FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

January 31, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2002-46
Petitioner	:	A. C. No. 46-01271-03852
	:	
v.	:	
	:	
EASTERN ASSOCIATED COAL CORP.,	:	Harris No. 1
Respondent	:	

DECISION

Appearances: Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, PC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Eastern Associated Coal Corporation, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges four violations of the Secretary's mandatory health and safety standards, one violation of the Secretary's mandatory training regulations and seeks a penalty of $1,473.00. A hearing was held in Charleston, West Virginia.[1] For the reasons set forth below, I vacate three citations, affirm the other two and assess a civil penalty of $874.00.

Background

Eastern Associated Coal Corporation operates the Harris No. 1 Mine, an underground coal mine in Boone County, West Virginia. The mine produces 3.9 million tons of coal per year.

[1] The record was kept open to admit two depositions that the parties were to take subsequent to the hearing. (Tr.422-25.) The depositions of Tyler Pawich and Joseph Deoskey were filed as Government Exhibits 15 and 16 and are admitted as such.

In October 2001, Eastern was planning to use the No. 4 entry in the mine's 4 East section to set up the face conveyor and shield for a longwall mining machine. To do this, it was necessary that the entry be 24 feet wide. However, because of a roof fall in the entry one crosscut outby, the entry had been narrowed to 18 feet and longer roof bolts had been installed in the roof. Because the roof was determined to be layered and had cracks in it, the company decided to have polyurethane grout injected into the roof as additional support before widening the entry to the necessary 24 feet.[2]

The Respondent hired ESS/Micon, a company that specializes in injecting the roof grout, to perform that function for it. At about 5:10 a.m., during the midnight shift on October 17, 2001, two Micon employees, Joe Deoskey and Tyler Pawich, were "gluing" the roof when two pieces of the roof fell and struck Pawich. The first, smaller piece hit him in the head, stunning him and knocking him to the ground. Then, a larger piece landed on his right knee, crushing it and pinning him to the ground. Pawich received emergency treatment and was transported from the mine.

Two MSHA inspectors, David Sturgill and T. L. Workman, began conducting an investigation of the accident around 10:00 a.m. on the 17th. After viewing the accident scene and interviewing witnesses, the five citations being contested in this proceeding were issued.

Findings of Fact and Conclusions of Law

Citation No. 7195725

This citation charges a violation of section 75.211(d), 30 C.F.R. § 75.211(d), in that:

> During an [*sic*] non-fatal accident investigation it was determined that a proper tool was not used for taking down loose rib/roof materials. Bars provided for taking down loose material shall be of a length and design that will allow the removal of loose material from a position that will not expose the person performing this work to injury from falling material.

(Govt. Ex. 4.) Section 75.211(d) provides that:

> A bar for taking down loose material shall be available in the working place or on all face equipment except haulage equipment. Bars provided for taking down loose material shall be of a length and design that will allow the removal of loose material

[2] The grout seeps into the cracks and open spaces in the roof and sets up like a glue to hold the roof together.

> from a position that will not expose the person performing this work to injury from falling material.

The evidence on this citation is undisputed. Joe Deoskey, the senior Micon employee, admitted that he scaled down loose roof and rib with a piece of drill steel. He said that he did not look for a scale bar nor did he ask any Eastern employee for one. Eastern miners testified that there was a scale bar on the roof bolting machine in the No. 3 entry. They also testified that one was available on the continuous miner on the section and at the tailpiece.

The regulation requires that the bar be available in the working place *or* on the face equipment. The bar was clearly available on the face equipment. That is all the regulation requires. It does not prohibit using a drill steel to scale loose rocks. If Deoskey had bothered to try to obtain a scale bar he would have been able to. Consequently, I conclude that the Respondent complied with this regulation and will vacate the citation.

Citation No. 7195727

This citation alleges a violation of section 75.360(f), 30 C.F.R. § 75.360(f), stating that:

> A proper pre-shift examination for the MMU 064-0 section was not conducted and recorded for the evening shift of 10-16-2001 for the oncoming midnight shift working 10-17-2001.
>
> Several hazardous conditions were discovered during an [*sic*] non fatal accident investigation, that were obvious.
>
> The approved roof control plan was not complied with during the grouting of the mine roof by employees of contractor ESS/Micon QK5[.] Supplemental supports were not installed within a 15 foot radius of holes already grouted and current holes being grouted at time of accident, sag devices were not used as per the plan[,] page 30[,] Part E[,] No. 1, 2, and 3.
>
> A kettle bottom measuring 10 inches by 10 inches of undetermined thickness was present in the No. 4 entry just outby left of half crib without additional support being installed.

(Govt. Ex. 2.)[3]

Section 75.360(f) requires that:

---

[3] The citation was amended on July 3, 2002, to change the regulation alleged to have been violated from section 75.363(b), 30 C.F.R. § 75.363(b). (Govt. Ex. 2, p. 3.) The Secretary's motion to amend the citation was granted, over the Respondent's objection, at the hearing. (Tr. 6-10.)

> A record of the results of each preshift examination, including a record of hazardous conditions and their locations found by the examiner during each examination and the results and locations of air and methane measurements, shall be made on the surface before any persons, other than certified persons conducting examinations required by this subpart, enter any underground area of the mine.

This citation was issued based on the inspectors' view of the entry some 11 hours after the preshift examination was completed and after the accident had occurred. They did not interview the miner who conducted the preshift examination. (Tr. 211, 272.) They also apparently did not question any other miners concerning the condition of the No. 4 entry during the preshift examination. (Tr. 133.) The evidence does not support the inspectors' conclusion that what they observed sometime after 10:00 a.m. on the 17th was present during the preshift examination on the evening of the 16th.

Everyone agrees that grouting was performed during the midnight shift on October 16 and during the midnight shift on October 17 and that it was not performed during the morning or afternoon shifts on October 16. The Respondent's Roof Control Plan requires that temporary roof supports be installed on five foot centers within a minimum radius of 15 feet around the injection hole during injection and for at least one hour after completion of injection. (Govt. Ex. 6, p.30.) Since no injecting was going on at the time that the preshift examination was performed, and more than one hour had elapsed since the completion of the last injection on the previous midnight shift, the failure to have temporary roof supports installed was not a violation of the plan and their absence was not an obvious hazard.

Similarly, the plan calls for the installation of at least two sag devices "during injection." (Govt. Ex. 6, p.30.) As no injection was being performed during the preshift examination, not having sag devices was neither a violation of the plan nor their absence an obvious hazard.

Whether the kettle bottom was an obvious hazard is problematical. Inspector Sturgill testified that "[i]t wasn't easy to see." (Tr. 45.) Inspector Workman did not notice it until he was advised to watch out for it. (Tr. 168, 373-74.) This testimony is all the more significant because at the time the inspectors were in the area, the accident had occurred and they were looking at the roof to see where the fall had happened.

Donnie Stafford, the section foreman who performed the preshift examination, testified that he visually examined the roof in the No. 4 entry. He stated:

> I looked at the roof in there. I didn't see anything abnormal that hadn't been there, you know, the previous times that I had been in there and I saw no need to – I didn't see anything.

> Q. Did you see any kettle bottoms by that half crib that was in the center of the entry?
>
> A. No, I did not.
>
> Q. What would you have done if you had seen a kettle bottom?
>
> A. Well, I'd either brung [*sic*] a bolt crew over there and put a bolt in it or dangered the entry off so somebody else would.

(Tr. 270-71.) Ed Laxton, who performed an on-shift examination of the No. 4 entry at about 12.45 a.m., testified that "the roof conditions looked pretty good. There was some cracking at the right-hand rib. I did not observe anything hazardous, no kettle bottoms, nothing like that." (Tr. 232.)

Finally, Deoskey testified that he observed the kettle bottom while drilling injection holes before the accident. He said that the kettle bottom "was obvious because I was up there to drill a hole. When I went up to drill a hole, I looked on the right and it was there. If I wouldn't have drilled a hole there, I probably wouldn't have seen it." (Govt. Ex. 16 at 45.) He later appeared to state that if one were performing a preshift exam the kettle bottom would have been easy to see. (Govt. Ex. 16 at 45-6.) It is not clear, however, whether he meant that it was easy to see from where he was up drilling a hole, or whether he meant it was easy to see from the floor. If he meant the latter, then his testimony is inconsistent and cannot be reconciled. Deoskey's testimony is further impeached by his statement that he told Pawich to look out for the kettle bottom. (Govt. Ex. 16 at 24.) Pawich claimed that while he had heard of kettle bottoms, he had never seen one and did not know if there was a kettle bottom in the No. 4 entry. (Govt. Ex. 15 at 22.)

The state of the evidence, then, is that no one saw the kettle bottom until Deoskey did when he was on a ladder drilling a hole right next to it. However, his testimony cannot be relied upon as to whether it was obvious or not. Since there is no direct evidence to contradict Stafford's and Laxton's claims that they did not observe a kettle bottom, I conclude that if it was present during the preshift examination, it was not, based on the inspectors' observations a half day later, immediately obvious.

Perhaps realizing the weakness of the case as set out in the citation, the Secretary now argues that there were adverse roof conditions, specifically cracks, broken top, loose and hanging roof, loose rib, and water running out of the roof, which should have been reported by the preshift examiner. Disregarding the questionable practice of the government expressly detailing specific "obvious hazardous conditions" in a citation and then ambushing the Respondent with additional allegations at the hearing, I find that the Secretary has not proved that these were obvious hazards that should have been discovered.

Inspector Sturgill testified that on arriving at the No. 4 entry he "observed water coming from the top, a rib roll, which is where the rib was pulled out I found out later, cribs in the area, water on the bottom, a half crib was constructed." (Tr. 44.) He later added that there were cracks in the roof. (Tr. 50.) Inspector Workman testified that there was "loose roof" which had not been scaled down. (Tr. 180.)

In considering these allegations, it must be kept in mind that the roof in the No. 4 entry had been extensively roof bolted and had four cribs providing additional support. (Resp. Ex. 21.) Inspector Workman testified in describing the roof conditions that he observed in the No. 4 entry on November 15: "They looked just about like they did when I was there before. I mean they had some little breakage here and there, but, just as I said, *they had already put additional bolts in, and that's what the law says, when it's encountered, then additional support shall be installed*." (Tr. 156 emphasis added.) Clearly, the company was installing additional support as needed. There is nothing to suggest that by the next day the roof top was drastically different than the one Workman saw on the 15th.

In addition, it appears that much of the water coming out of the roof, was either on one side or coming out around the roof bolts. The two examiners were aware of the water, but did not consider it a hazard. (Tr. 254, 275-76.) In this connection, Inspector Sturgill agreed that water coming out of the roof is not always something that has to be recorded in the preshift book. (Tr. 112.)

Further, the Secretary does not contend that the cribs were a hazard.[4] The rib roll "was loose rock encountered there and they pulled it so it wouldn't be a falling hazard." (Tr. 48.) Therefore, the roll itself was not a hazard.

Finally, as noted above, the conditions in the No. 4 entry that were observed by the inspectors were those that existed after a roof fall. Thus, the conclusion that the same conditions were present during the preshift examination is conjectural at best. Furthermore, if these conditions were so obviously hazardous, it is curious that they were not listed in the citation, or the inspectors' notes. (Govt. Exs. 9 & 10.) , Ultimately, I find it very significant that the inspectors participated in the investigation in the No. 4 entry with their entourage of company employees without requiring that any roof be scaled down, that any additional support be installed, or indeed, that the entry be "dangered off."

For these reasons, I find that the evidence does not support the allegation that an improper preshift examination was performed. Accordingly, I conclude that section 75.360(f) was not violated and will vacate the citation.

---

[4] The half crib in the entry apparently was just that, an uncompleted crib. It appears to have served no useful purpose, but it certainly was not a hazard. The attention paid to it during the trial was completely out of proportion to its relevance.

Citation No. 7195726

This citation charges a violation of section 75.362(a)(1) because:

> A proper on-shift examination for the MMU 064-0 section was not conducted and recorded for the midnight shift of 10-17-2001.
>
> Several hazardous conditions were discovered during a non fatal accident investigation, that were obvious.
>
> The approved roof control plan was not complied with during the grouting of the mine roof by employees of contractor ESS/Micon QK5[.] Supplemental supports were not installed within a 15 foot radius of holes already grouted and current holes being grouted at the time of the accident, sag devices were not used as per the plan[,] page 30[,] Part E[,] No. 1, 2, and 3.
>
> A kettle bottom measuring 10 inches by 10 inches of undetermined thickness was present in the No. 4 entry just outby left of half crib without additional support being installed.
>
> The on-shift examiner stated that he walked to Tyler's [*sic*] position (14' to 16' outby the face area), but did not proceed on to the face in the #4 entry.
>
> On-shift examiners are required to go all the way to the face in performing the exam.
>
> The on-shift exam was also in violation of 75.362(d), because no methane reading was taken at the face. Further the on-shift examiner's report did not have any methane readings or air readings, and it said "section idle" even though people were working on the section.[5]

(Govt. Ex. 1.)

Section 75.362(a)(1) requires that:

> At least once during each shift, or more often if necessary for safety, a certified person designated by the operator shall conduct an on-shift examination of each section where anyone is assigned to work during the shift . . . . The certified person shall check for hazardous conditions, test for methane and oxygen

[5] The last three paragraphs were added to the citation as the result of a Motion to Amend made by the Secretary on the day of the hearing. The motion was granted over the objection of the Respondent. (Tr. 10-20.)

deficiency, and determine if the air is moving in its proper direction.

Except for substituting "on-shift" for "preshift" and the date and time of the examination, the first four paragraphs of this citation are identical to the previous citation. For many of the same reasons, the Secretary has also failed to prove this citation.

Laxton, the certified person performing the on-shift, examination, testified that he performed an examination of the No. 4 entry at about 12:45 a.m. He stated that Deoskey and Pawich were not present in the entry at that time, but were in the dinner hole. (Tr. 230.) They had not started to work, because they asked Laxton to get some drill bits for them. (Tr. 230.) No grouting had been done since the midnight shift on the day before.

In these circumstances, there was no requirement in the Roof Control Plan that supplemental supports or sag devices be installed. Thus, their absence was not a hazardous condition.

For the same reasons that the kettle bottom, and the other embellishments added by the Secretary during the trial, were not obvious hazardous conditions that should have been recorded with regard to the previous citation, I conclude that they were not obvious hazardous conditions that should have been recorded with regard to this citation.

At the hearing, the Secretary also asserted that the on-shift exam was not proper because Laxton did not go all the way to the face of the No. 4 entry when performing the exam. As the Respondent correctly notes, there is nothing in section 75.362(a)(1) that requires going to the face. Section 75.362(c)(3), 30 C.F.R. § 75.362(c)(3), requires that the velocity of air at each end of the longwall or shortwall face be checked. However, since coal was not being mined in the No. 4 entry and had not been for at least a week, there were no mining machines of any type in the entry and, therefore, no longwall or shortwall face to go to. Otherwise, there is nothing in any section of 75.362, except section 75.362(d)(2), 30 C.F.R. § 75.352(d)(2), that even mentions the face. Although apparently relied on by the Secretary, section 75.362(d)(2) is not applicable to this situation.

In the first place, section 75.362(d) is required in addition to and not as part of the on-shift examination. In the second place, it only comes into play when electrical equipment is being used in the working place. If such equipment is being used, then section 75.362(d)(2) requires that methane tests be made at the face. "Working place" is "[t]he area of a coal mine inby the last open crosscut." 30 C.F.R. § 75.2. The only equipment being used to grout the roof was a glue pump which, according to the mine map, was located outby the last open crosscut. (Resp. Ex. 21.) Therefore, even if section 75.362(d)(2) were part of the on-shift examination requirement, it was not required in this case because no electrical equipment was being used in the working place.

Laxton testified that he did test for methane in the No. 4 entry in "the place most likely that methane would be, farthest away from the curtain, closest to the top" and that he received a reading of "zero." (Tr. 229, 250.) He said that he did not observe any hazardous conditions. (Tr. 232.) He stated that he determined that the air was moving in the proper direction. (Tr. 251.) He was never asked whether he tested for oxygen deficiency, however, since there is no evidence that he did not and since he was an experienced examiner, I will assume that he did. In short, Laxton did everything required of him by section 75.362(a)(1). In fact, except for contending that Laxton did not take a methane reading at the face, the Secretary's main thrust on this citation is that his findings were not properly recorded.[6]

Unfortunately, nowhere in section 75.362 is there a requirement that the results of an on-site examination be recorded. Section 75.363(b), 30 C.F.R. § 75.363(b), requires that a "record shall be made of any *hazardous* condition . . . in a book maintained for this purpose on the surface . . ." (Emphasis added.) It further states that: "This record shall not be required for shifts when no hazardous conditions are found or for hazardous conditions found during the preshift or weekly examinations . . . ." Inasmuch as Laxton found no hazardous conditions, he was not required to make any report.

In sum, it appears that a proper on-shift examination was conducted for the MMU 064-0 section. It further appears that since no hazards were found, particularly the ones alleged by the Secretary, nothing had to be recorded in the on-shift book. Consequently, I conclude that the Respondent did not violate section 75.362(a)(1) and will vacate the citation.

Citation No. 3568565

This citation asserts a violation of section 75.220(a)(1), 30 C.F.R. § 75.220(a)(1), because:

> During a non-fatal accident investigation it was determined that the Approved Roof Control Plan for this mine dated February 20, 2001 was not complied with on the MMU 064 East Mains Section in the No. 4 entry where a non-fatal accident occurred on 10-17-2001. Loose, mine roof was present beginning 12' outby spad 30223 and extending inby for a distance of 30' and had not been scaled down. Adequate temporary supports were not installed on 5' centers with a minimum radius of 15' around the hole being injected, and roof sag devices were not installed around the No. 5 hole being injected with grout material. See page No. 30 Part E No. 1, 2, 3 of approved roof control plan.

[6] While Laxton apparently did not go right up to the face, he came within four to ten feet of it. [Tr. 229, Resp. Ex. 21 (as measured on the mine map, he was within four feet of the face).]

(Govt. Ex. 5.) Section 75.220(a)(1) requires that: "Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered."

There is no dispute that the Micon employees did not install temporary supports or sag devices while injecting the roof with grouting material.[7] This would appear to be a violation of the roof control plan as cited. Nonetheless, the Respondent argues that the sections in the plan concerning grouting were "improperly imposed" on Eastern and, therefore, cannot serve as a basis for the alleged violation. (Resp. Br. at 39.) Specifically, the company argues that the grouting provisions are neither mine specific nor the result of good faith negotiations. The facts, however, indicate that Eastern did not try to negotiate the provisions with MSHA as to whether they applied to the specific requirements of the Harris Mine, or on any other basis, but instead acquiesced in including them in the plan.

The five pages in the Roof Control Plan were originally included at the direction of MSHA. Inspector Workman told Eastern that grouting could not be performed at the mine unless it was covered in the roof or ventilation control plan. (Tr. 218.) Danny Spratt, the manager for safety and training, asked him how they could get such provisions in the plan and he told them he had a copy of some that he would fax to them. (Tr. 337.) On receiving the faxed the provisions, Eastern's management looked them over, then typed them up, put on a cover letter and had the plan approved by MSHA on May 11, 2001. (Govt. Ex. 6, p.2, Tr. 337.) No negotiations were had with MSHA over the provisions.

The company now claims that it did not object to the provisions because it needed the grouting being done at the time to be completed so the longwall could be moved. Even if that is true, it does not explain why Eastern did not object to them later. In fact, it was not until the yearly review of the plan, apparently in January or February 2002, that the company revisited the provisions.[8] (Tr. 338.) Even then, the Respondent did not try to renegotiate or object to the provisions, instead they proposed "to condense those five pages into two pages." (Tr. 338.) Danny Spratt and others met with the MSHA Assistant District Manager and "had quite a lengthy meeting and the results of that meeting, our plan was not changed." (Tr. 338.)

The Commission has stated, with regard to the negotiating of roof control and ventilation plans, that:

---

[7] To the extent that the allegation in the citation concerning loose roof material is intended to be a violation of the roof control plan separate from the requirements concerning grouting, it is rejected for the same reasons it was rejected in the two previous citations.

[8] It is not clear from the evidence exactly when the mine's yearly review was, however, based on the fact that the previous year's review was approved on February 20, 2001, I am assuming that the 2002 yearly review occurred at about the same time. (Govt. Ex. 6, p.3.)

> The requirement that the Secretary approve an operator's mine ventilation plan does not mean that the operator has no option but to acquiesce to the Secretary's desires regarding the contents of the plan. Legitimate disagreements as to the proper course of action are bound to occur. In attempting to resolve such differences, the Secretary and an operator must negotiate in good faith and for a reasonable period concerning a disputed provision. Where such good faith negotiation has taken place, and the operator and the Secretary remain at odds over a plan provision, *review of the dispute may be obtained by the operator's refusal to adopt the disputed provision, thus triggering litigation before the Commission.*

Carbon County Coal Co., 7 FMSHRC 1367, 1371 (September 1985)(emphasis added) (citation omitted).

Here, Eastern did not attempt to negotiate the grouting requirements when they were originally included in its plan. Nor did it raise the issue after completing the grouting which it maintains prevented it from challenging the provisions initially. Further, there is no evidence that it raised the issue after receiving the instant citation in November, 2001. When it did finally get around to raising it, the company did so not by objecting to the provisions, but by proposing to "condense" the provisions. After one meeting, the company assented to continue including the five pages in its plan. Thus, it appears that what little negotiations there were resulted in the two parties agreeing. Certainly, there is no evidence that the company tried to take the matter to the district manager or to anyone else in the MSHA hierarchy. Nor did Eastern refuse to adopt the provisions to trigger litigation before the Commission.

Consequently, I find that while the company now claims that the grouting requirements were imposed on it, in fact it put up little or no fight, instead agreeing to the inclusion of the provisions in its roof control plan. Since the grouting provisions were not imposed upon the Respondent, it was required by section 75.220(a)(1) to comply with their requirements and to insure that others working in the mine did also. By not doing so, the company violated section 75.220(a)(1).

Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable

likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *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, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, 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 will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

Applying the *Mathies* criteria, I make the following findings. The violation of section 75.220(a)(1), by not installing temporary roof supports and sag devices during grouting, created the distinct safety hazard of a roof fall. In view of the fact that the grouting was being performed to shore up a weak roof and the fact that the injection of the grouting material put the roof under additional pressure until the grout "set up," a roof fall resulting in a injury to someone standing under the affected roof was reasonably likely to occur. Finally, the resulting injury was likely to be of a reasonably serious nature, such as a crushed knee. Clearly, the failure to use temporary roof supports and sag devices was a significant contributing cause to the accident, making it "significant and substantial." *Walker Stone Co., Inc.*, 19 FMSHRC 48, 53 (January 1997). Accordingly, I so find.

Citation No. 7195722

This citation alleges a violation of section 48.11 of the Secretary's mandatory training requirements, 30 C.F.R. § 48.11, because: "At an AFB investigation it has been determined that Tyler Pawich and Joe Deoskey, Micon employees, contracting for Eastern Associated Coal Corp., Harris No. 1 Mine, had not been properly trained in the General Safety Precautions and Guidelines for Polyurethane Grouting for roof Strata and Rib consolidation of the approved Roof Control Plan." (Govt. Ex. 3.)[9] Section 48.11 requires that:

[9] The citation originally alleged a violation of section 48.5(a), 30 C.F.R. § 48.5(a), but was amended on November 24, 2001 (the modification is actually dated October 24, 2001). (Govt. Ex. 3 at 2.)

> (a) Operators shall provide to those miners, as defined in § 48.2(a)(2) (Definition of miner) of this subpart A, a training program before such miners commence their work duties. This training program shall include the following instruction, which is applicable to the duties of such miners:
>
> (1) Hazard recognition and avoidance;
>
> (2) Emergency and evacuation procedures;
>
> (3) Health and safety standards, safety rules, and safe working procedures;
>
> (4) Use of self-rescue and respiratory devices, with self-contained self-rescue device training that includes complete donning procedures in which each person assumes a donning position, opens the device, activates the device, inserts the mouthpiece or simulates this task while explaining proper insertion of the mouthpiece, and puts on the nose clip; and
>
> (5) Such other instruction as may be required by the District Manager based on circumstances and conditions at the mine.

Section 48.2(a)(2), 30 C.F.R. § 48.2(a)(2), states that a *miner* is, "for the purposes of § 48.11 (Hazard training) of this subpart A, any person working in an underground mine, including any delivery, office, or scientific worker or occasional, short-term maintenance or service worker contracted by the operator . . . ."

It is the Secretary's position that paragraphs (a)(1) and (a)(3) of section 48.11 required that the hazard training given Pawich and Deoskey include pages 29 through 34 of Eastern's Roof Control Plan. Those pages are entitled "General Safety Precautions and Guidelines for Polyurethane Grouting for Roof Strata and Rib Consolidation" and cover such topics as: Notification of Use, Training, Personal Protection, Roof Control, Equipment, Storage and Handling, Injection Process, Ventilation, Fire Protection, Spills and Disposal. (Govt. Ex. 6, pp. 29-34.) On the other hand, the Respondent argues that training on these subjects would be task training, not hazard training. The Secretary has the better argument on this issue.

While some of the guidelines may sound like the types of things covered in task training, training concerning the guidelines would not be covered by section 48.7, 30 C.F.R. § 48.7, which governs task training. In the first place, task training is only required for those newly assigned to work as "mobile equipment operators, drilling machine operators, haulage and conveyor systems operators, roof and ground control machine operators, and those in blasting operations." *Id.* In the second place, section 48.7(e), 30 C.F.R. § 48.7(e), states that "[a]ll training and supervised practice and operation required by this section shall be given by a qualified trainer, or a supervisor experienced in the assigned tasks, or other person experienced in the assigned tasks." The Respondent always hires a specialist to perform roof grouting. Thus, the company has no one in a position to perform the task training and, indeed, knows less about the task of roof grouting than do the experts hired to do it.

The type of training given to employees of independent contractors such as Micon, depends on the frequency or length of their time in the mine. Section 48.2(a)(1), 30 C.F.R. § 48.2(a)(1), includes in its definition of *miner*, "a maintenance or service worker contracted for by the operator to work at the mine for frequent or extended periods." If such a miner is at the mine frequently or for extended periods, he would receive "Experienced miner training" under section 48.6, 30 C.F.R. § 48.6, the first time he came to the mine. That training would include *health and safety aspects of the tasks to which the experienced miner is assigned*. 30 C.F.R. § 48.6(a)(11).

However, if the employee of an independent contractor is only at the mine infrequently, for short periods of time, the only training he receives is hazard training under section 48.11. Nonetheless, section 48.11 clearly requires training in health and safety standards, safety rules and safe working procedures, which are applicable to the miner's duties. Thus, it is reasonable to expect that when an operator has safety provisions in its roof control plan which specifically apply to the task that the contract employee is going to be performing, the operator will go over those provisions during hazard training.[10] While not all of the guidelines in the roof control plan involved health and safety aspects of roof grouting, enough of them do that the training comes within section 48.11(a)(3) of the regulation.

It is undisputed that the Respondent did not provide such training to Deoskey and Pawich.[11] Operators have the overall compliance responsibility for insuring that independent contractors comply with the standards and regulations applicable to the work being performed by them in the operator's mine. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1996); *Mingo Logan Coal Co.*, 19 FMSHRC 246, 250 (February 1997). Proper hazard training would have fulfilled that obligation. Accordingly, I conclude that the Respondent violated the regulation by not doing so.

Significant and Substantial

I find that the "significant and substantial" designation is not applicable to this violation. As section 104(d)(1) clearly states, only violations of "mandatory health or safety standard[s]" can be S&S. Section 3(l) of the Act, 30 U.S.C. § 802(l), defines "mandatory health or safety standard" as "the interim mandatory health or safety standards established by titles II or III of the Act, and the standards promulgated pursuant to title I of this Act." Mandatory health and safety training is not included in either title II or III of the Act, nor is it included in the Secretary's

[10] Accordingly, I find that the Respondent's additional argument that the standard is impermissibly vague or does not meet the "reasonably prudent person involved in the mining industry" test is without merit.

[11] It appears that one of the reasons, if not the main reason, why no training was given on the grouting provisions was that John Knabb, who gave the hazard training, was not familiar with the grouting procedures in the roof control plan. (Tr. 317.)

mandatory health and safety standards promulgated pursuant to title I of the Act, which are clearly labeled as such.
30 C.F.R. Parts K, M and O. Since this citation is not a violation of a mandatory health or safety standard, it cannot be S&S. *Cyprus Cumberland Resources v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999).

Therefore, I conclude that the violation was not "significant and substantial." The citation will be modified accordingly.

Civil Penalty Assessment

The Secretary has proposed penalties of $874.00 for the two violations I have found that the company committed. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with these criteria the parties have stipulated that the Harris No. 1 Mine produces 3.9 million tons of coal a year and that Eastern and its affiliated companies produce 149 million tons of coal a year. (Jt. Ex. 1.) Therefore, I find that the mine is a very large mine and Eastern a very large company.

The parties have also stipulated that in the previous 24 month period the Harris mine had 119 assessed violations during 438 inspection days. (Jt. Ex. 1.) In addition, Inspector Sturgill testified that: "This company is a very good company, a very safety conscious company." (Tr. 60.) And Inspector Workman said that the company had "always worked with me every way they can to eliminate accidents" and "I just wish we had a lot more like them to work with." (Tr. 188.) I find that this indicates that the operator has a very good history of previous violations.

I further find based on the absence of any evidence to the contrary, that payment of the proposed penalty will not adversely affect Eastern's ability to remain in business and that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violations.

In view of the serious knee injury sustained by Pawich, I find that the gravity of both violations was fairly serious.

Finally, I agree with the conclusions of the inspectors that the company was moderately negligent in committing these two violations.

Taking all of these factors into consideration, I conclude that the penalties of $475.00 for Citation No. 7195722 and $399.00 for Citation No. 3568565, proposed by the Secretary, are appropriate.

Order

In view of the above, Citation Nos. 7195725, 7195726 and 7195727 are **VACATED**, Citation No. 7195722 is **MODIFIED** by deleting the "significant and substantial" designation and is **AFFIRMED** as modified and Citation No. 3568565 is **AFFIRMED**. Eastern Association Coal Corporation is **ORDERED TO PAY** a civil penalty of **$874.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209-2247

R. Henry Moore, Esq., Buchanan Ingersoll, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219

/hs