

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 20, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2007-293
Petitioner	:	A.C. No. 46-08798-111222
	:	
v.	:	
	:	
IO COAL COMPANY,	:	Europa Mine
Respondent	:	

DECISION

Appearances: Benjamin Chachkin, Esq., U.S. Department of Labor, Arlington, Virginia, on behalf of the Petitioner
David J. Hardy, Esq., Spilman, Thomas & Battle, PLLC, Charleston, West Virginia, on behalf of the Respondent

Before: Judge Barbour

In this civil penalty proceeding brought pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (“Mine Act or Act”) (30 U.S.C. §§ 815, 820), the Secretary of Labor (“Secretary”), on behalf of her Mine Safety and Health Administration (“MSHA”), petitioned for the assessment of civil penalties for two alleged violations of 30 C.F.R. § 75.220(a), a mandatory safety standard for underground coal mines requiring a mine operator to develop and follow a roof control plan suitable for its mine and the conditions therein. The alleged violations were set forth in a citation and an order issued pursuant to section 104(d)(1) of the Act. 30 U.S.C. § 814(d)(1).

In a letter received prior to trial, counsels advised me they had settled their differences regarding all allegations relating to the citation and the only issues remaining to be resolved were those relating to the order. I approved the settlement at the hearing. Tr. 19-20. The settlement’s terms are reiterated at the end of this decision.

In issuing the order for the alleged violation of section 75.220(a)(1), the inspector found the violation was a significant and substantial contribution to a mine safety hazard (S&S) and was the result of IO Coal Company’s (IO’s) unwarrantable failure to comply with its roof control plan. Therefore, in addition to the fact of violation, the inspector’s S&S and unwarrantable findings were at issue, as was the appropriateness of the Secretary’s proposed civil penalty of

\$6,900 for the alleged violation. The hearing was conducted in Charleston, West Virginia. Testimonial and documentary evidence were offered by both sides. Subsequently, counsels submitted helpful briefs.

STIPULATIONS

The parties stipulated as follows:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction . . . [over] these . . . proceedings pursuant to Section 105 [(30 U.S.C. § 815)] of the . . . [Act].
2. IO . . . is the operator of the Europa Mine.
3. [O]perations of the Europa Mine are subject to the jurisdiction of the Act.
4. [T]he maximum penalty that [can] be assessed for [the violation] will not affect the ability of IO . . . to remain in business.
5. MSHA inspector Jack Hatfield and MSHA field [office] supervisor Terry Price . . . were acting in [their] official capacities and as authorized representatives of the Secretary . . . when the . . . [order] involved in this proceeding [was] issued.
6. [A t]rue cop[y] of . . . the . . . [order] at issue in this proceeding . . . [was] served on IO . . . as required by the Act.
7. Government Exhibit [1] is an authentic copy of [O]rder [No.] 7252442 . . . and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the [authenticity] of any statements asserted therein.

* * *

13. Government Exhibit [No. 6] is an authentic copy of page six of the roof control plan in effect at the . . . [m]ine at the time of the issuance of [Order No.]

7252422.

14. Government Exhibit [No. 8] is an authentic copy of page six of the [roof] control . . . plan in effect at the . . . [m]ine on August [16], 2007.
15. Government Exhibit [7] is an authentic copy of Respondent's Answers to Interrogatories pages two through six.
16. [T]he [violation] involved in this matter [was] abated in good faith.
17. Government Exhibit 10, the violat[ion] data sheet[,] may be admitted into evidence.
18. Government Exhibit 11, the narrative findings for special assessment[,] sets forth 6 criteria . . . [found in] 30 C.F.R. § 100.3(a) and other information available to the [O]ffice of [A]ssessments [in calculating the proposed penalty of] \$6,900 [for the violation charged in] [O]rder [N]o. 7252422.
19. Government Exhibit 12, the assessed violation history report[,] . . . accurately sets forth the history of violations at the . . . [m]ine for the time period specified and may be admitted into evidence and used in determining civil penalty assessments for the alleged violations in this case.
20. Government Exhibit [9] is . . . an accurate copy of the . . . diagram marked at . . . [the] deposition [of mine foreman Fred Thomas] .
21. IO . . . may be considered a large mine operator for purposes of 30 U.S.C. [§] 820(i) and . . . [the mine] can be considered a large mine.

Tr. 12-16.¹

¹After the stipulations were read into the record, counsel for IO stated the company was withdrawing from stipulations 8 through 12, which concerned citations other than the order at

THE INSPECTOR AND THE ORDER

MSHA Inspector Hatfield began working in underground coal mines upon graduating from high school in 1970. He was employed by several different companies and held various positions, including section boss, mine foreman, safety engineer, and safety director. In October 2004, he started working for MSHA as a coal mine inspector. Tr. 31-33. In April 2006, he was assigned to inspect IO's Europa Mine. Tr. 98. On the morning of June 12, 2006, Hatfield conducted an inspection of the mine in which he found one of its working sections (the 005 MMU section) contained adverse roof conditions in the form of "multiple inadequately supported kettle bottoms and unsupported surface cracks." Gov't Exh. 1. In Hatfield's opinion, the conditions violated Safety Precaution No. 7 of the mine's roof control plan, which stated:

When adverse roof conditions are encountered[,] such as horsebacks, slicken-sided slip formations, clay veins, kettle bottoms, surface cracks, mud streaks or similar types of conditions in the mine roof, supplemental roof supports shall be installed in addition to primary roof support as appropriate in the affected area.²

Gov't Exh. 6.

As a result, Hatfield issued Order No. 7252422, charging the company with a violation of its approved and adopted roof control plan.

PRIOR CITATIONS, SURFACE CRACKS, AND KETTLE BOTTOMS

Before testifying about the order, Hatfield was asked about prior citations alleging violations of section 75.220(a)(1). He stated the first such alleged violation was set forth in Citation No. 7252337, issued on May 1, 2006. Gov't Exh. 2. The citation was issued for specified "[a]dverse roof conditions" on the 004 MMU section of the mine and for the lack of "effective supplemental support." Gov't Exh. 2. According to Hatfield, the "adverse roof conditions" included "surface cracks, kettle bottoms, [and] mud streaks" at several locations. Tr. 34; Gov't Exh. 2.

Hatfield was familiar with surface cracks. He had worked in mines whose roofs exhibited them. Tr. 97. Hatfield described the cracks as those that "make their way to the surface." Tr. 35. He stated they are revealed when coal is extracted. Tr. 129. Usually, they are

issue. Tr.17-18.

²In addition to requiring supplemental roof supports, the plan contained a list of the permissible types of supplemental supports. Resp. Exh. 10.

discolored (they can be yellow or orange). Sometimes they have a pronounced gap. Frequently they exhibit mud streaks and/or exude water. A surface crack can be a single crack extending from the coal seam through the overburden to the surface. Tr. 34-35; *see also* Tr. 207, 236-237 (testimony of mine foreman Frederick (“Fred”) Thomas). Or, a surface crack can be a series of cracks that intersect with one another and lead from the mine roof to the surface. Tr. 35. (“[I]t may come up and adjoin another crack, intersect with another crack and then go to the surface.” *Id.*) Hatfield offered an explanation of how a person on the surface can determine if a mine below has surface cracks: “If you go out on a . . . cold morning and . . . you look across the field . . . you’ll see warm air coming out [of the crack].”³ Tr. 35-36.

One hazard associated with surface cracks that particularly concerned Hatfield was “boxing out.” Tr. 38. The surface cracks “box out” when they interconnect above the roof and create a “chunk of rock” that is likely to fall if it was not supported. Tr. 39. In Hatfield’s opinion, roof bolts do not necessarily offer adequate support for a “boxed out” area because the surface cracks can connect above the roof bolts. Unless a strap is installed on the surface of the roof to hold the boxed out area in place, the area can fall despite the presence of the roof bolts. *Id.*

Hatfield also was familiar with “kettle bottoms.” He stated, “I’ve seem them since I started at the mine. [G]enerally, a kettle bottom is a piece of petrified heavy rock strata that is circular . . . it may be a little oval or oblong and . . . have . . . coal encrusted around . . . [its] circumference.”⁴ Tr. 37-38. Hatfield explained kettle bottoms can be very heavy. In addition, the visible portion of a kettle bottom is not necessarily an indication of the kettle bottom’s size. For example, a kettle bottom with an exposed diameter of two feet can have an unexposed diameter of four feet. Tr. 38. The kettle bottom can “funnel out” above the roof. *Id.*

³Terry Price, an MSHA field office coal mine inspection supervisor and Hatfield’s boss, essentially shared Hatfield’s understanding of surface cracks. He stated:

A surface crack usually is in the roof down through the ribs Sometimes a surface crack will have particles of mud, sometimes it will have particles of rock; sometimes it will just be a crack without particles. The main characteristic has been the presence of water. Generally [the water produces] a stain

Tr. 163-164.

⁴Price described kettle bottoms more succinctly. They are “basically . . . petrified tree trunk[s] surrounded by a thin layer of coal.” Tr. 164. The size of a kettle bottom depends on “how big the tree trunk was.” *Id.*

On May 17, 2006, Hatfield issued another citation at the mine – Citation No. 7252378. Hatfield gave the citation to mine foreman Thomas. Tr. 44. The citation concerned roof conditions on the 006 MMU section. Gov’t Exh. 3; Tr. 43. According to Hatfield, there were “surface cracks running parallel and perpendicular with . . . [an] entry” and unsupported kettle bottoms. *Id.* After he issued the citation, Hatfield stated he reviewed the roof control plan, particularly Safety Precaution No. 7, with Thomas. Tr. 45. The company abated the condition by installing supplemental roof support in the form of T-3 or T-5 straps.⁵ *Id.*; Tr. 148.

On June 5, 2006, Hatfield issued another citation to Thomas, Citation No. 7252411. Gov’t Exh. 4; Tr. 45-46. The citation concerned roof conditions, also located on the 006 MMU. Tr. 46. As Hatfield recalled, he found “an unsupported kettle bottom in the . . . roof about 60 feet outby the last open crosscut, number five entry.” *Id.* Hatfield measured the kettle bottom. It was circular and about two feet in diameter. The kettle bottom had “coal edging,” which Hatfield believed made it more “likely to fall.” *Id.* Hatfield feared the falling kettle bottom would hit and injure or kill a miner. Tr. 46-47. After issuing the citation, Hatfield testified he discussed kettle bottoms with company officials in order to “make them understand what I classed as a kettle bottom.” Tr. 47. He told them they should pay more attention to the problem. *Id.*

On June 8, 2006, Hatfield issued Citation No. 7252417 to Thomas. Gov’t Exh. 5; Tr.47. Once more the citation concerned kettle bottoms on the 006 MMU section. Tr. 46. Hatfield explained he issued the citation for an unsupported kettle bottom located in the roof of the last open crosscut between the number one and number two entries. Tr. 47-48. The kettle bottom was approximately two feet in diameter and had a “coal and slicken-sided edging.” Tr. 48; *see* Gov’t Exh. 5. Because the kettle bottom lacked supplemental support, Hatfield believed it presented a hazard to miners who traveled on foot through the area on all shifts. Tr. 48. He noted the 006 MMU section had been cited for the same condition previously on two occasions. *Id.* As with the previous citations, Hatfield testified he showed management officials a copy of the roof control plan, including Safety Precaution No. 7.⁶ Tr. 48.

⁵Several different types of metal straps had been used at the mine as supplemental roof support. The least substantial were “bacon strips,” thin, short metal straps anchored at the ends with roof bolts and roof bolt plates. The bacon strips were approximately five feet long and 22 inches wide. Tr. 124-125. They often were used to support small kettle bottoms or small rocks that could not be pulled or scaled down. Tr. 40. The company stopped using the strips a year or two before Hatfield issued the contested order. Tr. 370. They were replaced by “T-3” and “T-5” metal straps. The T-3 and T-5 straps were thicker and longer than the bacon strips. They could hold more weight and cover greater areas. Tr. 40.

⁶ However, Thomas asserted he and Hatfield did not discuss the plan and the precaution (Tr. 251), and Thomas strongly disagreed with Hatfield’s assessment as to the existence of the supposed kettle bottoms. He stated, “I never knew what . . . Hatfield was going to do from one time to the next. He’d call anything a kettle bottom. In my professional opinion . . . Hatfield did

THE ORDER

The stage was now set for the issuance of the contested order. On June 11, 2006, Timothy (“Tim”) Beckner, the mine superintendent, was at the mine. He traveled to the 005 MMU section. Beckner was “impressed” by what he saw. Tr. 365. He described the section as “good and clean.” *Id.* The roof appeared well supported. There were, he testified, T-5 metal straps “in every entry and every crosscut.” Tr. 368.

The next day Hatfield had a very different impression of the section. He arrived around mid-morning and traveled to the 005 MMU section. Thomas was with him. Section foreman Michael (“Mike”) Jefferson was also included in the group at various times.⁷

Hatfield first checked the section for imminent dangers. As he did, he testified he noticed the roof on the section contained surface cracks and other kinds of cracks, as well as unsupported kettle bottoms. In fact, according to Hatfield, there were more kettle bottoms on the section than on any other areas of the mine he had inspected. Tr. 52. Asked about the number of kettle bottoms, Hatfield stated, there were “quite a few . . . more than a dozen.” *Id.* He described them as “pretty obvious.” *Id.* Hatfield agreed there were “some straps” installed as roof support, but he could not remember where they were, how many there were, and whether they were T-3 or T-5 straps. Tr. 99, 104. As Hatfield began pointing out the cracks and kettle bottoms, Thomas stated he became “really frustrated” with Hatfield. Tr. 200.

The men walked up the number 4 entry and then walked to the number 1 entry and across the face, at which point Hatfield traveled back to the number 7 entry. Tr. 190. After seeing the section’s roof with what he believed were inadequately supported and unsupported surface cracks and kettle bottoms, Hatfield concluded the company was not complying with its roof control plan. Hatfield believed he had warned IO officials before about the need for roof control plan compliance. Therefore, Hatfield told Thomas he was issuing a section 104(d)(1) order, closing the section. 30 U.S.C. § 814(d)(1). Tr. 51-52. Thomas was “very upset.” Tr. 205.

Hatfield maintained, prior to issuing the order when he pointed out the conditions to Thomas and/or to Jefferson, “they never said anything.” Tr. 114. While not specifically denying this, Thomas asserted Jefferson tried to talk to Hatfield, and Hatfield “absolutely would not talk to him.”⁸ Tr. 204. Although they might not have said anything directly to Hatfield, Thomas was adamant he and Jefferson disagreed with Hatfield’s assessment of the area. *Id.*

not understand the word.” Tr. 252.

⁷Jefferson began working as a section foreman at the mine in 2003. Eight miners worked under his direction. Tr. 304-305.

⁸Beckner described Hatfield as “arrogant” and “overbearing.” Tr. 388. He added, “[Y]ou just can’t talk to him.” *Id.*

IO'S PHOTOGRAPHIC EVIDENCE-KETTLE BOTTOMS AND SURFACE CRACKS

At the hearing, the company introduced into evidence several photographs of the section's roof. According to Thomas, although the photographs did not depict every condition the inspector pointed out, they represented the types of conditions Hatfield observed. Tr. 206, 219, 222 The photographs were taken by Michael ("Mike") McMullen, who was in charge of the engineers working at the mine.

Thomas testified the area depicted in Respondent's Exhibit 1 (an area located in the No. 7 entry (Tr. 226, 259)) was thought by Hatfield to be an inadequately supported kettle bottom, but in Thomas's view the area did not "look anything like a kettle bottom." Tr. 201. Jefferson agreed. He thought the photograph showed "just slate, [a] sloughed area." Tr. 315, *see also* Tr. 349. According to Jefferson, the photograph was a good example of the type of areas Hatfield thought were kettle bottoms, but in fact were not. *Id.* Tim Beckner also agreed the photograph did not depict a kettle bottom. Rather, it showed "an indentation in the top." Tr. 380. Like Jefferson, Beckner felt the photograph was a good illustration of the kind of formation Hatfield mistakenly thought was a kettle bottom. Tr. 380-381.

Thomas also complained that Hatfield misidentified surface roof cracks he thought needed supplemental support. In Thomas's view, the formations Hatfield thought required support were not surface cracks. Rather, they were layered roof strata, where "one layer" of rock abutted another layer. Tr. 194. Thomas testified the photograph entered into evidence as Respondent's Exhibit 3 was an example of Hatfield's errors. The photograph showed layered shale. Tr. 383, 418. In Thomas's opinion, Hatfield really did not know what a surface crack was. Thomas stated, "[H]e was calling things that [weren't] surface cracks, surface cracks. He was calling two or three different types of situations surface cracks. He would call a stress crack . . . a surface crack⁹ He was referring to layered strata as surface cracks." Tr. 229-230. In fact, Thomas testified he saw no unsupported surface cracks when he traveled the section with Hatfield. Tr. 203. Thomas was sure all of the kettle bottoms and surface cracks that were present on the section had been supported as the plan required. *Id.*; *see also* Tr. 207. He stated, "There [were] metal straps all over that section." Tr. 199. He would have been comfortable sitting under the roof anywhere on the section. *Id.* In his opinion of the Respondent's photographic exhibits, the only one that showed a surface crack was Respondent's Exhibit 6, and that crack was properly supported with T-5 straps.¹⁰ Tr. 196; Resp. Exh. 6.

After Hatfield issued the order, Thomas asked his superiors to look at the section, and

⁹Thomas maintained the photograph entered into evidence as Respondent's Exhibit 4 represented a stress crack, not a surface crack. Tr. 230.

¹⁰In fact, mining engineer Fabian Boltralik thought the crack had more support than was necessary. He termed the support, "overkill." Tr. 422.

Jefferson asked his miners to halt all work. As a result, no additional roof support was installed until the section was seen by higher mine management officials.

THE CITED CONDITIONS AND THE DIAGRAM

Prior to the hearing, Thomas prepared a diagram (Gov't Exh. 9) depicting the cited areas of the 005 MMU section. *See* Stip. 20. Thomas's diagram lacked four outby coal pillars. They were added by Hatfield at the hearing. Tr. 60; Gov't Exh. 9. As depicted on the diagram, the faces of the 005 MMU section's seven entries were toward the top of the diagram. The outby areas of the mine were toward the bottom. Tr. 57.

Hatfield marked the diagram to indicate the locations of the cited cracks and kettle bottoms. He indicated the presence of cracks by drawing "wavy" lines. He indicated the presence of kettle bottoms by drawing circles. Gov't Exh. 9. The cracks and kettle bottoms extended outby three crosscuts from the face. Tr. 59.

In marking the diagram, Hatfield did not distinguish between surface cracks and other kinds of cracks. Tr. 111. He was asked if the cracks he cited and placed on the diagram were surface cracks. He replied, "I feel like . . . I saw surface cracks, but as far as putting them in that location [on the diagram], I didn't know that it was surface cracks but they are cracks – they were cracks in the roof." Tr. 70; *see also* Tr. 151. A short time later he stated, although his notes did not reflect the presence of surface cracks, "I do know that there were unsupported surface cracks." Tr. 70; *see also* Tr. 72. He also testified the cracks about which he was concerned were "intersecting . . . were multiple in nature . . . [and] they created an exposure of the workers to a roof fall." *Id.* He explained that when a crack exists, no one can determine how far it goes up into the roof or at what direction. It is possible for the crack to "box out" other cracks and leave a wedge of self supporting roof material, a wedge that is likely to fall. Tr. 71-72. The inspector stated all of the cracks he marked on Gov't Exh. 9 and all of the cracks he mentioned in his notes were adverse roof conditions requiring supplemental support. Tr. 73.

In Hatfield's opinion, it was the section foreman who should make a judgement call as to whether supplemental support was required. Tr. 130; *see also* Tr. 176. Mine superintendent Beckner agreed. Tr. 380. Beckner stated, if the roof was cracked the section foreman should look for several things, i.e., whether there were multiple cracks, whether a crack had a rock stuck in it, whether a crack was gapped with water and mud running out of it, and whether there was any material falling out of the crack. *Id.*, Tr. 385. All of these things were indices of surface cracks.

As for the kettle bottoms, Hatfield reviewed his notes and testified he saw 15 that were unsupported in the cited area. Tr. 69. However, his notes did not reflect all of the kettle bottoms he observed on the section. Rather, his notes were a "running document" he kept as he traversed the entries and crosscuts. Tr. 70. Hatfield did not record the diameters of the kettle bottoms, and he could not include any dimensions on the diagram. Tr. 149-150.

Hatfield especially noted, in the No. 3 entry two breaks outby the last open crosscut, there was a kettle bottom and near the kettle bottom were cracks that almost touched the kettle bottom's outside edges. He believed the cracks "loosen[ed] . . . the kettle bottom and . . . [roof] strata could fall." Tr. 64.

According to Hatfield, one way to support a kettle bottom was to install a roof bolt to one side of the formation and have the plate of the roof bolt extend over part of the kettle bottom.¹¹ Tr. 120-121. There were kettle bottoms on the 005 MMU supported in this way. Tr. 121. As for mine management's contention the formations he thought were kettle bottoms were not, Hatfield was sure he was right: "I've seen a lot of kettle bottoms and I don't know how I misidentified them." Tr. 83. He pointed out on June 12, prior to issuance of the order, no one took issue with his identification of the formations, and the same was true in connection with the previous citations he issued involving kettle bottoms. Tr. 84.

Hatfield testified miners working on the section were required to travel through the cited area. Tr. 67, 75. He believed the inadequately supported and unsupported cracks and kettle bottoms were reasonably likely to result in falling roof and disabling injuries to the miners. Tr. 75-76; Gov't Exh. 1. He termed the conditions "very dangerous." Tr. 76. He also believed IO was highly negligent in allowing the conditions to exist. He emphasized that prior to June 12, he had talked to management officials about the need for supplemental support, "and it just seemed . . . [he] wasn't getting anywhere with just writing a citation." Tr. 76.

THE CITED CONDITIONS FROM MANAGEMENT'S VIEWPOINT

Jefferson could not accompany Hatfield during all of the inspection. After Jefferson left, Hatfield and Thomas continued across the section. When Jefferson learned Hatfield was issuing a withdrawal order closing the section, Jefferson was surprised. Tr. 307. He gathered the crew and sent them out of the section. Tr. 308. Jefferson then walked with Hatfield back across the section. Jefferson had a can of paint and he "paint[ed] places where [Hatfield] felt an extra bolt or strap should go." Tr. 309. Jefferson maintained the places Hatfield wanted him to mark "really didn't make sense . . . because . . . straps . . . and bolts already [were] there." *Id.* In addition, Hatfield "was pointing kettle bottoms out that [weren't] kettle bottoms." *Id.* Rather, they looked to Jefferson like "different layers of . . . slate." *Id.* While Jefferson agreed there were some kettle bottoms in the section's roof, they had all been properly supported. Tr. 310, 311. When Hatfield pointed out what he thought was an unsupported kettle bottom or unsupported crack, Hatfield would ask Jefferson if he agreed. Jefferson testified, "I never, not one time, agreed with him on anything he said." Tr. 319. (However, a close reading of Jefferson's testimony shows he did not testify he orally disagreed with Hatfield.)

Jefferson described the 005 MMU section as, "[O]ne of the best conditioned sections I've

¹¹Superintendent Beckner agreed this was a good way to provide a kettle bottom with support. Tr. 379.

had.” Tr. 320. Not only were the general roof conditions good, his crew had installed additional straps to make the roof “extra safe” because Jefferson had “preached to them every day, the mine’s only [as] safe as they make it.” *Id.* In fact, when Hatfield arrived at the 005 MMU section, the crew already had installed supplemental support in the form of T-5 straps where support was needed in the entries and cross cuts. Tr. 311, 313. Jefferson described his crew as “pretty upset” when they had to withdraw from the section. Tr. 325.

Jefferson was asked if he saw 15 unsupported kettle bottoms across the section. He answered, “No.” Tr. 311. Moreover, as was usually the case, the pre-shift report for the section had been called out to him before the day shift started. The pre-shift examiner did not mention any adverse roof conditions.¹² Tr. 324.

In the meantime, after Hatfield issued the order, Thomas called Tim Beckner and told him what had happened. Tr. 371. Beckner immediately went to the mine and traveled to the section. Hatfield was still there when Beckner arrived. Beckner asked Hatfield to walk the section with him and to point out the conditions needing supplemental support. Hatfield refused and left the mine. Beckner then traveled the section with Thomas. Beckner testified the formations pointed out to him as being unsupported kettle bottoms were not. They were “indentations in the fault, that were strapped . . . or just little rolls or bumps.”¹³ Tr. 377. Two or three times while Beckner and Thomas were traveling the section, Jefferson joined them. Jefferson expressed disbelief a withdrawal order had been issued. He said, “I thought we [were] doing a good job.” Tr. 394.

Boltralik also went to the mine after being informed of the order. Boltralik was a professional mining engineer. Tr. 403. He had been employed for approximately 29 years in underground coal mining. Tr. 405. Mike McMullen was his supervisor. Tr. 407. One of their jobs was to keep the mine’s roof control plan current and to resolve issues regarding the plan. Tr. 410.

McMullen came to the mine, and he and Boltralik went to the 005 MMU section. Tr. 268. By the time they reached the section, Hatfield was gone. Tr. 292. Boltralik, McMullen, and Thomas looked at the entire area covered by the order. Tr. 410, 430. Thomas pointed out at least a dozen areas Hatfield believed were in violation of the roof control plan. Tr. 430. Some of the areas were marked with paint and some were not. *Id.* McMullen described his general reaction to the roof on the section: “I felt . . . they were doing a good job.” Tr. 271. Tr. 272. “I did not see anything to cause me any concern.” Tr. 277-278.

¹²The written report of the pre-shift examination could not be located and was not offered into evidence.

¹³When Beckner referred to “rolls” or “bumps,” he meant “just a little dent or . . . a little lump . . . something that is round, or just a round indentation in the top . . . a formation in the rock strata.” Tr. 377-378

As Thomas showed Boltralik and McMullen roof areas Hatfield indicated were in violation of the plan, McMullen took photographs. Respondent's Exhibits 1 - 7 are several of the photographs. Tr. 269. According to McMullen, he photographed areas where Thomas said Hatfield "implied there was a crack or a kettle bottom and there wasn't." Tr. 278. Boltralik estimated the photographs represented 20 percent of the cited area. Tr. 435.

The company's witnesses generally agreed the formations pictured in the photographs did not require supplemental support and did not violate the plan. For example, McMullen termed the crack pictured in Respondent's Exhibit 4 as a "stress or tension crack," one commonly seen in mines and one not requiring supplemental support. Tr. 280; *see also* Tr. 284-285. He was not concerned about the crack because it had not "gapped." Tr. 285. Beckner stated the photograph showed "possibly a small hairline crack," nothing that would require supplemental support. Tr. 399. For his part, Jefferson did not believe Respondent's Exhibit 4 actually pictured a crack. Rather, the photograph showed "flaking." Tr. 333, 334. The area certainly did not need supplemental support. Tr. 354-355.

According to McMullen, another surface crack was shown in Respondent's Exhibit 6. He termed what was pictured as "a crack with a gap in it." Tr. 281. However, he was quick to note it had been properly supported with either a T-3 or a T-5 strap as required. Tr. 281. In fact, McMullen acknowledged there were "a lot" of surface cracks at the mine (Tr. 287-288), but none lacked requisite support. Tr. 281.

With regard to Respondent's Exhibit 3, McMullen stated he did not see any surface cracks. He thought the picture probably depicted "layers [or roof rock] that just broke up and there's no crack . . . not even a hairline crack." Tr. 281. Jefferson also did not see any unsupported cracks. Tr. 318.

Finally, McMullen did not think Respondent's Exhibit 1 showed a kettle bottom. Instead, it appeared to be a photograph of a place where a kettle bottom had been "mined out." Tr. 282.

HATFIELD'S JUNE 13 VISIT TO THE MINE

Hatfield returned to the mine around mid-morning on June 13. He was accompanied by Terry Price, his supervisor. *Id.*, Tr. 166. After they arrived, Doug Williams, the company's operations manager; Tim Beckner and Fred Thomas advised Price they disagreed with the order. They believed the 005 section should not have been shut down. Tr. 152-153. Price listened and then traveled underground to the section with Hatfield. Hatfield testified the section still contained unsupported cracks and kettle bottoms. Price described the roof on the section as containing "large cracks." Tr. 167.

Hatfield maintained he saw one particularly noticeable unsupported kettle bottom, and he asked Williams, who was traveling with him, if he would look at it. Williams did, and he then ordered the roof bolting machine operator to install a strap across it. Tr. 79. After that was done,

Price decided a part of the section could be “released” from the order and production could resume. The “release” applied to entries four through seven. The work of providing additional supplemental support continued in entries one through three. Tr. 79-80, 167-168. Later that afternoon, the order was terminated with regard to the entire section. Tr. 80.

REVISIONS OF THE PLAN

Following the termination of the order, the roof control plan was twice revised. The first revision, on June 6, 2007, added the following sentence to Safety Precaution No. 7: “When two or more cracks are encountered, the cracks will be strapped.” Resp. Exh. 9; Tr. 275-276. McMullen believed the sentence was added because of a roof fall at the mine. Tr. 276; *see also* Tr. 172. The second revision, on August 16, 2007, added the following sentence to Safety Precaution No. 7: “When two or more cracks run with the entry, crosscut or through an intersection, the cracks will be supported with roof channel (equivalent 3" x 8" wood collars) utilizing roof channel plates during the installation of primary roof support.” Resp. Exh. 8; Tr. 276-277. McMullen believed the phrase “utilizing roof channel plates” was added to officially require a practice (the use of roof channel plates) that IO already was routinely doing. Tr. 277.

RESOLUTION OF THE ISSUES

THE ALLEGED VIOLATION

The primary issue is whether the Secretary can prove IO violated section 75.220(a)(1) as alleged in the order. Echoing the standard, the Secretary notes, under section 75.220(a)(1) the operator is required: (1) to develop and follow an approved roof control plan; and (2) to take additional measures to protect persons if unusual hazards are encountered. The Secretary also notes the Commission’s holding that the “adequacy of particular roof support . . . must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to met the protection of the standards.” Sec. Br. 10 (*quoting Cannon Coal Co.*, 9 FMSHRC 667, 668 (April 1987)).

The Secretary asserts “multiple adverse roof conditions [on the applicable portions of the 005 MMU section] were either inadequately supported or completely unsupported.” Sec. Br. 10. She points to Hatfield’s testimony that he observed the adverse roof conditions and that they included surface cracks and kettle bottoms. Sec. Br. 5 (*citing* Tr. 51). She also references Hatfield’s testimony about ten areas containing either single unsupported cracks or multiple intersecting or parallel cracks that were not supported and his observation of 15 unsupported or inadequately supported kettle bottoms. Sec. Br. 6-7. She notes Hatfield, after reviewing his notes, was able to locate on the diagram (Gov’t Exh. 9) the ten areas containing cracks and “each” kettle bottom. *Id.*

In the Secretary’s opinion, Hatfield was the “only witness who presented competent and

credible testimony as to the hazardous conditions present at the time of his inspection.” Sec. Br. 11. She notes, neither section foreman Jefferson nor mine foreman Thomas was present during all of Hatfield’s inspection, and she asserts other company witnesses who testified – Beckner, Boltralick, and McMullen – did not arrive on the section until after substantial roof support was installed. *Id.* (citing Tr. 293). Therefore, according to the Secretary, “the Respondent[’s] witnesses could not testify to personal knowledge of all the hazardous conditions identified by . . . Hatfield.” *Id.*

IO responds Hatfield misidentified the cited roof conditions and the Secretary failed to carry her burden of proof. IO notes the description of the alleged violation set forth in the order is restricted to “multiple inadequately supported and unsupported surface cracks and kettle bottoms.” Resp. Br. 9 (citing Gov’t Exh. 1). Therefore, according to IO, the only evidence to be considered is that related to surface cracks and kettle bottoms. *Id.* 10-11. IO argues the Secretary failed to prove there were “multiple inadequately supported . . . surface cracks” as alleged in the order. Resp. Br. 11 (citing Gov’t Exh. 1). The company notes examples of cracks Hatfield contended were inadequately supported, and it asserts the testimony and evidence actually revealed they were properly supported. Rep. Br. 12-13 (citing Resp. Exh. 5, 6 and 7 and Tr. 176, 180, 195, 259-262 and 278, 309). The company also argues the inspector’s judgement was faulty and his testimony was not credible. Resp. Br. 13. IO points out that nowhere in the inspector’s notes was a crack described as a “surface crack.” *Id.* 17. Moreover, all of IO’s witnesses testified they saw no inadequately supported or unsupported surface cracks. *Id.* 19-22.

The company maintains, although the order specifically mentions only kettle bottoms and surface cracks, even if it is read to include instances of improperly supported non-surface cracks, the order should be vacated because the roof control plan does not require such cracks to be supported. The plan in effect when the order was cited referred only to “surface cracks” as requiring supplemental support. IO recognizes the plan required supplemental support for “adverse roof conditions . . . such as . . . surface cracks . . . or similar types of conditions in the mine roof,” but argues “non surface cracks are not another *type of condition*, but another *type of crack*.” Resp. Br. 23 (emphasis in original). Moreover, the subsequent revisions of the plan to require strapping “[w]hen two or more cracks are encountered” and when two or more cracks “[run] with the entry, crosscut or through an intersection” are significant in that they refer to cracks, not to surface cracks. “[T]here would have been no need to modify the . . . [p]lan to include conditions already covered.” Resp. Br. 24. In any event, IO asserts, if the plan and citation include “non-surface cracks,” the Secretary failed to meet her burden of showing the existence of non-surface cracks for which supplemental support was required. The company notes Hatfield agreed not all non-surface cracks require support (Resp. Br. 25 (citing Tr. 113)), and as for the non-surface cracks he believed required supplemental support, the evidence shows he was wrong. Resp. Br. 26-27.

As for the order’s allegation the 005 MMU section contained “multiple inadequately supported and unsupported . . . kettle bottoms,” the only evidence offered, aside from the order itself, was Hatfield’s testimony based on his notes, that he found the kettle bottoms at locations he

marked on the diagram of the section. IO contends the accuracy of Hatfield's identification of kettle bottoms is "highly questionable" and flawed. *See* Resp. Br. 27-30.

RESOLUTION OF THE ISSUE

A mine-specific roof control plan and its amendments establish requirements at the mine involved that are equivalent to mandatory safety standards. Once the operator has adopted a plan and the agency has approved it, the plan and its subsequent modifications must be followed by the operator. If the operator fails to comply, it may be cited for a violation of section 75.220(a)(1). When the citation is contested, either within 30 days of its issuance and/or subsequently when a penalty is proposed for the alleged violation of the plan, the burden of proof is on the Secretary to establish the violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (November 1995, *aff'd.*, *Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1330, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (November 1989; *Jim Walter Resources Inc.*, 9 FMSHRC 903, 907 (May 1987). The Commission has articulated the Secretary satisfies her preponderance of the evidence burden by demonstrating "that it [is] more likely than not" the cited violation occurred. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 13 (January 1997).

THE PLAN'S REQUIREMENTS

As previously noted, Precaution 7 stated:

When adverse roof conditions are encountered such as horsebacks, slicken-sided slip formations, clay veins, kettle bottoms, surface cracks, mud streaks or similar types of conditions in the mine roof, supplemental roof supports shall be installed in addition to primary roof support as appropriate in the affected area.

Gov't Exh. 6.

The wording makes clear Precaution 7 was directed at eliminating the hazard of roof fall from "adverse roof conditions." The wording also makes clear the requirement to install supplemental roof supports was not intended to be triggered solely by the enumerated conditions ("horsebacks, slicken-sided formations, clay veins, kettle bottoms, surface cracks," etc.). The words "such as" indicate the enumerated conditions were descriptive of the types of conditions encompassed by the provision. The enumerated conditions were not a complete catalogue of conditions requiring supplemental support. Thus, if a non-listed condition was "adverse," in that it made the roof more likely to a fall (the common characteristic of the listed conditions), it was governed by the provision and had to be adequately supported. In sum, under Precaution 7, conditions whose

presence made the roof more likely to fall than if they were not present, required supplemental roof support. However, alleged violations of the precaution must specify the violative conditions charged.

THE ORDER

In Order No. 7252422 Hatfield stated the way in which IO allegedly failed to follow the provision.

The 005 MMU has multiple inadequately supported and unsupported surface cracks and kettle bottoms. These conditions are in numerous locations across the entries and crosscuts from the Section Feeder and Power Center inby on the active 005 MMU. Some of the areas on the 05 MMU have intersecting surface cracks with no or inadequate support.

Gov't Exh. 1.

The order is specific. Its simple and direct language states the alleged violation is limited to "unsupported surface cracks and kettle bottoms," nothing more and nothing less. Hatfield specified no other allegedly adverse roof conditions in describing the violation and, therefore, the question is whether the Secretary proved by a preponderance of the evidence that on June 12, 2006, on the 005 MMU section, there existed "multiple inadequately supported and unsupported surface cracks and kettle bottoms" in "numerous locations across the entries and crosscuts from the Section Feeder and Power Center inby." Gov't Exh. 1.

THE SURFACE CRACKS

Hatfield described "surface cracks" as cracks that "make their way to the surface." Tr. 35. He explained surface cracks in the coal roof can be identified by one or a combination of the following visual indicators: discoloration caused by mud or minerals seeping from the overburden, mud in the cracks, a gapping of the cracks, and/or water issuing from the cracks. Tr. 34-35. Although a surface crack may be a single crack, it also may be a series of different interconnecting cracks starting at the roof and ending on the surface. Tr. 35-36. Hatfield's description did not conflict with the way surface cracks were described by IO's witnesses, and I conclude Hatfield knew what surface cracks were. However, it is not enough to know an adverse condition. The Secretary must show Hatfield sufficiently identified the "multiple unsupported and inadequately supported surface cracks" cited in the order, and it is apparent to me there are major problems with the Secretary's case in this regard. Gov't Exh. 1

The Secretary rather inexplicably offered no photographic evidence of the cited conditions. Further, Hatfield did not identify in the order the specific locations of the conditions; nor did he

describe them in any detail.¹⁴ Rather, the order speaks generally of “multiple inadequately supported and unsupported surface cracks” at “numerous locations” and of “[s]ome . . . areas” that have inadequately supported surface cracks. Gov’t Exh. 1. The order’s lack of detail regarding the precise location and description of the allegedly violative conditions does little to help the Secretary meet her burden of proof.

The Secretary totally relied on Hatfield’s markings placed on Thomas’s diagram of the pertinent part of the 005 MMU section – Hatfield’s “wavy” lines.¹⁵ After Hatfield marked the diagram, I asked, “[A]re these surface cracks that you’re referring to?” Hatfield’s reply was equivocal. “There’s surface cracks and I feel like – the best of my remembrance, I saw the surface cracks, but as far as putting them in that location, I didn’t know that it was surface cracks but they are cracks – they were cracks in the roof.” *Id.* Hatfield did not know which of the lines he placed on the diagram represented surface cracks, as the following exchange between Hatfield and the Secretary’s counsel shows:

Counsel: [Y]ou can’t say that all of these cracks you have . . .
in your notes were surface cracks, according to
your definition of surface cracks ?

Hatfield: No, not in these notes, but I do know that there were
unsupported surface cracks.

Counsel: So does that mean that more than one, i.e. some of
these cracks were unsupported surface cracks?

Hatfield: Yes.

¹⁴This is in sharp contrast to the practice of the Secretary’s inspectors when they cite violations of accumulations of combustible material. In those instances, inspectors almost always indicate the specific location of the cited accumulations, their color, dimensions and consistency.

¹⁵In the No. 7 entry, Hatfield identified an “unsupported crack.” Tr. 61. In the No. 6 entry, he identified “one crack.” *Id.* Between the No. 6 and No. 5 entries in the last open cross cut, he identified another “unsupported crack.” Tr. 62. He then identified unsupported cracks “[o]utby the last open crosscut, five to six” (Tr. 63) and two cracks in the last open crosscut between the No. 4 and No. 5 entries. (These cracks apparently had been indicated on the diagram by Thomas when he was deposed. *Id.*) He identified “two cracks” that ran over to a kettle bottom. *Id.* The cracks were located “two breaks outby the last open crosscut.” *Id.* He further identified three cracks “outby the last open crosscut number two [entry].” *Id.* Finally, he identified an “unsupported crack in number one entry inby the last open crosscut.” Tr. 65.

Counsel: Now, these other cracks that may have been surface cracks, they may not, you just don't have that in your notes, were these adverse roof conditions?

Hatfield: Yes.

Tr. 70-71.

Based on the lack of specificity regarding the location and presence of the “multiple inadequately supported and unsupported surface cracks” (Gov't Exh. 1), I conclude the Secretary did not carry her burden of proof. I reach the conclusion after noting the allegation regarding violative cracks is unequivocally restricted to “surface cracks.” It is true Hatfield testified “adverse conditions” in the form of other kinds of cracks existed (Tr. 71), but he did not mention the other conditions in the order, and the order cannot be expanded via his testimony to encompass conditions to which he never referred.¹⁶

Despite knowing surface cracks had distinctive visual indicators, Hatfield was not able to use the indicators to characterize the surface cracks allegedly constituting the violation. Nor could he state which of the cracks he drew on the diagram (Gov't Exh. 9) were surface cracks. In fact, his testimony regarding the nature of the cracks on the diagram was not entirely clear, but the most reasonable interpretation of what he said is while some of the cracks indicated on the diagram – indications made through reference to his notes – were surface cracks, some were not. He could not say which were which, nor could he otherwise conclusively locate the surface cracks. *See* Tr. 69-71. (“I saw the surface cracks, but as far as putting them in that location, I didn't know that it was surface cracks.” Tr. 70.)

There being no photographic evidence of the allegedly violative surface cracks, nor physical descriptions to distinguish them, the Secretary essentially maintains they existed somewhere in the area depicted in the diagram (Gov't Exh. 9) because Hatfield said so. This is not enough to meet her burden of proof, especially given the fact Hatfield in his notes – which were not offered into evidence – failed to distinguish between various kinds of cracks and only used the word “crack” or “cracks” as this exchange between counsel for IO and Hatfield established:

Counsel: [I]n all of the cracks . . . [you documented in your notes] you just wrote down the word crack; is that correct?

¹⁶Presumably it was possible prior to the hearing to modify the order to include the additional allegedly violative cracks other than surface cracks or other “adverse conditions,” but it was not done.

Hatfield: I wrote down crack, I wrote down cracks plural.

Counsel: Right.

Hatfield: Yes, I did.

Counsel: You made no distinction at all between a hairline pressure crack and a surface crack; is that correct?

Hatfield: I don't think I wrote down hairline or surface crack.

Counsel: You made no distinction between a crack and a surface crack; did you?

Hatfield: No.

Tr. 150-151.

To summarize, with no demonstrative or testimonial evidence establishing the physical appearance of the allegedly violative cracks and with no ability to establish which of the locations Hatfield identified actually represented surface cracks, I conclude the Secretary fell short of proving “[t]he 005 MMU [section] ha[d] multiple inadequately supported and unsupported surface cracks” and “[s]ome . . . intersecting surface cracks” as alleged in the order. Gov’t Exh. 1. The evidence and testimony offered by the Secretary should have been more specific.

THE KETTLE BOTTOMS

The allegation regarding “multiple inadequately supported and unsupported . . . kettle bottoms” is another matter. Gov’t Exh. 1. Hatfield first testified there were “quite a few . . . more than a dozen” and they were “pretty obvious.” Tr. 52. Counsel for the Secretary asked Hatfield “how many separate unsupported kettle bottoms” Hatfield identified in his notes, and Hatfield responded “I think there’s 15.” Tr. 68. These kettle bottoms had “no support at all.” *Id.* Hatfield did not recall the dimensions of the 15 kettle bottoms, but he knew they were kettle bottoms. (“I don’t remember the exact dimension[s]. I didn’t note it in my notes or the violation. I observed that they were kettle bottoms.”) *Id.*; *see also* Tr. 149-150.

Mine foreman Fred Thomas conceded a few kettle bottoms were present, but they were not “real noticeable” or “real prominent” (Tr. 199-200). However, he maintained the things Hatfield pointed out were not kettle bottoms. Tr. 201, 236. There was nothing on the 005 section Thomas felt was inadequately supported. Tr. 201-202. Hatfield was “seeing things that [weren’t] there.”

Tr. 201. Jefferson agreed with Thomas that Hatfield pointed out things that were not kettle bottoms. Like Thomas, Jefferson acknowledged there were some kettle bottoms on the section, but, he maintained, they were supported. Tr. 309 - 311.

As with the alleged surface cracks, the Secretary offered no photographic evidence to support her allegation of “multiple inadequately supported and unsupported . . . kettle bottoms.” She rested her case solely on Hatfield’s testimony the kettle bottoms existed as he indicated on Government Exhibit 9. The question is whether the Secretary proved by a preponderance of the evidence “multiple inadequately supported and unsupported . . . kettle bottoms” existed in the mine on June 12, and I conclude she did.

The testimony of Hatfield as to the existence of the kettle bottoms must be balanced against the testimony of the company’s witnesses as to their non-existence. Hatfield, an inspector of long experience in underground coal mines (Tr. 31-33), clearly knew what kettle bottoms were. Tr. 37-38, 69, 83-84. Company personnel who traveled with Hatfield on the day he issued the order and who saw the section before the order was terminated also knew what they were, and they uniformly maintained Hatfield incorrectly identified as kettle bottoms formations that were not. *See* Tr. 202, 309-311, 346, 377.

None of the witnesses were, in my opinion, disingenuous. As ardently as Hatfield believed he cited actual unsupported or inadequately supported kettle bottoms, the others believed he did not. However, on balance, I credit the inspector’s testimony that the inadequately supported and unsupported kettle bottoms existed as he indicated on Gov’t Exh. 9. I find it telling, as Hatfield himself noted, that when he pointed out the inadequately supported or unsupported kettle bottoms during the course of his inspection, neither Thomas nor anyone traveling with him disagreed. Tr. 84, 114. If, in fact, Hatfield misidentified kettle bottoms, it is reasonable to expect IO personnel to have protested long and loud, then and there. They did not. *Id.* A close reading of the testimony reveals it was after he issued the order that they began to argue he misidentified the formations.

Moreover, unlike the allegation involving the surface cracks, Hatfield testified each circle he drew on the diagram represented an inadequately supported or unsupported kettle bottom. His testimony in this regard was clear and it was persuasive. This was not a situation where some of the circles represented kettle bottoms and some did not.

For these reasons, I find the inadequately supported and unsupported kettle bottoms identified by Hatfield on Gov’t Exhibit 9 existed, and IO violated its roof control plan by failing to properly support them.

S&S

A significant and substantial (S&S) violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety and health

hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S, “if, based upon the particular facts surrounding a violation, there exists a reasonable likelihood the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). To establish the S&S nature of a violation, the Secretary must prove: (1) 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 will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *Buck Creek Coal Co., Inc.*, 52 F. 3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec’y of Labor*, 81 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985). Further, an S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (August 1985); *U.S. Steel*, 7 FMSHRC at 1130.

Finally, the S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September 1996).

The Secretary has established the violation, in that she has proven inadequately supported and unsupported kettle bottoms existed on the section as located by Hatfield on Gov’t Exh. 9. The inadequately supported and unsupported kettle bottoms posed discrete safety hazards, in that the material constituting the kettle bottoms was not part of the coal bed and the kettle bottoms could slip from the roof at any time unless adequate support was provided.¹⁷

The Secretary also established the inadequately supported and unsupported kettle bottoms were reasonably likely to result in a serious injury. When asked by his counsel why he found the violation to be reasonably likely to result in a permanently disabling injury, Hatfield responded, “I thought there was a potential . . . that there would be someone permanently disabled by falling strata.” Tr. 75. Throughout his testimony when using the word “strata” with regard to the roof, Hatfield included falling kettle bottoms. See Tr. 37-38, 64. Given the fact approximately eight miners worked and traveled under the cited kettle bottoms (Tr. 75), and given the fact the record establishes the inadequately supported and unsupported kettle bottoms could fall at any time (Tr.

¹⁷See American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms*, 2d. ed. (1996) at 297 (definition of “kettle bottom” stating a kettle bottom “may drop out of the roof of a mine without warning, sometimes causing serious injuries to miners.”)

43-44), I find the Secretary met her burden of proving the third element of the S&S criteria.

She also established the fourth element. Clearly, being struck by a falling kettle bottom subjected a miner to an injury of a reasonably serious nature or worse.

GRAVITY

The violation was serious. As I have noted, if a miner were struck by a falling kettle bottom, serious injury or death would most likely result.

UNWARRANTABLE FAILURE AND NEGLIGENCE

Hatfield found the violation was due to the unwarrantable failure of the company to comply with its roof control plan. Unwarrantable failure is “aggravated conduct constituting more than ordinary negligence by a miner operator in relation to a violation of the Act.” *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). It is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (February 1991); *see also Rock of Ages Corp. v. Sec’y of Labor*, 170 F. 3d 148, 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995) (approving the Commission’s unwarrantable failure test). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure and recognized a heightened standard of care is required of such individuals. *See Youghioghney & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987) (section foreman held to demanding standard of care in safety matters); *S&H Mining Inc.*, 17 FMSHRC 1918, 1923 (November 1995) (heightened standard of care required of section foreman and mine superintendent).

I conclude, while the Secretary established the existence of the inadequately supported and unsupported kettle bottoms was due to ordinary negligence on IO’s part, she did not prove IO’s lack of care was unwarrantable. Not all kettle bottoms in the cited area of the section were inadequately supported or unsupported. Witnesses from both sides agreed some kettle bottoms in the cited area were properly supported. I infer from this that there was not a wide-spread and reckless disregard of the requirements of the roof control plan. Rather, I find Jefferson tried, but failed to meet the standard of care required of him.

There was no showing by the Secretary that Jefferson’s failure was intentional. He was not as careful as he should have been in making sure all kettle bottoms in the area were properly supported, but he was not indifferent to his responsibilities. When observing the roof conditions, he simply misjudged some of the kettle bottoms. The understandable nature of Jefferson’s failure was shown by the genuine and good faith disagreements between the inspector and IO personnel

as to what constituted a kettle bottom.¹⁸

Because I have found the violation was due to Jefferson's and, therefore, the company's ordinary negligence, the order cannot be sustained.

OTHER CIVIL PENALTY CRITERIA

HISTORY OF PREVIOUS VIOLATIONS

The Secretary offered into evidence without objection an "Assessed Violation History Report" for the mine. Gov't Exh. 8. The report shows, in the 24 months prior to the issuance of the order in question, 317 violations had been assessed for the mine, 313 of which had been paid. Gov't Exh. 8 at 8. This is a large history.

SIZE

The parties stipulated IO is a large operator and the Europa Mine is a large mine. Stip. 21.

GOOD FAITH ABATEMENT

Following the issuance of the order, IO moved rapidly to support the cited conditions so the order could be lifted. This constituted good faith abatement on the company's part.

ABILITY TO CONTINUE IN BUSINESS

The parties stipulated any penalty assessed for the violation will not affect the ability of IO to remain in business. Stip. 4.

CIVIL PENALTY ASSESSMENT

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 U.S.C. §</u>	<u>PROPOSED ASSESSMENT</u>
7252422	6/12/06	75.220(a)(1)	\$6,900

I have found the Secretary proved the violation only so far as it is based on the cited kettle bottoms. Nonetheless, even though a major part of the alleged violation was not established, the

¹⁸Moreover, Hatfield's finding of unwarrantable failure and high negligence may have been based on personal pique more than on an analysis of the standard of care IO and its employees were required to meet. When asked why he found the violation was due to IO's "high" negligence, he responded, "Because I talked to the operator on several occasions about the roof control plan and it seemed I wasn't getting anywhere with just writing a citation." Tr. 76.

part that was proven represents a serious violation. I further have found the violation was not the result of IO's unwarrantable failure to comply, but, rather, was caused by its ordinary negligence. Given these findings and the other civil penalty criteria noted above, I conclude a civil penalty of \$2,500 is appropriate.

SETTLEMENT

In Citation No. 7252931, the Secretary alleged a miner had gone inby the last row of permanent roof supports in violation of the mine's roof control plan. The Secretary maintained the violation was the result of IO's high negligence and unwarrantable failure to comply with its plan. However, counsel for the Secretary explained, while the miner had proceeded inby the roof support as alleged, it was questionable whether the Secretary could establish her negligence and unwarrantable allegations. The Secretary noted IO management had no knowledge the miner was directed to go inby the support, and she noted the person who was responsible for the incident had been asked to leave IO's employ. The Secretary, therefore, agreed to modify the citation from one issued under section 104(d)(1) of the Act (30 U.S.C. § 814(d)(1)) to one issued pursuant to section 104(a). 30 U.S.C. § 814(a). She also agreed to modify an inspector's negligence finding to "moderate." For its part, IO agreed to pay a civil penalty of \$2,500 for the violation. Tr. 19-20. I approved the settlement. *Id.*

ORDER

The S&S finding in Order No. 7252422 **IS SUSTAINED**. The finding of unwarrantable failure upon which Order No. 7252422 is in part based **IS REJECTED**, and the finding of high negligence in Order No. 7252422 **IS MODIFIED** to a finding of moderate negligence. The order itself **IS MODIFIED** from an order issued pursuant to section 104(d)(1) of the Act to a citation issued pursuant to section 104(a).

As agreed in the settlement, within 40 days of the date of this decision, the Secretary **SHALL MODIFY** the finding of high negligence in Citation No. 7252931 to a finding of moderate negligence and **SHALL MODIFY** the citation from one issued pursuant to section 104(d)(1) of the Act to one issued pursuant to section 104(a) of the Act.

Within 40 days of the date of this decision, IO **SHALL PAY** a civil penalty of \$2,500 for the violation of section 75.220(a)(1) set forth in Citation No. 7252422 and **SHALL PAY** a civil penalty of \$2,500 for the violation of section 75.220(a)(1) set forth in Citation No. 7252931. Upon modification of Citation No. 7252931 and payment of the penalties, this proceeding **IS DISMISSED**.

David F. Barbour
Administrative Law Judge

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