Ranger at the time of the accident, or that the Roof Ranger was otherwise misused.

b. Citation No. 7577189 - On-Shift Examinations

As a result of the accident investigation, Rennie also issued section 104(a) Citation No. 7577189 on April 11, 2003. (Gov. Ex. 4). Citation No. 7577189 alleges an S&S violation of the mandatory safety standard in section 75.362(a)(1).

Citation No. 7577189 states:

> Adequate on-shift examinations were not conducted on the B-2 working section. Hazardous roof and rib conditions as evidenced by excessive popping and sloughing of the ribs due to increased pressures and stresses, existed but were not

[3] The Secretary asserts that a significant cause of the accident was an unbolted partial cut made in the No. 7 entry during the day shift on February 14, 2003. (*Sec'y reply br.,* p.2-3; Tr. 269, 365-66; Gov. Ex. 10, p.6, Resp. Ex. 2). The Secretary contends that the failure to bolt this partial cut, until shortly before the accident on the midnight shift, further destabilized the roof and ribs. Notwithstanding the speculative nature of this assertion, it has not been shown that the partial cut violated the roof control plan or otherwise supports the fact of occurrence of a section 75.220(a)(1) violation. Nor was the partial cut cited as a contributing cause of the fatality in the Secretary's accident investigation. (*Wabash reply br.*, p.3).

> identified by the person conducting the examinations. Miners on the B-2 working section indicated that these conditions existed for approximately 2 weeks prior to a fatal fall of rib accident that occurred on February 15, 2003.
>
> Additional hazardous conditions, which were not contributory to the accident, were also present on the B-2 working section. These hazardous conditions constituted violations of the regulations and were cited in [Citation] Nos. 7576446, 7577172, 7577187 and 7575479. The certified person's failure to recognize and correct obviously hazardous conditions further demonstrates that adequate examinations were not conducted.

(Gov. Ex. 4).

With respect to gravity, Citation No. 7577189 reflects that a fatality occurred. The degree of negligence attributable to Wabash is characterized as "high."

> The cited standard in section 75.362(a)(1) provides:
>
> At least once during each shift, or more often if necessary for safety, a certified person designated by the operator shall conduct an on-shift examination of each section where anyone is assigned to work during the shift and any area where mechanized mining equipment is being installed or removed during the shift. The certified person shall check for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction.

As a general proposition, the preamble to the latest rulemaking for section 75.362(a)(1) summarizes the purpose of an on-shift examination:

> Like the pre-shift examination, the on-shift examination of working sections is a long accepted safety practice in coal mining. As coal is extracted, conditions in the mine continually change and hazardous conditions can develop. Because the mining environment changes constantly during coal production, this examination identifies emerging hazards or verifies that hazards have not developed since the pre-shift examination. . . . The on-shift examination is intended to address hazards that develop during the shift.

(Resp. Ex. 1; 61 Fed. Reg. 9797 (March 11, 1996)).

Citation No. 7577189 concerns the adequacy of on-shift examinations during the two weeks preceding the accident. However, given its reference to the fatality as a reflection of the degree of gravity, it is helpful to initially focus on Hamilton's pre-accident, pre-shift examination that occurred from approximately 9 p.m. until 11:42 p.m. on February 14, 2003, to evaluate the conditions on the midnight shift. Hamilton's February 14, 2003, pre-shift examination report

noted a partial cut in the No. 7 entry. (Resp. Ex. 2). Hamilton also noted that the No. 4, No. 5 and No. 6 entries needed roof bolting, and that entry No. 5 needed additional rib support on the corner. (Resp. Ex. 2; Tr. 267-68). Finally, Hamilton's pre-shift examination reflected danger signs were posted at several locations in the B-2 section. (Resp. Ex. 2)

The Secretary did not proffer any on-shift examination reports to support her assertion that the examinations were inadequate. In this regard, the Secretary has not identified any specific identifiable hazard that evolved after Hamilton's pre-shift examination that required additional measures that subsequently should have been noted by Evans in his February 15, 2003, midnight on-shift examination. On the contrary, the Secretary relies on the general rib conditions in the B-2 section as a basis for concluding Evan's on-shift examinations were inadequate and that they were a material factor in the accident.

Mining is inherently dangerous. Consequently pre-shift and on-shift examinations are methods of identifying specific hazards and of ensuring corrective actions are taken. They are not intended as vehicles for expressing opinions about general mine conditions. As Hamilton testified, "[i]f I see any bad order of roof bolts, you know, I'd write those up, tag them and write them up, or if they'd rashed off where they'd gotten too wide, we would have [written them] up." (Tr. 282). Mine examinations are not intended to document general rib conditions, particularly in this case, where rib rashing was common in the mine.

In the final analysis, the Secretary has failed to identify a discrete hazard that contributed to the fatal accident that should have been noted by on-shift examiners. Thus, the Secretary has failed to carry her burden of demonstrating that the thoroughness, or lack thereof, of on-shift examinations contributed to the fatality.

Wabash does not dispute its failure to note specific hazards that did not contribute to the accident that were the subjects of other citations not in issue in this proceeding. These hazards include intersections exceeding the maximum allowable four-way diagonal intersection measurement of 70 feet; entry widths in excess of the maximum allowable 20 feet; and roof bolts located more than four feet from several ribs. (Resp. Ex 5). These conditions initially were not violations of the roof control plan but evolved as a consequence of changes in the B-2 working section that occurred as a result of rib rashing.

Although the cited violations of the roof control plan were discovered by Rennie on February 17, 2003, I am not persuaded by Wabash's assertion that all of the subject conditions occurred as a result of rib rashing that happened after the February 15, 2003, on-shift examination. Although the exact measurements obtained by Rennie may reflect additional post-accident rib sloughage, it is reasonable to conclude at least most, if not all, of the cited violations were present to some extent but not noted during the on-shift examinations. Thus, on balance, the evidence supports the conclusion that the on-shift examinations were inadequate. It is not clear whether any of the hazards uncovered by Rennie were noted by pre-shift examiners. On-shift examinations are a fail-safe method of noting hazards that have been overlooked

by the pre-shift examiner. Thus, the failure to cite an operator for inadequate pre-shift examinations is not a defense with respect to a citation for inadequate on-shift examinations. **Accordingly, Citation No. 7577189 shall be affirmed**.

Having determined that the subject violation in Citation No. 7577189 did not contribute to the accident reduces the degree of gravity. However the degree of negligence attributable to Wabash remains high. In reaching this conclusion I am cognizant that the violative distances of the cited entry and intersection widths and the bolt spacing, were relatively small and attributable to a continuing process of rib changes. While the specific hazards that were not noted by on-shift examiners were not obvious in the absence of actual measurement, specific measurements should have been taken to ensure that degradation of the ribs did not create roof control problems. In the final analysis, the poor mining conditions warranted a higher degree of diligence on the part of on-shift examiners.

Wabash did not specifically address the S&S issue. (*Wabash br.* at n.6). However, it is reasonably likely that the hazards contributed to by a failure to ensure continuing compliance with the roof control plan by means of adequate on-shift examinations will result in a roof or rib accident that causes serious injury. Thus, the evidence reflects the violation was properly designated as S&S.

Wabash is a large operator whose ability to continue in business will not be jeopardized by imposition of a modest civil penalty. The citation was promptly abated by withdrawal from the B-2 working section. The Secretary proposed a civil penalty of $50,000.00 for Citation No. 7577189. Given the reduction in the gravity and high degree of negligence associated with the subject violation, **a civil penalty of $10,000.00 shall be assessed for Citation No. 7577189**. The $10,000.00 civil penalty reflects the high degree of negligence demonstrated by inadequate on-shift inspections despite irrefutable evidence of deteriorating mining conditions.

c. Timeliness of the Proposed Civil Penalty

Having concluded that a penalty should be assessed for Citation No. 7577189, we turn to the issue of whether the Secretary proposed the penalty within a reasonable period of time as contemplated by section 105(a) of the Mine Act. Section 105(a) provides:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104, [she] shall, within a reasonable time after the termination of such inspection or investigation, notify the operator . . . of the civil penalty proposed . . . .

30 U.S.C. § 815(a).

The statutory scheme authorizing the Secretary's imposition of a civil penalty is a major means by which operator compliance is achieved. The purpose of section 105(a) is to encourage

operator compliance through timely penalty proposals rather than to create an escape mechanism through which an operator can avoid payment. The legislative history of section 105(a) explains, "there may be circumstances, although rare, when prompt proposal of a civil penalty may not be possible, and the *[Senate] Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding*." (Emphasis added). S. Rep. No. 95-181, at 34, reprinted in Legis. Hist. at 622.

Citation No. 7577189 was issued on April 11, 2003. MSHA's Report of Investigation of the subject February 15, 2003, fatal rib fall was released on April 29, 2003. The civil penalty for Citation No. 7577189 was initially proposed by the Secretary On August 16, 2004. Wabash asserts the Secretary did not propose the civil penalty for Citation No. 7577189 within a reasonable period of time.

In seeking to void the civil penalty, Wabash relies on the Commission's *Twentymile* decision that explicitly addressed whether a 17-month penalty proposal period violated the reasonable time provisions of section 105(a). In *Twentymile*, the Commission, in essence, bifurcated the civil penalty proceeding by separating it into a fact of violation component, and a proposed penalty component. 26 FMSHRC at 682. In this way, while affirming the fact of the subject violation, the Commission concluded a 17-month delay, absent a showing of extenuating circumstances, was so unjustifiable as to warrant "the extraordinary remedy " of "vitiating the imposition of the penalty itself." *Id*. at 682, 685.

In so doing, the Commission reasoned, "the Commission, not the Secretary, is ultimately responsible for determining whether a proposed penalty assessment has been made 'within a reasonable time.'" *Id.* at 685. In analyzing previous precedent concerning whether prejudice was a prerequisite to avoiding civil penalty liability, the Commission concluded an operator can avoid payment upon a showing of *either* that the Secretary's delay in proposing a penalty was unreasonable *or* that the delay resulted in prejudice to the operator. *Id.* at 682.

The Court of Appeals indirectly reversed the Commission's unwillingness to defer to the Secretary's interpretation of "reasonable time" in section 105(a). Specifically, the Court adopted the Secretary's "reasonable" interpretation that it was the termination of the accident investigation rather than the issuance of the citation that was the reference point for determining whether the penalty was reasonably proposed. *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d at 261, 262. Although the Court did not expressly defer to the Secretary's view on what was a reasonable period for penalty proposals under section 105(a), it did note that Courts are reluctant to void agency action based on an agency's failure "to observe a procedural requirement." *Id.* at 261. The Court also noted that statutory processing guidelines generally are intended to "spur the Secretary to action" rather than to confer rights on litigants that limit the scope of the Secretary's authority. *Id.* (citations omitted).

Consequently, a fair reading of the Court's *Twentymile* decision leads to the conclusion that the Court deferred to the Secretary's interpretation, and, thus, the applicability, of the "reasonable time" provision of section 105(a). In this regard, the Court, citing *Martin v. Occupational Safety & Health Review Comm'n,* 499 U.S. 144, 158 (1991), noted that [w]here the Secretary and the Commission conflict in their interpretations of the statute, the Court defers to the Secretary . . . .[4] *Id.* 262, n.1.

In view of the above discussion of the Court's decision, I shall defer to the Secretary's interpretation of section 105(a) that the approximate 15½-month time period for proposal of the civil penalty in this case, beginning on the date of the issuance of the accident report, is "reasonable." The proposal of a civil penalty, like the adjudication in this proceeding, is a deliberative process. I am mindful of the myriad of circumstances, uniquely known to the Secretary, that can effect deliberations such as resolution of policy differences, or personnel issues related to retirements or reassignments.

Clearly, the oversight by this Commission of the efficacy of the Secretary's processing procedures is a slippery slope to be avoided. Only the Secretary knows the number of personnel, and the levels of review, that are involved in her deliberative process. Absent a Commission imposed *per se* deadline that strips the Secretary of flexibility, a case-by-case approach would require a qualitative appraisal of the propriety of the Secretary's procedures for each proposed penalty that can only be resolved at an evidentiary hearing, a result never intended by the Mine Act.

Moreover, such oversight would place the Commission in a quasi-supervisory role that conflicts with the Commission's mission as an independent adjudicator. While the Secretary's proposed penalty process my have been inefficient, in light of the Court's *Twentymile* decision, absent Commission direction to the contrary, I will not substitute my judgement for the Secretary's regarding whether her processing time is reasonable, or, whether she has achieved the desired deterrent effect. In reaching this conclusion, I am not suggesting that an unconscionable delay, not present here, should never be construed as a violation of section 105(a).

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[4] Following *Martin*, the Supreme Court recognized the "expertise" of the Commission as an independent-review body with the statutory mandate of developing a uniform and comprehensive interpretation of the Mine Act. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994). Thus, it may sometimes be appropriate for the Commission, an independent appellate body of limited rather than general jurisdiction, to decline to defer to the Secretary on matters of interpretation of the parties' statutory rights. *See Cyprus Cumberland Res. Corp.*, 20 FMSHRC 285, 289-94 (ALJ) (Mar. 1998), *rev'd on other grounds*, 22 FMSHRC 1066 (Sept. 2000), *aff'd*, *Rag Cumberland Res. v. FMSHRC*, 272 F.3d 590 (D.C. Cir. 2001); *see also W-P Coal Co.*, 16 FMSHRC 1407, 1410 (July 1994) (distinguishing the deference owed the Secretary's interpretations of her OSHA and MSHA regulations under the *Martin* and *Thunder Basin* decisions).

Finally, even if the 15½-month time period was considered to be an unreasonable delay, the Court's *Twentymile* decision noted it is "particularly inappropriate to set aside the Secretary's recommendation for penalty . . . given [an operator's failure] . . . to show any prejudice to itself from whatever delay in fact occurred." 411 F. 3d at 262. I am unpersuaded by Wabash's contention that it was prejudiced by the Secretary's delay because mining conditions have changed since February 15, 2003. Specifically, Wabash contends it was precluded from proving it was unable to connect the "walk-through" bolter to the energized load center for operation on the right side. (*Wabash br.*, p.29). In addition, Wabash contends it is unable to demonstrate the additional support measures beyond those required by the roof control plan that were installed on February 15, 2003, because of the passage of time. *Id.* Resolution of these questions of fact is not material to disposition of the issue of the fact of occurrence of the cited violations in this case. Moreover, evidentiary problems caused by mine condition changes prior to a hearing on the merits are inherent in the fact finding process and can be overcome by photographs or testimony.

In sum, I shall defer to the Secretary's interpretation of section 105(a) that her processing time in this case was reasonable. Even if the Secretary's actions constituted an unjustifiable delay, Wabash has failed to demonstrate any meaningful prejudice that would warrant the extraordinary relief of voiding the civil penalty justifiably imposed in this matter. Accordingly, a civil penalty of $10,000.00 shall be imposed for Citation No. 7577189.

ORDER

In view of the above, **IT IS ORDERED** that Citation No. 7577188 **IS VACATED**.

IT IS FURTHER ORDERED that Citation No. 7577189 **IS AFFIRMED** as modified.

IT IS FURTHER ORDERED that Wabash Mine Holding Company shall, within 40 days of the date of this Decision, pay a civil penalty of $10,000.00 in satisfaction of Citation No. 7577189. Upon receipt of timely payment of the civil penalty, Docket No. LAKE 2004-147 **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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