

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 23, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 97-5
Petitioner	:	A. C. No. 11-00601-04045
v.	:	
	:	Rend Lake Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Ruben R. Chapa, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for the Secretary;
Elizabeth S. Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Bulluck

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, through her Mine Safety and Health Administration (MSHA), against Consolidation Coal Company (AConsol@), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815. The petition seeks civil penalties of \$50.00 and \$903.00, respectively, for alleged violations of a notice to provide safeguard issued pursuant to section 75.1043, 30 U.S.C. ' 75.1403, and section 75.202(a), 30 U.S.C. ' 75.202(a).

A hearing was held in Mt. Vernon, Illinois. The parties' post-hearing briefs are of record. For the reasons set forth below, the safeguard violation and the unsupported roof violation shall be affirmed.

I. Stipulations

The parties stipulated to the following facts:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.

2. At all times relevant to these proceedings, respondent, Consolidation Coal Company (hereinafter, Arespondent@ or AConsolidation@) and the Rend Lake Mine are subject to the provisions of the Federal Mine Safety and Health Act of 1977 (hereinafter, the AAct@).

3. At all times relevant to these proceedings, respondent owned and operated the Rend Lake Mine, a bituminous coal mine located in Jefferson County, Illinois.

4. The Administrative Law Judge has jurisdiction of this case pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.* (1994).

5. The respondent=s mine produced approximately 3,269,017 tons of coal from January 1, 1995 through December 31, 1995.

6. All of the respondent=s operations produced approximately 65,431,842 tons of coal from January 1, 1995 through December 31, 1995.

7. The subject citations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Consolidation on the date indicated therein.

8. The proposed civil penalties in this proceeding will not affect the operator=s ability to continue in business.

II. Safeguard Notice No. 3041481/Citation No. 3839842

A. Factual Background

Consol owns and operates the Rend Lake bituminous coal mine in Jefferson County, Illinois. On March 2, 1987, MSHA Inspector Frank Garavalia (deceased at the time of hearing) issued Safeguard No. 3041481, pursuant to 30 C.F.R. ' 75.1403, citing the following condition:

A Memco mantrip was parked approximately 3 feet from a line curtain (brattice) in the crosscut left off the belt entry at survey Tag No. 7196. Both miners and mining equipment could travel through this location. Neither a workman, nor a warning sign was stationed on the curtain=s blind side indicating that the equipment was parked behind the curtain. The mantrip was not visible through the curtain. This was observed in the 2nd east, 2nd left working section. This is a notice to provide safeguards requiring that mining equipment be visible through a curtain, a workman be stationed on the curtain=s blind sign [sic], or a warning sign be conspicuously posted on the opposite side of the curtain from the parked equipment. This safeguard includes all underground areas of this coal mine

(Ex. P-1). Section 75.1403 authorizes an MSHA inspector to issue safeguards that, in the inspector=s judgment, are necessary to minimize hazards with respect to transportation and materials.

The facts surrounding the issuance of the contested citation and the alleged violative condition cited therein are not in dispute. On July 26, 1996, at 10:55 a.m., MSHA Inspector

Michael Rennie, accompanied by mine safety representative Rick Shockly and safety committeeman Danny Brown, conducted a Triple A inspection of the Rend Lake Mine (Tr. 76, 100-105). While inspecting the 2G longwall section of the mine, Inspector Rennie walked through a brattice curtain positioned in an adjacent crosscut and came upon the No. 41 scoop parked two feet away from the curtain on its blind side (Tr. 76, 81, 106; Ex. J-3).¹ No sign or workman was posted to warn of the equipment stationed behind the curtain (Tr. 77-78, 152). Inspector Rennie issued the following 104(a) non-significant and substantial citation, for violation of section 75.1403, based on the above-cited Safeguard No. 3041481:

The No. 41 battery-powered Simmonds Rand scoop was parked approximately 2 feet from a ventilation curtain (brattice) in the crosscut right off the 2G travelway at survey station 12+80. Neither a workman or a warning sign was posted on the travelway side of the curtain. Safeguard Notice No. 3041481 requires that mining equipment be visible through a curtain, a workman stationed on the curtain's blind side, or a warning sign be conspicuously posted on the opposite side of the curtain from the parked equipment. This safeguard includes all areas of the underground coal mine

(Ex. P-8).

B. Findings of Fact and Conclusions of Law

1. Validity of Safeguard

The seminal issue for resolution is whether Safeguard No.3041481, issued by Inspector Frank Garavalia on March 2, 1987, is valid. The Commission has noted that through section 314(b) of the Act, 30 U.S.C. ' 874(b), the Secretary, through MSHA inspectors, is accorded broad discretion to issue safeguards, without operator consultation, in order to guard against all hazards attendant upon haulage and transport[ation] in coal mining. @ *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (January 1992) (ASOCCO II@); *Jim Walter Resources, Inc.*, 7 FMSHRC 493, 496 (April 1985). Safe and unobstructed travel by miners on foot has been recognized as falling within the purview of the haulage and transportation hazards that safeguards seek to prevent. See *Southern Ohio Coal Co.*, 7 FMSHRC 509, 513 (April 1985) (SOCCO I).

¹A brattice curtain is a means of ventilation control in a mine, primarily used to direct air to the working face areas, by fastening the curtain across the roof of an entry, and for maximum direction of airflow, to the adjacent ribs (Tr. 29-31, 71).

A notice to provide safeguards is mine-specific, in that an inspector must determine: 1) that there exists at a mine an actual transportation hazard that is not covered by a mandatory standard; 2) that a safeguard is necessary to correct the hazardous condition; and 3) the corrective measures that the safeguard should require. 14 FMSHRC at 8. As long as a safeguard is premised upon an inspector's evaluation of the specific conditions at a particular mine, that similar unsafe conditions and similar safeguards to address them are present at other mines does not invalidate it. *Id.* at 8, 10.

Recognizing the need for an appropriate balance between the Secretary's authority to require safeguards additional to mandatory standards and the operator's right to notice of the conduct required of him, the Commission has required that a safeguard notice identify with specificity the hazard at which it is directed and the conduct required to remedy such hazard. 7 FMSHRC 512. Therefore, where an operator challenges a safeguard's validity, the Secretary bears the burden of proving that the safeguard provided the operator with sufficient notice of the nature of the targeted hazard and the remedial conduct required, so as to enable the operator to secure prompt and complete abatement. *Id.*; 14 FMSHRC 13. In interpreting a contested safeguard, the Commission has mandated a narrow construction of its terms and intended reach, while noting that this approach does not give license to challenges based on purely semantical arguments. 7 FMSHRC 512; *Bethenergy Mines, Inc.*, 15 FMSHRC 981, 985 (June 1993).

Consol takes the position that the underlying safeguard is impermissibly vague, in that it fails to adequately identify the hazard addressed and, therefore, permits *ad hoc* discretion in interpretation, inspector-by-inspector. Furthermore, Consol argues that the safeguard inappropriately encompasses all mining equipment, rather than mobile equipment (such as the parked mantrip cited in the safeguard), it fails to specify the range of distance within the curtain that triggers the warning requirements, and it does not specify whether it is protecting miners traveling on mobile equipment or on foot (R. br. 5-9). In support of this position, Consol references MSHA bulletins and accident reports dealing with injuries resulting from moving equipment running into parked equipment (Exs. P-2, P-3 and P-4), and other safeguards within District 8 mines, many of which specify permissible distances between parked transportation equipment and brattice curtains (generally, twenty-five feet) (Ex. R-9).²

Arguing the validity of the safeguard at issue, the Secretary takes the position that, on its face, the safeguard demonstrates the existence of a condition at the Rend Lake Mine that created a transportation hazard, and that it is specific in identifying both the hazard and the conduct necessary to remedy such hazard. Moreover, the Secretary asserts that the targeted transportation hazard applies to mining equipment traveling through curtains that could collide

²/ The Secretary's Motion to Strike Respondent's Attachment to Post-Hearing Brief (17 similar safeguards issued to other District 8 mines) was denied during teleconference with the parties on October 31, 1997, and the record was reopened for admission of the documents.

with any parked equipment, as well as miners traveling through curtains by foot who could bump into parked equipment and sustain injury (P. br. at 7-16).

As inspection supervisor in the Benton, Illinois field office, MSHA Inspector Steven Kattenbraker testified that he normally reviewed safeguards issued from his office to ensure that they accurately described the behavior that is expected of the operators (Tr. 15-18). Although he was unable to recall whether he had specifically discussed the safeguard at issue with Inspector Garavalia, Inspector Kattenbraker testified that due to a 1980 fatality, MSHA had placed emphasis on eliminating injuries caused by the transportation hazard of parking vehicles behind curtains (Tr. 19-24, 47-49; see Ex. P-2, January 23, 1980, notice by MSHA District 8 Manager to District 8 mine operators, alerting them to a recent fatality caused by the collision of a shuttle car traveling through a curtain with a continuous mining machine parked behind the curtain; see also Ex. P-3, MSHA Program Informational Bulletin No. 84-16C addressing underground haulage accidents). The record establishes that this fatality occurred at Consol's Hillsboro Mine, located in Coffeen, Montgomery County, Illinois, part of MSHA's District 8 (Ex. P-4; Tr. 41-42). Inspector Kattenbraker offered his opinion that all mining equipment parked behind a curtain poses the hazard targeted by the safeguard, that twenty-five feet is standard in most other safeguards as a safe distance between parked equipment and brattice curtain, and that while he would prefer that the instant safeguard specify a safe distance, it, nevertheless, puts the operator on notice that the equipment should be parked at a distance from a curtain that allows clear visibility of the equipment to the vehicle or person traveling through the curtain (Tr. 51-55, 59-60).

Inspector Michael Rennie testified that the instant safeguard gives the operator adequate notice of how far to station mine equipment behind curtains, because the mine operator is imputed to have a working knowledge of his equipment, including size and length, and is held responsible for making appropriate judgments as to the distance necessary for safe clearance of mine equipment traveling through its curtains (Tr. 139, 142, 144, 147). He explained that, due to the equipment size and the operator's location on the equipment, several feet of the equipment may travel through a curtain before the operator passes through and is able to see the parked equipment on the other side (Tr. 131). Therefore, Inspector Rennie is of the opinion that, while MSHA regards twenty to twenty-five feet as a safe parking distance, based on the size and length of most mining equipment, some discretion is required of the mine operator, as well as the inspector who evaluates the condition (Tr. 139-140).

The condition at the mine for which the underlying citation was issued is not a matter in controversy. Based on MSHA's emphasis on eliminating accidents caused by mining equipment parked behind brattice curtain, and on Inspector Garavalia's observation that the mantrip was not visible through the curtain and was parked three feet behind it, it was within his discretion to conclude that a transportation hazard existed at the Rend Lake mine, and that a safeguard notice was necessary to correct the hazard. A narrow reading of the safeguard provides the operator with sufficient notice of the hazardous condition to be prevented: parking mining equipment behind a curtain through which such equipment cannot be seen from the blind side, without posting a workman or a warning sign. Implicit in its language, based upon the cited condition, is that both miners traveling on foot and on equipment could travel through a curtain, and where the hazardous condition exists, sustain injuries. Although the instant safeguard is silent as to a

specific distance that equipment may be stationed safely behind a curtain, the Commission has held that an operator was given fair notice of the requirements of a safeguard where its language included interpretive terms. *U. S. Steel Mining Co., Inc.*, 15 FMSHRC 2445, 2448 (December 1993). In this case, the word "parked" is used in a context that puts the operator on notice that any distance between a non see-through curtain and stationary mining equipment that does not permit safe travel through the curtain's blind side (a clear view of equipment on the back side) by miners on foot and operating mining equipment, shall require corrective measures. Therefore, I reject Consol's arguments that the safeguard is vague, find that Consol was given adequate notice of the targeted hazard and the corrective measures required, and, therefore, conclude that the safeguard was validly issued.

2. Fact of Violation

The subject safeguard requires that parked mining equipment be visible through a curtain, or where it is not visible, a workman be stationed on the curtain's blind side or a warning sign be conspicuously posted on the opposite side from the parked equipment. Because it is clearly reasonable to consider equipment stationed a distance of two feet from a curtain to be "parked," it is curious that Consol uses the instant citation to challenge the validity of the underlying safeguard.

In applying the requirements of the safeguard to the uncontroverted facts of this case, the evidence establishes that only cap lighting was available in the cited passageway, visibility was not possible through the solid curtain, no workman or sign was posted, and as the inspection party walked through the curtain, Inspector Rennie and Dan Brown almost bumped into the scoop parked two feet from the curtain (Tr. 77-79, 81, 106, 108, 151-153; Exs. P-8, P-9, J-2). Accordingly, the Secretary has met her burden of proving that the safeguard was violated by the cited conditions.

3. Civil Penalty

While the Secretary has proposed a civil penalty of \$50.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. ' 820(i). See *Sellersburg Stone Co.*, 5 FMSHRC 287, 291-292 (March 1993), *aff'd*, 763 F.2d 1147 (7th Cir. 1984).

Consol is a large operator, with an insignificant history of prior violations, including two prior violations of the subject safeguard within three months of the instant citation (Ex. P-5).³ The Secretary did not allege, nor does the record reflect, that its violations history is an

³/ Inasmuch as the Secretary has failed to provided the most current data of violations (July 1992 to June 1994 provided, rather than July 1994 to July 1996), Consol's history of previous violations is construed in the light most favorable to the operator (See Ex. P-7).

aggravating factor that provides a basis for raising the penalty. As stipulated, the proposed civil penalty will not affect Consol's ability to continue in business.

The remaining criteria involve consideration of the gravity of the violation and the negligence of Consol in causing it. I find the gravity of the violation to be serious, since the potential for grave injuries to miners, including death, caused by collisions of equipment and of persons and equipment, is well documented by the record. Consideration that Consol had been cited for similar violations within three months of the instant citation persuades me that Consol appreciated the nature of the hazard and, consequently, leads me to ascribe moderate negligence to Consol. Therefore, having considered Consol's large size, insignificant history of prior violations, seriousness of the violation, good faith abatement and moderate degree of negligence, I find that the \$50.00 penalty proposed by the Secretary is appropriate.

III. Citation No. 4265333

A. Factual Background

On July 18, 1996, at approximately 12:15 a.m. during the midnight shift, MSHA Inspector Michael Pike, accompanied by foreman Victor Sauerhage and walkaround representative/safety committeeman Melvin Filkins, entered the mine by the Nason portal in order to conduct a CCA inspection (6 month roof control review), which would entail checking entries, intersection widths, bolt spacing, observing bolt installation, and ensuring compliance with the roof control plan (Tr. 161-162). The inspection party began travel by scooter (personnel carrier) on the main east travelway to the opposite side of the mine, fifty to one hundred feet behind a scooter transporting pumpers Robert Carpenter and Dewey O'Daniel to the location of their tools (Tr. 167, 241-243).⁴ As the pumpers approached the No. 96-97 crosscut, they observed on the roadway some rock and top coal that had fallen out from around a roof bolt, causing them to stop in the middle of the travelway about twenty-five feet from the fallen rock and observe the roof (Tr. 164, 223, 241, 243-244, 246, 257-258). Inspector Pike, foreman Sauerhage and walkaround representative Filkins stopped moments later behind the pumpers, who informed Pike and Filkins of the roof condition (Tr. 164, 241, 243). Inspector Pike, accompanied by Filkins, examined the roof in the area identified by the pumpers (Tr. 164, 213-214, 218-219), then informed Sauerhage that the road was going to be closed and the rock cleaned up until they got it all bolted (Tr. 241, 246-247, 258). Sauerhage rerouted the pumpers by directing them to walk along the belt line (a parallel entry) to collect their tools (Tr. 241-242, 249), called for midnight shift foreman Robert Pigg to come to the area (Tr. 258-259, 286), and sent for the diesel roof bolter to come immediately from the west (Sesser) side of the mine (Tr. 261, 287). While Sauerhage was calling for the midnight shift foreman and the roof bolter, Inspector Pike stationed himself in the travelway and prevented all persons, including workers on overtime, from entering the area between the 96-97 crosscut, by detouring them around the area to the belt line (Tr. 164-165, 259, 293). Shift foreman Pigg flagged-off the area with orange reflector tape, and had supplemental roof bolts installed in accordance with legal requirements (Tr. 166, 293-294). No persons other than the roof bolters were permitted to work or travel in the affected area until the supplemental roof support was installed (Tr. 311).

⁴/ A pumper pumps water out of a mine by use of a stationary pump (Tr. 167).

Inspector Pike issued section 104(a), non-significant and substantial Citation No. 4265533, describing the violation of section 75.202(a) as follows:

An area of inadequate supported mine roof app. 45 feet in length and 20 feet wide was present between the No. 96 and 97 crosscut on the main east travelway. People are required to work and travel this area

(Ex. P-10).⁵

B. Findings of Fact and Conclusions of Law

1. Fact of Violation

Section 75.202(a) is a broadly written standard, designed to protect miners from Any roof, face or rib hazards, as well as hazards associated with coal or rocks bursts, in areas where they may travel, by supporting or controlling the roof, face or ribs.@ *Jim Walter Resources, Inc.*, 16 FMSHRC 456 at 477, 478 (February 1994) (ALJ). The Commission has required liability under the standard to be subjected to the consideration of whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized that the roof or ribs were not adequately supported or otherwise controlled. *Id.* at 479. By application of the reasonably prudent person test, the Commission has held an operator in violation of the standard, notwithstanding the operator's compliance with its approved roof control plan. *Id.* at 478-479. Moreover, as required by the very language of the standard, the Commission has required the Secretary to prove that the cited area was one Awhere persons work or travel,@under normal circumstances. *Cyprus Empire Corp.*, 12 FMSHRC 911, 917 (May 1990).

It is well recognized, as the Secretary points out, that roof falls pose one of the most serious hazards in the coal mining industry. *United Mine Workers of America v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989). The Commission has noted the inherently dangerous nature of mine roofs, and attributed the leading cause of death in underground mines to roof falls. *Consolidation Coal Co.*, 6 FMSHRC 34, 37 (January 1984); *Eastover Mining Co.*, 4 FMSHRC 1207, 1211 and n.8 (July 1982); *Halfway Incorporated*, 8 FMSHRC 8, 13 (January 1986).

Consol argues that the Secretary has not proven a violation of section 75.202(a) since the cited area had been supported in accordance with the approved roof control plan, a pre-shift examination had assessed the area as safe for travel, and upon discovery of the unstable roof, the

⁵/ 30 C.F.R. ' 75.202(a) provides that: The roof, face, and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

area was flagged-off and miners were prevented from travel or work therein, until additional roof support was installed (R. br. at 12, 13).

The Secretary contends that the evidence supports Inspector Pike's conclusion that the roof was failing, that the Rend Lake Mine has a history of roof falls and problems with inadequately supported roof areas, and that miners worked and/or traveled in the cited area (P. br. at 16-18).

Inspector Michael Pike, employed by MSHA for approximately 11 years, has been a roof control specialist since 1993 (Tr. 158-159, 161). He testified that he reviewed the mine's violation history prior to conducting the inspection, went down into the mine with the midnight shift, began travel with the inspection team to the other side of the mine, and shortly thereafter came upon the pumpers at the cited area (Tr. 162, 164). Inspector Pike discussed the roof condition which he observed in the following testimony:

Q. Now, please describe the condition which led--led you to issue the citation.

A. The mine roof had fallen from around the roof bolt that had been installed. I checked it. While we was sitting there, I noticed on both ribs the thing had been working and was flaking out....Mr. Filkins and Mr. Sauerhage was there with me. I inspected the top. The top started working and bumping. I told Victor [Sauerhage] they needed to get somebody up there and start doing something with it--the mine roof would probably fall. Victor informed me that he would go back, call Mr. Pigg, get somebody up there to look at the condition. While we was sitting there, a crack appeared in the mine roof, which ran from one corner to the other. It started working in the crosscuts off the side of the intersection. That this area was closed up, due to the hazard that it presented to people traveling in the area (Tr. 164-165).

Q. Let's talk about "working." When you say the word, what do you mean by that?

A. What the top was doing was flaking out between the ribs and the roof on both rib lines (Tr. 169).

Q. When you talk about ribs, you mean the sides?

A. Yes, sir, just like this room. This--the walls here would be a rib. The ceiling would be your roof. And it would come approximately a foot from your rib out into the mine roof, and it was working. The coal was working. It would come out to approximately ten feet from the corner of the crosscut, back into the main line

entry on both sides. The top, when I say it was bumping, it thumped where the mine roof was cracking. And there was a crack that went from one corner to the other corner of the rib on it (Tr. 169).

The Court: Is [sic] working and bumping the same? Working=flaking?

A. Working is the flaking part of it. Bumping is where your mine roof, itself, is cracking, and you can hear it. It didn't do it all the time, but it--it bumped three or four times there.

Q. Is that a sign of anything?

A. Yes, sir. It's a sign of roof failure.

The Court: When a roof fails, is there always bumping and working before it fails?

A. No, ma'am, not all the time.

The Court: So one would hope that they get this warning.

A. Yes, sir--yes, ma'am (Tr. 170).

Q. Let's go back now to--you said there was--there was a roof bolt that was loose when you observed it?

A. There was a roof bolt on the right-hand side going in where the mine roof had fell from around it. A rock had fallen down there, and that's what stopped the pumpers from going in.

Q. What do you mean by the bolt was loose?

A. You--you take a roof bolt, and you bolt it tight to the roof. And what had happened: the mine roof had fallen from around the bolt hanging there. Approximately a foot, a foot and a half of it was hanging where there was no mine roof, and the bolt was not intact with the surface. So the bolt was not--had its bearing surface to support the mine roof there. And just like I told Mr. Pigg, if I had come up there and just the bolt by itself was the only indication that I seen that it was just hanging there, I would inform them to putC install a bolt. And a citation would not have been issued. But in this instance where the mine roof was flaking, and working, and while we was there, fell around another bolt, in my opinion, through mining. This warranted a violation. And the top needed to be

adequately supported. I investigated the roof, and there was approximately 45 feet in length of the area that was working and where it had flaked. I had went plumb through the intersection all the way across and was flaking over there on that side.

And the entry width was approximately 20 feet wide, so this covered a pretty wide area, where if it was just the bolt, we could have flagged it, let the people went [sic] around the belt

(Tr. 173-175).

Walkaround representative Melvin Filkins, a rock dust motorman, has worked at the Rend Lake Mine in excess of twenty-six years (Tr. 212). Filkins described the roof condition which he had observed in the following testimony:

Q. Please describe the condition you observed, which was the cause for that citation.

A. There was two or three roof bolts hanging down more than the other ones was, and there was some flaking off of the roof. And it was wet bottoms there, hitting the bottoms, and working on the rib line.

Q. Are these typical conditions you see at the Rend Lake mine?

A. No, sir (Tr. 213-214).

Q. Was the roof working, based on your observation?

A. It was flaking off and working along--along the rib line (Tr. 219).

The Court: Mr. Filkins, were you alarmed by what you saw?

A. Yeah. It wasn't a good situation. Needed to be corrected (Tr. 238).

Pumper Robert Carpenter, who has been employed at the Rend Lake Mine in excess of eighteen years (Tr. 240), testified that he and fellow pumper Dewey O'Daniel had stopped their scooter twenty-five feet or so of where some rock and top coal had already fallen out onto the main east travelway (Tr. 241, 243, 244).

Foreman Victor Sauerhage, involved in the mining industry since 1974 and employed at the Rend Lake Mine since 1987 (Tr. 255), testified to observing a small amount of rock in the roadway, but that he did not go to the area and examine the roof condition himself (Tr. 262-263).

Shift foreman Robert Pigg testified that around 12:20 to 12:30 a.m., while at the Nason bottom, he was summoned by foreman Sauerhage to the cited area (Tr. 286). He testified that upon his immediate arrival at the area, he observed a loose bolt on the north rib and a pile of rock over a three to four foot area, and Inspector Pike informed him of the roof conditions that he had observed (Tr. 287, 289). Foreman Pigg then explained that he conducted his own inspection of the area from the front and behind from the belt entry, since Inspector Pike would not permit him to travel through the area, but that he failed to hear any bumping, see any cracking or flaking, or any other signs of the intersection working (Tr. 288-289, 291, 293-294, 314). While he stated that he did notice some stress cracks, he concluded that they were common to the mine and did not appear to be indicative of recent working; it was his opinion that the condition did not indicate that the roof was about to fall (Tr. 293, 295).

It is clear from the record that only Inspector Pike and walkaround representative Filkins actually went under the area and investigated the roof condition (Tr. 218). Filkins, a long time miner at Rend Lake and familiar with the history and conditions in the mine, corroborated Inspector Pike's testimony, and therefore, I credit their statements as an accurate depiction of the cited roof condition. Accordingly, I find that the roof was unstable, in that it was working and bumping to a degree that signaled roof failure.

In applying the reasonably prudent person test to the facts of this case, it is necessary to resolve the length of time that the unstable roof condition existed. I credit Inspector Pike as knowledgeable in the field of roof control, having conducted hundreds of roof inspections during his tenure with MSHA (Tr. 158-161). He testified that, based on the cracks and the size of the rock pile stacked along the ribs, the condition had not just occurred (Tr. 206). The record establishes that the pre-shift examination was conducted by Fred Baker between the hours of 9:00 and 11:00 p.m., and that he probably traveled through the main east travelway and proceeded to the Nason bottom to record his entries in the examiner's book somewhere between 10:30 and 11:00 p.m. (Tr. 282-283, 286, 312-313). Shift foreman Pigg testified that examiner Baker only reported the main east travelway to be rough and muddy in a couple of places (Tr. 277). While not calling into question the qualifications of examiner Baker, based on Inspector Pike's expertise and observations, I credit the inspector's opinion that the roof had been working for some time in advance of the pumpers discovering the fallen rock, and conclude, therefore, that a reasonably prudent person would have detected signs of the failing roof during the pre-shift examination. I note that the best evidence of the roof condition at the time of the pre-shift examination would have come from Fred Baker, himself, but that he was not called to testify.

The record is equally clear that the cited area is one in which miners routinely worked and traveled. Walkaround representative Filkins testified that the main east travelway was frequently traveled on a daily basis by men and equipment (Tr. 214-216). Foreman Sauerhage testified that, since another side of the mine had opened up, the main east travelway was just a way of getting from one side of the mine to the other (Tr. 265-268). Shift foreman Pigg testified that on a routine day-to-day basis, pumpers going to and from their toolboxes and pumping the area, parts runners from the Sesser side delivering parts to Nason sections, examiners on their routes, the general underground foremen, as well as he, himself, would be traveling the main east travelway

(Tr. 298-299). Pumper Carpenter testified that the main east travelway is a busy thoroughfare (Tr. 242). As the Secretary has correctly pointed out in her brief, the precedent relied upon by Consol, *Energy West Mining Co.*, 18 FMSHRC 1628 (September 1996) (ALJ); *Cyprus Empire Corp.*, 12 FMSHRC 911 (May 1990); and *Utah Fuel Co.*, 18 FMSHRC 1469 (August 1996) (ALJ), is distinguishable from the instant case, as those cases involve circumstances in which operators had taken prior measures to address dangerous roof conditions, and in *Cyprus* and *Utah Fuel*, no persons were found to have worked or traveled in the affected areas (R. br. At 9-11; P. br. at 19-20). While in this case, it is undisputed that, upon discovery of the condition, Inspector Pike prohibited work and travel through the affected area and had it flagged-off until supplemental roof support was installed, it has also been established that the pumpers and overtime workers were on their way into the area (Tr. 164, 204-205). The pumpers had no official warning, and but for the good fortune of having encountered the fallen rock, they might have suffered serious injury. Consol's argument that the pumpers were in a position to warn others of the danger does not address the operator's affirmative duty to have provided warning to the pumpers, as well as to the persons who were, subsequently, to travel to the area. Any such interpretation of the duty required by the standard would leave the envisioned protection to the discretion of individuals who do not necessarily bear that responsibility. Accordingly, having found that the roof was unstable, that a reasonably prudent person should have detected these signs of roof failure during the pre-shift inspection, and that miners traveled and worked in the area, I conclude that Consol violated section 75.202(a) by failure to take adequate measures to protect persons from hazards related to roof fall.

2. Significant and Substantial

Section 104(d)(1) of the Mine Act designates a violation S&S when it is of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.⁶ A violation is properly designated S&S if, based upon 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.⁶ *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth the four criteria the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d 133, 135 (7th Cir. 1995); *Austin Power, Inc., v. Secretary*, 861 F. 2d 99, 103-104 (5th Cir. 1988), *aff'd* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the

context of continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988).

Inspector Pike testified on behalf of the Secretary that he determined the reasonable likelihood of someone getting injured or killed based upon the mine roof working, and the crack in it had already filled out from around some bolts and cutting down the ribline, as well as the fact that most fatalities are caused by roof falls (Tr. 177-179). He also gave unrefuted testimony that the roof had required use of ten-foot bolts for supplemental support, due to breaks found in the roof strata as high as seven feet (Tr. 178-179). In his opinion, then, his conclusion that someone would have been killed if the roof had fallen had been a reasonable one, despite the fact that most vehicles that traveled the roadway had canopies (See Tr. 171-172, 192-197).

The Secretary is not required to prove that miners were actually exposed to the roof hazard at the time of the inspection, as long as it is shown that a miner could be at risk during the course of normal mining operations. *See Consolidation Coal Co.*, 15 FMSHRC 214 (February 1993) (ALJ) (citing 8 FMSHRC 12). In that context, the evidence indicates that rock was falling during the inspection, at least the pumpers and overtime workers would have traveled through the affected area, and the pumpers conceivably could have worked in the wet travelway where a permanent pump was located (Tr. 164-165, 172-173, 175, 195-196, 260). Consequently, based on the evidence, I find that there was a reasonable likelihood that a roof fall contributed to by the unstable roof would result in serious injury, including death, to the pumpers and/or the overtime workers. Accordingly, I find that the violation was S&S.

3. Civil Penalty

Addressing the six penalty criteria set forth in section 110(i), as discussed above, Consol is a large operator, with an insignificant history of prior violations, and the parties have stipulated that the proposed civil penalty of \$903.00 will not affect Consol's ability to continue in business.

Respecting consideration of the gravity criteria, I find the violation to be serious, in that the potential injury to a miner traveling or working in the area ranges from cuts, bruises, broken bones to death. Shift foreman Pigg's assessment as to the abnormalcy of the cited roof condition (Tr. 165-166, 295), despite the Rend Lake Mine's prior history of unstable roof and roof falls (Tr. 191-192, 217, 221, 225-226, 227-228, 230-232), when combined with the indication, based on the totality of the evidence, that tangible signs of the unstable roof existed at the time of the pre-shift inspection, suggests a certain degree of complacency on the part of Consol. However, based upon Consol's immediate and appropriate abatement of the condition, I attribute moderate negligence to Consol. Consequently, having considered Consol's large size, insignificant history of prior violations, seriousness of the violation, good faith abatement and moderate degree of negligence, I find that a civil penalty of \$903.00 is appropriate.

ORDER

Accordingly, Citations No. 3839842 and 4265333 are **AFFIRMED**, and Consol is **ORDERED TO PAY** civil penalties of **\$953.00** within 30 days of the date of this decision. On receipt of payment, this proceeding is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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