FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 7, 2000

KNOX CREEK COAL CORPORATION,	:	**CONTEST PROCEEDINGS**
Contestant	:	
	:	Docket No. VA 98-50-R
v.	:	Citation No. 7297931; 6/15/98
	:	
SECRETARY OF LABOR,	:	Docket No. VA 98-51-R
MINE SAFETY AND HEALTH	:	Citation No. 7297932; 6/15/98
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. VA 98-52-R
	:	Citation No. 7297933; 6/15/98
	:	
	:	Kennedy No. 2
	:	Mine ID 44-06872
	:	
SECRETARY OF LABOR	:	**CIVIL PENALTY PROCEEDING**
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. VA 99-14
Petitioner	:	A.C. No. 44-06872-03504
	:	
v.	:	Kennedy No. 2 Mine
	:	
KNOX CREEK COAL CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;

Julia K. Shreve, Esq., and David J. Hardy, Esq., Charleston, West Virginia, for Respondent.

Before: Judge Barbour

These consolidated contest and civil penalty proceedings arise under sections 105(a), 105(d), and 110(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §§ 815(a), 815(d), 820(a)). The cases involve four citations issued at the Kennedy No. 2 Mine, an underground bituminous coal mine located in Buchanan, County, Virginia. All of the citations concern alleged violations of mandatory safety standards relating to the condition of the roof in the mine and/or the actions of the company's employees with respect to the condition. A hearing on the matter was conducted in Grundy, Virginia, following which the parties submitted briefs.

STIPULATIONS

At the commencement of the hearing the parties stipulated as follows:

> 1. The [Administrative Law] Judge . . . [has] jurisdiction to hear and decide the . . . proceeding . . . .
>
> 2. Knox Creek Coal Corporation [(Knox Creek or the company)] is the owner and operator of the . . . [m]ine.
>
> 3. [O]perations of the . . . [m]ine are subject to the jurisdiction of the Act.
>
> 4. [T]he maximum penalty which could be assessed for these [alleged] violations will not affect the ability of . . . [Knox Creek] to remain in business.
>
> 5. MSHA Inspector David Fowler was acting in his official capacity as an authorized representative of the Secretary of Labor [(Secretary)] when he issued Citation Nos. 7297931, 7297932, 7297933 and 7297939.
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> 6. [T]rue copies of Citation No[s]. 7297931, 7297932, 7397933 and 7297939 along with all appropriate continuation forms and modifications were served on . . . [Knox Creek] or its agent as required by the Act.
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> 7. Citation Nos. 7297931, 7297932, 7297933 and 7297939 are authentic and may be admitted into evidence for the purpose of establishing their issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
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> 8. Citation Nos. 7297931, 7297932, 7297933 and 7297939 have not been subject to previous review proceedings.

9. [A] clean-up plan was not provided in writing at the entrance to the scene of the roof fall that occurred on June 11, 1989 (Tr. 30-31; see Joint Exh. 1).

THE FACTS

THE MINE AND THE ROOF CONTROL PLAN

The Kennedy No. 2 Mine is an underground bituminous coal mine. At all times pertinent to these matters coal at the mine was cut by remote controlled continuous mining machines (continuous miners) (Tr. 41). The extracted coal was removed from the mine by conveyor belt then hauled away by truck (Tr. 206).

Prior to June 1998, the roof control plan at the mine restricted cuts taken by continuous miners to 20 feet. However, the company believed longer cuts (also referred to as "deep" or "extended" cuts) could be taken safely and submitted to MSHA a proposed amendment to its plan. The amendment provided for cuts of up to 35 feet .[1]

Upon receipt of the proposed amendment MSHA assigned Kenneth Shortridge, an MSHA roof control specialist, to investigate (Tr. 309). Shortridge went to the mine and looked at the roof in the areas where deep cuts were proposed. In general, the roof was cracked and seeping water, especially in the No. 3 and No. 4 entries. Shortridge recommended MSHA not approve the amendment. Shortridge testified that he "didn't feel . . . [the mine] had the type of roof that could stand [an] over 20[-]foot cut" (Tr. 310). When Shortridge told this to then mine superintendent Harry Childress, Childress asked if Knox Creek could withdraw the proposal and submit it later. Shortridge said that it could (Tr. 311).

Two or three weeks passed and the company resubmitted the proposal. Shortridge returned to the mine. He found the roof "tremendously" improved (Tr. 312). Although cracks still existed in the roof, they were small -- Shortridge described them as "hairline cracks". The hairline cracks ran in various directions. In other words, all of the cracks did not run in the direction the continuous miners would be advancing. Shortridge did not believe the hairline cracks prevented him from recommending approval. On February 18, 1998, the amendment was approved (Tr. 312-313; Gov. Exh.1).

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[1] Opie McKinney, a mine inspector for the Commonwealth of Virginia, explained that until the late 1980s or the early 1990s, cuts normally were limited to 20 feet. The introduction of remote controlled continuous miners permitted the operators of the machines to remain outside face areas while operating the machines. Also, they allowed the mining of more coal in less time (Tr. 234). As a result, in certain instances MSHA began to approve longer cuts (Tr. 129-130).

THE AMENDED ROOF CONTROL PLAN

The amended plan stated that any working place developed further than 20 feet inby the last full row of roof bolts to the deepest point of penetration in the working face was a "deep cut" and that deep cuts could not exceed 35 feet (Gov. Exh. 1 at 4 ¶ C). It provided further, "When adverse roof conditions are encountered, the continuous min[er] . . . cut depth shall be limited to . . . 20 . . . feet . . . or less, as necessary to provide for effective roof control" (Gov Exh. 1 at 4 ¶ H). The provision listed eight circumstances which might indicate adverse roof conditions (Id. at 4-5). It further stated that adverse roof conditions were not limited to those listed (Id. at 4; see also Tr. 44).[2] The listed conditions were: "[w]ater coming through the roof"; "the presence of change in the type of roof . . ."; "cutting along the rib"; "[d]raw rock that is not mined with the coal"; "'drummy' or 'loose' roof detected during roof testing"; "[m]ining under a stream or other minimum cover . . . "; "[a] roof test hole in the cut adjacent to the cut to be advanced . . . [that] shows conditions, such as a slip, rash, rider seam, or other subnormal condition"; or "[a]ny other detectable condition, such as excessive loading of roof bolts, unusual spalling of ribs, or heaving of floor, that is known to indicate the presence of adverse roof conditions in the mine" (Gov. Exh. 1 at 5 ¶ H. a.- h.).

THE JUNE 11 ROOF FALL AND ROOF CONDITIONS IN THE AFFECTED ENTRIES

On the evening of June 11, 1998, Safety Director Neely was called at home and told that a large roof fall had occurred at the mine (Tr. 50-51). Neely telephoned McKinney and MSHA to report the fall (Tr. 51, 82, 208). Neely told McKinney that he was going to the mine to view the fall (Tr 51-52, 82).

When Neely reached the mine, he traveled underground to the affected area. He entered the No. 4 crosscut and observed that the fall. It extended throughout much of the crosscut. He also saw that in part it was deep, the deepest area being on the left side of the crosscut and the depth tapered off as the fall approached the right rib (Tr. 52). After viewing the fall and confirming that no one had been hurt, Neely left the mine.

The following morning David Fowler, an MSHA mine inspector, went to the mine to conduct a regular inspection. He arrived around 8:15 a.m.. He overheard members of mine management talking about the fall. Neely had returned and was present. Fowler asked him about reporting the fall (Tr. 207). Neely told Fowler that he called Wayne Hart, Fowler's supervisor, the night before and made a report. Satisfied that MSHA's reporting requirements had been met,

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[2] Ted Neely, a former safety director for Knox Creek and a management official who assisted in developing the roof control plan (Tr. 40, 43), testified the listed conditions were intended to give "some defining but not all defining [adverse] conditions that could exist" (Tr. 45).

Fowler telephoned Shortridge and asked Shortridge to come and view the area (Tr.208). In the meantime, McKinney too arrived at the mine.

Neely, McKinney, Shortridge and others went to the site of the fall.[3] Viewing the area a second time Neely realized the fall was larger than he first thought. It extended from the No. 4 entry well into the No. 3 entry, a total distance, according to McKinney, of 56 feet. In addition, the fall occurred across the entire 20-feet width of the No. 4 entry (Tr. 116, 189-190; see also Gov Exh. 3 at 3). The roof in the No. 4 entry intersection had not been bolted but in the No. 3 entry where it had been bolted the roof either pulled down the bolts or fell around them (Tr. 53-54, 84, 322).

To Neely the sides of the fall cavity looked "very slick" (Tr. 72). He believed the fall most likely was caused by a "slickensided slip", which he described as a fault or a crack that extended to the maximum height of the fall area and into which water had traveled causing the layers of roof material to deteriorate and break away (Id.).

McKinney agreed. He testified that the black rock he observed in the fall area lead him to believe there had been such a slip which meant the rock of the roof had not molded together and conformed to the adjacent rock (Tr. 159).[4]

Fowler also believed there was a slickensided slip in the No. 4 entry, one that ran at a high angle to the roof . He viewed the "feathered edge" of the largest crack in the entry as a possible sign of the slip (Tr. 280). After the roof fell the slickensided fault area was obvious, but Fowler admitted he did not know for certain whether it was obvious before the cut was taken (Tr. 281-282).

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[3] When the party reached the fall area they found that all of the fallen roof material had been cleaned up (Tr. 105).

[4] To depict the roof conditions, the Secretary offered numerous photographs that were taken 29 days after the fall (Gov. Exh. 6). The photographs were admitted into evidence on the basis that they might reveal conditions that existed immediately after and prior to the fall. Following their admission Fowler cast doubt on their relevance. He testified that the area photographed had been rock dusted several times subsequent to the fall (Tr. 276-268). This tended to obscure the roof conditions. Moreover, Jackie Yates, a continuous miner operator, persuasively testified that the photographs were not a reliable source for evaluating roof conditions immediately after and prior to the fall because, "the conditions deteriorate with time" (Tr. 400). For these reasons the conclusions I have reached regarding the subject roof conditions are based on the testimony of the witnesses rather than the photographs.

In the No. 3 entry just outby the area where the fall had occurred members of the inspection party observed cracks in the roof. McKinney spoke of, "many cracks" and of some that ran across the width of the entry (Tr. 91, 152-153). According to McKinney, a few of the cracks had begun to separate (Tr. 155, 157, 158). Also he noticed several of the cracks had straps over them. McKinney believed that the roof bolter operators must have had concerns about the condition of the roof or they would not have installed the straps (Tr. 148).

Fowler and Shortridge also observed the cracks in the No. 3 entry (Tr. 210, 321). They concurred with McKinney that several of the cracks ran across the width of the entry and that several were strapped. Although the cracks were more than hairline cracks, Fowler noted they were not "gapped open" (Tr. 210) and Shortridge did not believe the cracks were wide enough for any harmful rock to fall out of them (Tr. 324).

In addition, the witnesses testified that there were many cracks outside the fall area in the No. 4 entry. These cracks caused the government's witnesses the most concern. McKinney testified the cracks in the No. 4 entry were more pronounced than those in the No. 3 entry. They were wider and, according to McKinney, they were "alarmingly visible" (Tr.122, see also Tr. 88, 160). Some of the cracks ran into the fall area and some ran across the entire entry (Tr. 92). One prominent crack that ran past the most inby strap in the No. 4 entry and into the fall area was, according to McKinney, 16 inches wide (Tr. 163-164).

McKinney counted 5 straps in the No. 4 entry (Tr. 88, 91; see Gov. Exh. 3 at 3). McKinney reiterated he believed the straps indicated the roof bolter operators knew that the roof conditions were changing and that the roof needed additional support. He stated, "straps cost money and coal people normally don't install straps unless there's a reason" (Tr. 91, 101).

Shortridge testified that several of the straps spanned a, "high angular slip type condition", an area where the, "immediate roof [was] not connected together as one piece of rock" (Tr. 320). The straps, "tie[d together] the separate pieces of [rock] on both sides of the crack" (Tr. 324). As he recalled, the gap created by this crack was wide enough that a person could stick their hand into it (Tr. 328). To McKinney the crack signified that there was a, "[c]hange in roof conditions where you don't have a bonding of the roof material" (Tr. 88).

McKinney also believed the several parallel cracks in the No. 4 entry signaled a major fault in the roof, a fault that ran in the same direction as the entry and the mining. Although cracks were not specifically mentioned in the roof control plan as an adverse condition, McKinney noted that the list of adverse conditions in the plan was not exclusive (Tr. 183-184). The direction of the cracks indicated that any roof fall was likely to be extensive. Had the cracks run across the entry rather than in the direction of mining, the faulty roof would have tended to be supported by the pillar blocks (Tr. 93-94). Summing up what he found, McKinney testified that, "There was a major fault band, a separation, bad top, adverse [roof] conditions . . . [that] ran across that section from . . . [the No.] 4 entry into [the No.] 3 entry" (Tr. 170).

Fowler noted there was no indication that roof conditions existing on June 12 in the No. 3 entry and the No. 4 entry outside the fall cavity had been changed by the fall. The roof bolts and straps outside the cavity were not stressed or distorted. Therefore, he believed that the conditions that existed on June 12 outside the fall area also existed on June 11. Especially because of the conditions that existed in the No. 4 entry, it was clear to Fowler the extended cut should not have been taken (Tr. 288-289, 291). However, he admitted that even when cracks were present it sometimes could be "extremely" difficult to determine whether they represented a hazard (Tr. 274).

During the June 12 mine visit McKinney was unable to speak with miners who were present in the No. 3 and No. 4 entries on June 11 (Tr. 186-187). Therefore, he returned on June 15 and interviewed Kevin Ward, the continuous miner operator who mined the deep cut. McKinney testified that Ward told him that he was in the process of cleaning up when:

> he saw the roof drip[5], and he backed the continuous miner out of the [No.] 4 intersection . . . . He asked . . . Jackson [, the shuttle car operator,] to remove his shuttle car so they could get out of there . . . [H]e started walking back toward the [No.] 4 entry when . . . [the roof] fell (Tr. 113-114).

McKinney asked Ward if he had cut through into the No. 3 entry prior to the fall and Ward stated he did not know (Tr. 134).[6] According to McKinney, Ward also stated he did not understand why the roof did not fall throughout in the No. 4 entry's entire intersection because, "the No. 4 intersection was cracked enough to fall" (Tr. 114).[7]

Fowler also spoke with Ward. He recalled Ward stating that he had seen the cracks in the No. 4 entry before he began the cut (Tr. 223) and that he was surprised all of the No. 4 entry had not fallen because the entry had a bad roof (Tr. 225). However, this characterization of the roof was disputed by Ward's roof bolter, Lester Lee "Chuck" Oden, who testified that prior to the fall he saw no indications the roof was hazardous (Tr. 532-533). It also was disputed by Ward himself who maintained that all he recalled seeing in the entry was a "[l]ittle scaley draw rock, a few straps" (Tr. 411). In addition, Ward was emphatic that there was no evidence of a slickensided slip in the roof prior to beginning the deep cut (Tr. 423).

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[5] Ward was not referring to water but rather to small pieces of rock that fell from the roof as he finished the cut and removed the continuous miner from the area (Tr. 224).

[6] Had Ward cut into the No. 3 entry, the cut would have exceeded 35 feet and would have been illegal under the roof control plan (Tr. 135).

[7] Ward testified he was not sure he said this to McKinney. If he did he could have been referring to pieces of draw rock that fell as he finished the cut and before the roof started to fall (Tr. 424-425).

Asked about supervision before and during the deep cut, Ward testified he remembered seeing Donald Riffe, his section foreman, “a couple of times” during the shift (Tr. 409). He could not recall if he saw Riffe before he took the deep cut, but he believed Riffe, “was probably around maybe once or twice” after he began the cut (Tr. 410).

Riffe was more specific. He stated that normally he examined entries before deep cuts were taken to be aware of conditions in the entries (Tr. 478). He did so on June 11. He saw the roof straps in the No. 3 and the No. 4 entries (Tr. 480). He did not know why they were installed, but he did not see anything about the roof in the strapped areas that alarmed him (Tr. 484). In addition, he felt that the cracks in the No. 3 and No. 4 entries were not unusual. Riffe termed them "thin laminations of rock" (Tr. 480).[8] He maintained that the condition of the entries was the same when the roof control plan amendment was evaluated and when prior deep cuts were taken in the presence of state and federal officials (Tr. 480).

Everyone agreed test holes had been drilled in the No. 4 entry roof prior to the deep cut. Oden, who drilled the holes, testified they revealed the first couple of inches of roof was composed of some draw rock and from there up the roof was “one massive rock” with no cracks nor other abnormalities (Tr. 537).

McKinney examined the holes after the fall and found they indicated no faults or other hazardous roof conditions (Tr. 126, 180). Shortridge too found no evidence of hazards (Tr. 351). Both men noted, however that test holes are not the only indicators of hazardous roof (Tr. 127-129, 353). As Shortridge stated, they do not indicate conditions "all over the section", only where the holes are drilled (Tr. 327).

RIFFE’S JUNE 11 ON-SHIFT EXAMINATION

On June 15, McKinney spoke with Riffe about whether he conducted an on-shift examination of the section on June 11. Fowler was present during the conversation. McKinney recalled Riffe stating that he conducted an examination of the No. 3 and No. 4 entries prior to the deep cut, that he knew there were cracks in the entries but that he wasn’t worried about them because they were incline cracks, not vertical cracks, and he only worried about vertical cracks (Tr. 114). Fowler agreed that Riffe stated he, "only worried about a vertical crack" (Tr. 284).

Riffe contended McKinney and Fowler misunderstood what he meant. "For someone to say that the only cracks they’re worried about are vertical cracks [would be] . . . ridiculous" (Tr. 471). Rather, he told McKinney he worried about cracks that, "approached the vertical" (Id., see also Tr. 472). They are the same as "high-angle cracks" and they are the "most hazardous" kind of cracks (Tr. 471) because, as Childress observed, they can indicate a large slip (Tr. 569).

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[8] Riffe described the "laminations" as, "something that has a potential of becoming a crack, but . . . is not necessarily a crack" (Tr. 480).

Riffe testified he visually examined the roof and ribs in the entries before the deep cut was taken. He tested the roof in the No. 4 entry by the sound and vibration method. He felt inside the test holes. His examination did not indicate the roof was hazardous (Tr. 438). In addition, earlier Knox Creek had taken down roof in the No. 4 entry to accommodate the belt drives outby and inby the No. 4 intersection. In both instances, the roof was normal (Tr. 438-439). Finally, the roof bolters from previous shifts did not report to Riffe any roof conditions that were abnormal (Tr. 443). Summing up the results of the inspection he conducted before the deep cut, Riffe stated he, "saw no conditions present that were any different [than] in the rest of the Kennedy No. 2 Mine" (Tr. 506). In Riffe's view, the roof fall was caused by an undetectable fault (Tr. 452, 454, 489).

DOCKET NO. VA-51-R

Citation No.	Date	30 C.F.R.
7297932	6/15/98	75.202

DOCKET NO. VA-99-14

Citation No.	Date	30 C.F.R.	Proposed Penalty
7297932	6/15/98	75.202	$6,000

THE VIOLATION

The citation states in pertinent part:

> [E]vidence and testimony indicate the approved 35 foot [d]eep [c]ut plan was not being complied with on . . . the No. 4 entry left cross cut where a roof fall occurred upon completion of the cut. The cut was mined even though evidence indicated there were numerous cracks in the mine roof in the No. 4 entry and in the No. 3 entry where the cut mined holed through. Additional supports such as straps had been installed in both entries across the cracks that were present in the areas of adverse roof. . . . The foreman stated he had observed the cracks and straps in both entries prior to mining the cross cut (Gov. Exh. 11)

A provision of a roof control plan, such as the deep cut provision, once adopted by the operator and approved by the Secretary, is enforceable as a mandatory safety standard. When an alleged violation of a plan is contested the burden of proof is on the Secretary. To meet the burden she must prove that the pertinent provision is part of the plan, that the cited condition or practice violated the provision, and she must establish her proof by a preponderance of the evidence (See Consolidation Coal Co., 11 FMSHRC 966, 973 (June 1989)). The Secretary may rely on direct evidence, on direct evidence and inferences, or, in some situations, on inferences

alone (Mid Continent Resources, 6 FMSHRC 1132 (May 1984)).

Here, the Secretary has established the first element of her required proof. The parties agree that on February 18, 1998, the roof control plan was supplemented to allow deep cuts of not more than 35 feet and to prohibit cuts to not more than 20 feet when, "adverse roof conditions" were encountered. They agree also that the supplement listed eight nonexclusive conditions that might indicate "adverse roof conditions" (Gov. Exh. 2 at 2¶ H; Tr. 45).

The phrase, "adverse roof conditions" is not defined in the provision nor elsewhere in the plan. Nevertheless, its meaning is discerned easily. The word "adverse" is defined generally as something that is "detrimental" or "unfavorable" (Webster's Third new International Dictionary (1993) at 31)). In the context of the supplement "adverse roof conditions" are conditions that a reasonably prudent person, familiar with the mining industry and the mine, would recognize as detrimental to the stability of the roof and as hazardous to miners. Such conditions might be indicated by any one of the conditions listed in subsections a. through h. of the provision, by a combination of the listed conditions, or by unlisted conditions that adversely and hazardously impacted the stability of the roof .

As is apparent from the wording of the citation, the Secretary is alleging that the adverse roof conditions constituting the violation were the cracks in the No. 3 and No. 4 entries and the straps that traversed some of the cracks.

With regard to the No. 3 entry, the general contention of the Secretary's witnesses was that several of its cracks ran across the entry's entire width. In addition, because some of the cracks were more than hairline cracks (in that they had begun to separate), the company should have realized the roof potentially was hazardous (Tr. 92, 152-153). The Secretary maintained the potential hazard also was evidenced by the straps the roof bolters installed over the cracks to support the roof (Tr. 87, 148). To Inspector Fowler the cracks in the No. 3 entry indicated the roof was not one solid piece (Tr. 211). To McKinney, although the cracks were not as alarming as those in the No. 4 entry, they were "indicators" of the adverse condition of the roof and of the need not to take a deep (Tr. 168).

In the No. 4 entry the witnesses contended the cracks were more numerous and wider than in the No. 3 entry. They were, "very visible" (Tr. 88) and as in the No. 3 entry some of them ran entirely across the entry. Also, as in the No. 3 entry the Secretary maintained the straps spanning the cracks indicated that the roof bolters knew the roof conditions were changing and that additional support was needed (Tr. 91, 101). The cracks should have signaled to mine management that the roof's condition was adverse, especially the large crack that was spanned by five straps. This crack was described as a, "high angular slip type condition" and as the result of an area where the, "immediate roof [was] not connected together as one piece of rock" (Tr. 320, see also Tr. 164-166).

The decision to take the deep cut was made on June 11. The alleged violation was based

on conditions observed by the Secretary's personnel on June 12. The critical question is what conditions were like when the decision was made. Did straps and cracks that existed in both entries on June 12 also exist on June 11? If so, would a reasonably prudent person, familiar with the mining industry and the conditions at the mine, have concluded the straps and cracks were a sign of adverse roof conditions and therefore that a deep cut should not be taken?

Certainly, the straps existed prior to the fall. No testimony was offered that they were installed after the fall but before the inspection party arrived on June 12. Moreover, Fowler's un-refuted testimony that on June 12 the straps showed no signs of being twisted, distorted, or displaced is supportive of the conclusion that they appeared on June 12 much as they appeared prior to the fall on June 11.

I also believe the record supports finding that on June 12 the cracks in both entries appeared much as they did on June 11 and that especially in the No. 4 entry the cracks were "very visible", as McKinney testified (Tr. 88). I am lead to this conclusion by Fowler's testimony that on June 12 there was no indication of stress on roof support (the roof bolts and plates) outside the roof fall cavity area (Tr. 288-289). This testimony is consistent with a dearth of specific evidence that any management officials told government investigators the conditions on June 12 were significantly different from those that existed the previous day (see e.g., Tr. 96). Had the conditions varied, I believe mine officials would have taken the initiative to advise the inspectors. After all, the company was faced with possible citations arising out of the incident.

I specifically reject Riffe's testimony that prior to the fall "[t]here [were] no visible cracks anywhere" in the No. 4 entry (Tr. 490, see also Tr. 492). The straps were installed to span the cracks, and the straps were present on June 11. Moreover, the lack of distorted roof supports outside the fall cavity makes it extremely unlikely that all of the cracks suddenly appeared after the fall and before the inspection party arrived. Finally, Riffe did not specifically deny that he told McKinney that he knew that there were cracks in the entries. Rather, he maintained McKinney misunderstood him, that he actually stated he was, "not as concerned about cracks that where horizontal as [he] was about cracks that approached the vertical" (Tr. 472). Clearly, the subject of cracks was discussed, and McKinney's version of the discussion is more plausible than Riffe's.

Having found that cracks existed in both entries on June 11, I also conclude the cracks were signs of "adverse roof conditions" and that the deep cut should not have been taken. This is because there is record support for finding the cracks in the No. 3 entry were more than harmless hairline cracks in that some ran all of the way across the entry and some had begun to separate (Tr. 91, 152-153, 157-158). It is perhaps self evident, but Fowler put it well when he described the cracks as evidence of "layers of rock that [were not] adher[ing] to each other" (Tr. 211).

In addition, there is record support for finding the cracks in the No. 4 entry were more pronounced even than those in the No. 3 entry (Tr. 88). Some were wider, and as in the No. 3 entry, some ran across the entry's width (Tr. 92, 96-97). Moreover, as McKinney persuasively testified, because cracks in both entries tended to run in the same direction as the deep cut, a fall

of greater proportions was more likely (Tr. 93-94).

For these reasons, I conclude that the more-than-hairline cracks in the No. 3 entry and the even more pronounced cracks in the No. 4 entry should have alerted mine management that the roof might not be bonded adequately and that if a deep cut were taken parallel with the cracks and toward the No. 3 entry the chance of an extensive roof fall was likely. The cracks were a sign of a condition that was detrimental to the stability of the roof and therefore were an adverse roof condition within the meaning of the deep cut plan. By making the deep cut in the presence of the cracks, Knox Creek violated the plan and section 75.202.[9]

S&S and GRAVITY

A violation is a significant and substantial contribution to a mine safety hazard (S&S) if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature (Arch of Kentucky, 20 FMSHRC 1321, 1329 (December 1998); Cyprus Emerald Resources, Inc., 20 FMSHRC 790, 816 (August 1998); Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981)). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission held that to establish an S&S violation the Secretary must prove: (1) the existence of the underlying violation; (2) a discrete safety hazard — that is a measure of danger to safety contributed to by the violation; (3) a reasonable likelihood the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury in question will be of a reasonably serious nature.

In considering the third element, the likelihood of the injury must be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (July 1984); see also Southern Ohio Coal Co. 13 FMSHRC 912, 916-917 (June 1991) and Halfway, Inc., 8 FMSHRC 8, 12 (January 1986)).

The Secretary proved each of the four elements. She established that the violation existed. She further established that by taking the deep cut in the presence of adverse roof conditions, the continuous miner operator increased the chances for a roof fall because as he mined coal in parallel with many of the cracks and as more roof was exposed he lessened the support for the existing roof. He failed to implement what McKinney described as "the ultimate additional step" in roof support techniques -- he failed to lessen the cut (Tr. 175).

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[9] In reaching this conclusion I have not considered the presence of the straps in both of the entries. Although the record supports finding the straps existed, it does not support finding they were indicative necessarily of an adverse roof condition. Rather, the testimony reveals that the use of straps at the mine was not unusual and that while they could be used as roof support also they could be used to prevent potentially loose but not necessarily harmful rock from falling (Tr. 388-389, 412, 534, 544, 628-629). Thus, the straps did not invariably signal the roof could be dangerously unstable.

The danger of mining a deep cut in conjunction with adverse conditions was shown by the fact both Ward and Jackson were imperiled by the fall. Both were close to the fall. Once it started there was no predicting how extensive it would be. Had the fall continued back toward them and overridden the roof supports (as happened in the No. 3 entry) it was reasonably likely both miners would have been seriously injured or killed.

In addition to being S&S the violation was very serious. It subjected two miners to the real possibility of serious injury or death. Indeed, the reasonable likelihood of injury or death nearly was a certainty because I credit McKinney's testimony that Ward told him he was surprised all of the roof in the No. 4 entry did not come down (Tr. 114). McKinney's recollection corresponds with what Fowler heard Ward say (Tr. 223), and Ward's explanation that if he said such a thing he could have been referring to draw rock pieces that fell as he finished the cut, was decidedly unconvincing (Tr. 424-425).

NEGLIGENCE and UNWARRANTABLE FAILURE

Because Riffe failed to exhibit the care required by the circumstances, I conclude that Knox Creek was negligent. I have credited McKinney's testimony that Ward told him the roof in the No. 4 entry intersection "was cracked enough to fall" (Tr. 114). Riffe, was present on the section before the cut was taken and while it was underway (Tr. 175). He saw the roof. The cracks and the direction in which they ran were obvious. He should have recognized the cracks were an indication of a condition detrimental to the roof's stability. He should have made certain that Ward restricted the cut to no more than 20 feet.

Although he was negligent, the record does not support finding that Knox Creek unwarrantably failed to comply with its plan. Unwarrantable failure refers to more serious conduct by an operator in connection with a violation. It is characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care" (Emery Mining Co., 9 FMSHRC 1997, 2003-04 (December 1987); see also Buck Creek Coal, Inc. v. FMSHRC, 52F3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test)). Riffe misjudged the roof, but he did not deliberately nor indifferently allow Ward to take the deep cut in the presence of the cracks. Riffe examined the test holes, which, although not conclusive, could have indicated slips in the roof (Tr. 72). The examinations revealed nothing adverse. He also was mindful that the roof bolters and the miners from previous shifts had not alerted him to potentially hazardous roof conditions (Tr. 438-439,443). Moreover, and as Fowler admitted, even when cracks are present, it can be "extremely" difficult to determine whether they signal a hazardous condition (Tr. 274).

DOCKET NO. VA-50-R

Citation No.	Date	30 C.F.R.
7297931	6/15/98	75.362

DOCKET NO. VA-99-14

Citation No.	Date	30 C.F.R.	Proposed Penalty
7297931	6/15/98	75.362	$204

THE VIOLATION

Citation No. 7297931 states:

> As evidence and testimony indicate an adequate on-shift roof evaluation examination was not conducted on the evening shift of June 11, 1998. The examiner stated he observed the numerous cracks in the No. 3 and No. 4 entries prior to the mining of an extended cut of at least 35 feet in the No. 4 entry left cross cut . . . . Roof straps were installed in the No. 3, [and No.] 4 . . . entries where loose draw rock and cracks were present. Even though these conditions were present the cuts mined were not limited to no greater than 20 feet (Gov. Exh. 10).[10]

Section 75.362 requires in part that, "[a]t least once during each shift, or more often if necessary for safety, a certified person . . . shall conduct an on-shift examination of each section where anyone is assigned to work . . . . The certified person shall check for hazardous conditions". The alleged violation is based upon the allegation that when Riffe conducted an examination in the No. 3 and No. 4 entries prior to Ward beginning the extended cut, that Riffe saw the cracks, but did nothing to restrict the cut (Tr. 114). The Secretary argues that inherent in the regulation is the obligation to take some action to correct any hazardous condition the examiner observes (Sec. Br. 28). "Simply performing an on-shift examination is not all that is required. Hazardous conditions must be corrected" (Id.).

I have found, as Riffe testified, that he was in the No. 3 and No. 4 entries prior to the deep cut and that he saw and evaluated the roof on those entries before the cut. Ward was assigned to work in the No. 4 entry, and I conclude Riffe's evaluation constituted part of the on-shift examination required by section 75.362. Cracks in both entries were obvious. Riffe should have recognized them for what they were — signs of a potentially hazardous condition. Since Riffe did not alert Ward to the hazard or do anything to eliminate it — for example, Riffe did not advise Ward to take a shorter cut — I conclude that Riffe did not adequately "check for

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[10] The citation also includes allegations concerning the roof in the No. 5 entry. The record contains insufficient evidence to make findings on the conditions in that entry. Therefore, I will not considered the allegations.

hazardous conditions" as required by the section 75.362.[11]

Riffe maintained, and the record fully supports finding, that the slickensided slip that most likely caused the roof fall could not be detected by Riffe when he examined the test holes in the No. 4 entry (Tr. 438). Moreover, while the slip clearly was visible after the fall, it is not at all sure that it or any evidence of it could be observed visually and with certainty prior to the fall. Only after the fall could those in the area see the slick sides of the fault. Only then could they see how high into the roof the fault rose as it approached and moved into the No. 3 entry (Tr. 452). Thus, it may well be that as of the time of Riffe's on-shift examination, the exact cause of the roof fall was undetectable (Tr. 489).

However, whether the cracks that existed in the No. 3 and the No. 4 entries before the deep cut were linked casually to the fault and thus to the fall is beside the point. Independently of the fall's specific cause the cracks signaled a potentially hazardous condition. The purpose of section 75.362 is the elimination of such conditions by correcting the conditions if possible or by removing miners from the hazard. As Fowler correctly observed, "the intent of the [on-shift] examination [is] in the first place, to find hazardous conditions and then when you find hazardous condition[s], to do something with it . . . . [t]o make the work area safe for the people on the section" (Tr. 228). By doing nothing, Riffe, and through Riffe, Knox Creek, violated section 75.362.

I recognize Riffe also testified he conducted an examination of the area after the roof fall (Tr. 464). During this examination he proceeded to the working face. He observed the condition of the roof and ribs. He checked for methane and oxygen deficiency. He took air readings (Tr. 464-465). This later and more thorough examination, did not excuse the initial inadequate examination he conducted prior to the extended cut. To hold that he had no obligation to act upon what he first saw, would be to subject safety to the timing of the examination.

Finally, and as the Secretary points out, section 75.362 requires that an on-shift examination be done more than once per shift, "if necessary for safety" (Sec Br. 29). In view of the condition of the roof in the entries and the work Riffe knew Ward would undertake, Riffe's examination prior to the cut was "necessary" and required.

S&S and GRAVITY

The violation was S&S. The danger presented was that because of Riffe's initial inadequate examination Ward and Jackson were subject to injury from a highly possible roof fall.

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[11] Fowler testified if Riffe truly believed the conditions were such that a cut should not be limited, the onshift examination would have been adequate (Tr. 279). It is important to note however that the law is otherwise. There is nothing in the standard suggesting a violation is negated by the honest but mistaken belief of the on-shift examiner.

The fact that in this instance Ward was working with a continuous miner that was operated remotely, reduced but did not eliminate the hazard. If Ward had he not moved and instructed Jackson to do the same as rock from the roof began to fall along the ribs, there was a reasonable likelihood that both men would have been hit. Even moving back did not fully eliminate the danger. There was no guarantee that once a fall started it would not carry to where the men were standing and pull down or fall around the roof bolts and plates. Finally, if the miners had been hit by the falling roof they almost certainly would have killed or seriously injured.

Because of the grave or even fatal potential consequences and the very real chance they would have occurred, Riffe's inadequate examination constituted a serious breach of section 75.362.

NEGLIGENCE

The on-shift examiner must meet a high standard of care. The environment in a mine is dynamic. Conditions can change dramatically from shift to shift and even during a shift. Therefore, the duty of the on-shift examiner to check for hazardous conditions as often as is necessary for safety and to take steps to alleviate such conditions when observed is an important component of the Act's scheme to ensure miners' safety. Riffe, acting on behalf of the company, failed to meet this duty.

DOCKET NO. VA-99-14

Citation No.	Date	30 C.F.R.	Proposed Penalty
7297939	7/15/98	75.220	$140

THE VIOLATION

Citation No. 7297939 states in part:

> The approved Roof Control Plan 35' Deep Cut Plan was not being complied with in the . . . No. 2 entry left cross cut where the cross cut had been mined through with a 35' deep cut. The continuous mining machine operator was observed operating the mining machine remotely while being positioned inby the second row of permanent supports. The approved Roof Control Plan 35' Deep Cut Plan requires the mining machine operator to be positioned outby the second full row of permanent supports while mining the deep cut remotely (Gov. Exh. 18).

On July 15, 1998, Fowler was conducting an inspection of the mine. He was accompanied by Neely. The men went to the No. 2 entry where a continuous miner was in use. The continuous miner was completing a 35-foot cut (Tr. 260). Fowler saw the continuous miner

operator, Jackie Yates, sitting near a rib. Yates, who had been cleaning up loose coal, was writing in a notebook (Tr. 60, 62).

According to Fowler, Yates was positioned under the first and second full row of roof bolts and all of Yates's body was inby the second full row (Tr. 255, 258). However, Neely remembered Yates as being in a somewhat different position, either under or a little inby the second row of roof bolts (Tr. 60). Yates himself testified that he was, "sitting underneath the second to the last row of bolts" (Tr. 383, see also Tr. 392). Fowler asked Yates to move outby the second full row, and the Yates complied (Tr. 255-256).

The deep cut provision of the roof control plan stated that when a deep cut was taken, "No workman shall proceed into the area inby the second full row of roof bolts where the continuous mining machine [has] increased cut depth in a deep cut" (Gov. Exh. 1, at 3 ¶ N, see also Tr. 61-62). Based upon what he observed, Fowler determined that Yates was "inby the second full row of roof bolts" and therefore that the company was in violation of the plan and section 75.220 (Gov. Exh. 18).

After receiving a citation, the company sent a written warning to Yates. According to Childress, the warning was, "to make sure that [Yates] was very aware . . . of where he was . . . and to ensure that he didn't proceed inby the second row [of roof bolts]" (Tr. 583, see also Tr. 384, 584; Gov. Exh. 20). The warning was sent despite the fact that this was the first such incident involving Yates (Tr. 583).

The company's witnesses did not disagree with Fowler's testimony that when he saw Yates, a deep cut was being completed (Tr. 260). In other words, as the pertinent provision of the roof control plan states, "the continuous mining machine [had] increased the cut depth" in the deep cut (Gov. Exh. 1 at 3 ¶ N). Therefore, the question of whether the violation existed turns upon whether the record supports finding that Yates was "inby the second full row of roof bolts" (Id.).

Perspective difficulties caused by the narrow confines of the mine may have made it hard for those other than Yates to determine his exact position with respect to the roof bolts. In any event, the person best situated to know his position was Yates. Because the demarcation line established by a row of roof bolts is decidedly more narrow than a person's body, his testimony that he was "sitting underneath the second to last row of bolts" leads to the reasonable inference that at least part of his body was inby the row.

If a person is partly inby and partly outby the second full row of roof bolts, has the deep cut provision of the plan been violated? Neely stated the plan meant that if a workman, "is inby the bolts, in between the first and second row of bolts, whether it's part of him or all of him, he is inby"(Tr. 65). Riffe agreed and testified that, "your entire body has to be outby permanent roof support[s]" (Tr. 518).

I believe they are right and that if any part of a workman's body is inby the second full

row of roof bolts, the deep cut provision is violated. As Fowler explained, the danger presented by the violation was that an extended cut increased the possibility that a roof fall would travel back to or even through the first row of roof bolts to at least the second row (Tr. 257). If this happened and if a miner's hand, arm, or leg were inby the second row of bolts, the miner would be subject to injury (Tr. 258). To hold that a miner so positioned was not in violation of the plan would defeat its purpose. Therefore, I find the Secretary established the violation.

S&S and Gravity

The violation was S&S. The hazard presented by the violation was that a miner inby the second full row of roof bolts would be subject to serious injury or death should a roof fall in the unsupported deep cut area override the first row of roof bolts. The ability of a roof fall to override roof bolts was demonstrated by the June 11 roof fall. If a similar roof fall had occurred in the No. 2 entry on July 15, and if it had traveled Yates's direction, there is a reasonable likelihood that Yates would have incurred a serious injury or worse.

Because of the potential consequences and the very real chance that grave injury or death would have resulted, the violation was serious.

Negligence

There is no indication in the record that the violation was due to Knox Creek's neglect. Yates was in the wrong. He hazardously positioned himself in violation of the roof control plan. An employee's violative misconduct, while not a defense to liability for a violation, can be relevant for establishing an operator's negligence for penalty purposes. The operator's lack of fault is a factor to be considered in assessing a civil penalty (see Fort Scott Fertilizer-Cullor, Inc., 17, FMSHRC 1112, 1115-16 (July 1995) (and cases cited therein)). Rather than impute the employee's misconduct to the operator, the company's supervision, training, and the disciplining of the miner all must be examined (Id.).

The Secretary presented no evidence that Knox Creek's supervision or training of Yates with regard to the deep cut provision of the roof control plan was inadequate. Morever, the company had not been required to discipline Yates for a previous similar violation (Tr. 583).[12]

[12] The Secretary's argument that Neely's presence established Knox Creek's negligence is misplaced (Sec. Br. 32). Neely, although a supervisor and a member of management, was accompanying the inspector not supervising Yates. The fact that together the inspector and Neely happened upon the violation does not justify finding Knox Creek failed to meet its duty of care.

In addition, the Secretary's argument that the company received "a related citation of its deep cut plan less than month before this citation" does not, standing alone, establish negligence (Id.).

DOCKET NO. VA-52-R

Citation No.	Date	30 C.F.R.
7297933	6/15/98	75.220

DOCKET NO. VA-99-14

Citation No.	Date	30 C.F.R.	Proposed Penalty
7297933	6/16/98	75.220	$50

THE VIOLATION, GRAVITY AND NEGLIGENCE

The citation states:

> The approved roof control plan was not being complied with on the 001 mmu in the No. 3 and No. 4 entries. According to the testimony given during the investigation of a roof fall accident the clean-up plan to remove the roof fall was not posted at the entrances of the roof fall that fell in the No. 4 entry left cross cut on June 11, 1998 (see Notice of Contest, WEVA 98-52-R).

The citation alleges that the violation was not serious and was due to Knox Creek's moderate negligence (Id.).

The parties agreed the violation existed as charged, and I so find (Tr. 31; Gov. Exh. 1, Stip. 9). Although the parties presented no evidence regarding any of the findings alleged in the citation, I conclude from their stipulation that the parties intended also to agree to the gravity and negligence findings of the inspector as stated thereon. Therefore, I find that the violation was not serious and was due to the company's moderate neglect.

OTHER CIVIL PENALTY CRITERIA

HISTORY OF PREVIOUS VIOLATIONS

The Secretary introduced without objection a computer printout representing the mine's history of previous violations (Tr. 429; Gov. Exh 21). Counsel for the Secretary characterized the history as "moderate" (Tr. 430). I agree with counsel, and I conclude that Knox Creek's history of previous violations is not such that the civil penalties assessed otherwise should be increased.

SIZE

Childress testified that around June 11, 1998 the mine usually employed 30 to 32 miners

(Tr. 552). According to Inspector Fowler, this "wasn't very big" (Tr. 206). Therefore, I find that the Kennedy No. 2 mine was medium to small in size and that the company was of a similar size (Tr. 552).

ABILITY TO CONTINUE IN BUSINESS

The parties stipulated that any penalties assessed would not affect the ability of Knox Creek to continue in business (Joint Exh. 1, Stip. 4; Tr. 30).

CIVIL PENALTY ASSESSMENTS

DOCKET NO. VA-99-14

Citation No.	Date	30 C.F.R.	Proposed Penalty
7297932	6/15/98	75.202	$ 6,000

I have found that the violation was highly serious in that it subjected two miners to the very real possibility of grave injury or death. I also have found that the violation was the result of Knox Creek's ordinary negligence. Given these factors and in view of Knox Creek's medium to small size, I conclude that an assessment of $1,500 is appropriate.

Citation No.	Date	30 C.F.R.	Proposed Penalty
7297931	6/15/98	75.362	$204

I have found that the violation was highly serious and was due to Knox Creek's ordinary negligence. Given these factors and in view of Knox Creek's medium to small size, I find that an assessment of $300 is appropriate.

Citation No.	Date	30 C.F.R.	Proposed Penalty
7297939	7/15/98	75.220	$140

I have found that the violation was serious and was not due to negligence on the company's part. Given these factors and in view of Knox Creek's medium to small size, I find that an assessment of $100 is appropriate.

Citation No.	Date	30 C.F.R.	Proposed Penalty
7297933	6/16/98	75.220	$50

In view of Stipulation 9 and of my conclusions drawn therefrom, I find that an assessment of $50 is appropriate.

ORDER

Knox Creek's contests of Citation No. 7297931, Citation No. 7297932 and Citation No. 7297933 are **DENIED** and Docket Nos. VA-98-50-R, VA 98-51-R and VA 98-52-R are **DISMISSED**. Within 30 days of the date of this decision the Secretary **IS ORDERED** to modify Citation No. 7297932 to a citation issued pursuant to section 104(a) of the Act (30 U.S.C. §814(a)) and Knox Creek **IS ORDERED** to pay to MSHA civil penalties of $ 1,950. Upon modification of the citation and receipt of full payment Docket No. Va-99-14-R is **DISMISSED**.

David F. Barbour
Chief Administrative Law Judge

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