

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

February 17, 1999

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 94-274  
Petitioner : A. C. No. 46-01453-04123  
 :  
v. :  
 : Humphrey No. 7 Mine  
CONSOLIDATION COAL COMPANY, :  
Respondent :

**DECISION**

Appearances: Elizabeth Lopes, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for the Petitioner;  
Elizabeth S. Chamberlin, Esq., Consol Inc.,  
Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the Secretary of Labor against Consolidation Coal Company under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 820.

This case contains seven violations three of which were settled prior to the hearing. The operator agreed to withdraw the fourth (Tr. 317). The settlements and the motion to withdraw were placed on the record and approved (Tr. 17-20, 317). Accordingly, Citation No. 3304292 is modified to delete the significant and substantial designation and a penalty in the amount of \$693 is assessed. Citation No. 3116375 is modified to delete the significant and substantial designation and a penalty of \$94 is assessed. A penalty in the original amount of \$235 is assessed for Citation No. 3305650. And a penalty in the original amount of \$288 is assessed for Citation No. 3304289.

On April 18, 1995, a hearing was held with respect to the remaining three 104(a) citations. The transcript has now been received and the parties have filed post hearing briefs.

The parties have agreed to the following stipulations (Court Exhibit No. 1) which provide as follows:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977.

2. Consolidation Coal Company is the owner and operator of the Humphrey No. 7 Mine.

3. Operations of the Humphrey No. 7 Mine are subject to the jurisdiction of the Act.

4. Consolidation Coal Company is a large operator.

5. The maximum penalties which could be assessed for these violations pursuant to 30 U.S.C. ' 820(a) will not affect the ability of Consolidation Coal Company to remain in business.

6. MSHA Inspector William Ponceroff was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Citation Nos. 3304285, 3304287 and 3304288.

7. True copies of Citation Nos. 3304285, 3304287 and 3304288 were served on Consolidation Coal Company or its agent as required by the Act.

8. Citation Nos. 3304285, 3304287 and 3304288 are authentic and may be admitted into evidence for the purpose of establishing their issuance but not for the purpose of establishing the accuracy of any statements asserted therein.

9. Citation Nos. 3304285, 3304287 and 3304288 are not the subject of review proceedings before the Commission.

10. Consolidation Coal did not Contest Citation No. 3305609 and paid the fifty dollar (\$50.00) penalty assessed for this violation.

11. MSHA's Proposed Assessment Data Sheet accurately sets forth (a) the number of assessed penalty violations charged to the Humphrey No. 7 Mine for the period from January 1991 through February 1994, and (b) the number of inspection days per month during this period.

12. MSHA's Assessed Violations History Report, R-17 report, may be used in determining appropriate civil penalty assessments for the alleged violations.

13. The operator demonstrated good faith abatement.

Without objection, all stipulations were accepted except for No. 11, for which the operator was given five days from the close of the hearing to submit any objections (Tr. 13). No objections having been received, Stipulation No. 11 is accepted. In addition, operator's Exhibit No. R-4, a piece of wire mesh, is hereby admitted into the record.

Citation No. 3304285

Citation No. 3304285 dated, January 12, 1994, charges a violation of 30 C.F.R. ' 75.202(a) for the following conditions or practices:

The mine roof was not adequately supported or otherwise controlled starting 20' outby the first intersection from the 1 East injection point. The roof is eroded between the boards. In the second intersection outby the referenced location and continuing for a distance of 40' the roof is eroded between the boards exposing the rock. The 3rd intersection outby and continuing for 50' the roof is eroded 10" to 15" deep, 42" wide and 4' long. The boards are broken. The 4th intersection has loose roof, 2 roof bolts have fallen out and the roof is sagging. The roof is eroded 12" to 18" above the boards, 42" wide and 4' long. The crosscuts on each side of this intersection require additional support. The 5th intersection need additional support. The roof is broken around the cribs and is sagging for a distance of 60' toward the injection point. The second crosscut outby the walk through door to the main line needs additional support where the roof is eroded.

30 C.F.R. ' 75.202 sets forth the following:

(a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

The inspector who issued the subject citation testified that on the day in question he was conducting an inspection as part of a winter alert program (Tr. 28). According to the inspector during the winter the mine dries out and there are a lot more roof falls (Tr. 28, 120). A second inspector who accompanied the issuing inspector also stated they were conducting a winter alert inspection for hazardous conditions (Tr. 130).

The cited area is a travelway going from the main track to an injection point (Tr. 30-31, Exhibit No. R-1). It is an intake aircourse used to ventilate abandoned areas (Tr. 202). The area had been mined through several years ago and miners do not now have to pass through it to get to where they work (Tr. 31). But it is subject to weekly examinations (Tr. 33).

The issuing inspector stated that the entire passageway was several hundred feet and that a few hundred feet had unsupported roof (Tr. 36). In places head coal was gone and rock was exposed (Tr. 78). The immediate roof he could see was shale (Tr. 78). The inspector also testified that he saw no floor to ceiling supports in the areas he cited (Tr. 82). These descriptions were confirmed by the accompanying inspector who said the roof had deteriorated extensively and there were large areas where planks and boards were broken and there was a large amount of exposed roof (Tr. 130-131). This second inspector also advised that he had been in the subject area during the prior quarter and that since that time the roof had deteriorated drastically, which he attributed to the change in the weather and the drying out of the mine (Tr. 140-141, 147).

In contrast to the foregoing, the operator's ventilation foreman who was the weekly examiner for the travelway, testified that there was only some sloughing and breaking loose at the roof with a little powder falling down and some small piles on the ground (Tr. 167). He said the roof was in good shape without signs of breakage and that sagging was due to potting out (Tr. 192-193). Where the roof was eroded, it was bolted and intact to the roof with additional supports (Tr. 176). He did not believe any more supports were needed and stated that the area was sound (Tr. 191). In his opinion it was a pretty good travel area (Tr. 168). In addition, the ventilation foreman stated that the roof in this area had not changed since he began walking it ten years previously in 1985 (Tr. 156, 167). According to the operator's safety inspector who walked the passageway after the citation was issued, there was no problem with the roof and the top was not sagging (Tr. 222-223, 224-225).

The record also contains testimony specific to each location enumerated by the inspector in the citation. For the first intersection the inspector testified that the roof was eroded between the boards for twenty feet (Tr. 110). However, he further stated that he saw no signs of roof movement and that by itself the condition in this intersection was not a significant and substantial violation (Tr. 111). The accompanying inspector remembered the conditions in the citation, although he could not say they were in the first intersection (Tr. 145-146). According to the accompanying inspector the condition was significant and substantial (Tr. 146). The ventilation foreman took the position

that although there was roof erosion, the intersection was well bolted and supported (Tr. 175-176). After reviewing and evaluating the testimony, I conclude that the evidence presented by the Secretary is persuasive in establishing the existence and extent of the conditions cited. The issuing inspector offered precise and detailed descriptions and in all material respects his testimony was confirmed by the second inspector who had been sequestered.

With respect to the second intersection, the issuing inspector's testimony stated that the roof was eroded between the boards for 40 feet (Tr. 89). The accompanying inspector confirmed the distance involved, advising that he and the first inspector counted the number of planks to get the measurement (Tr. 132-133). The issuing inspector said that he would not consider this condition by itself to be significant and substantial because there were no other signs of roof deterioration in this location (Tr. 111-112). The ventilation foreman denied seeing any 40 foot distance and said there were only some areas that had potted out (Tr. 182-183). I find credible the evidence offered by the Secretary because the inspectors' recollections were clear, exact, and consistent. In light of these circumstances, the denials of the foreman are not convincing.

The issuing inspector testified that in the third intersection there were broken boards indicating that the roof was eroding away to a depth of 15 inches and a width of 44 inches (Tr. 112). Several boards adjacent to each other over the center of the entry were sagging where they were broken (Tr. 112-114). The sagging boards indicated that there was movement of the upper strata of the roof (Tr. 114). The roof showed signs of taking weight and there could be a failure (Tr. 112). The issuing inspector also asserted that the violation in this area was significant and substantial because the roof was taking weight and could fail (Tr. 112). The accompanying inspector verified the distance of 50 feet stating that he and the issuing inspector counted the boards which were quite a few in number and next to each other (Tr. 133). He had an independent recollection of the 50 feet (Tr. 144). On the other hand, the ventilation foreman said he did not see any eroded roof for 50 feet and nothing of the depth and height given by the inspector (Tr. 183-184). He did not see broken boards or anything major (Tr. 184). I find the Secretary's evidence convincing because of the precise measurements and comprehensive descriptions given by the two inspectors. The issuing inspector's explanation of why the conditions and their consequences were significant and substantial was particularly cogent.

In the fourth intersection the issuing inspector stated that the roof was sagging and eroded, rock was exposed and two

roof bolts which had fallen out, were lying on the mine floor (Tr. 32, 84, 88). He explained that the roof was composed of consolidated strata (Tr. 43-44). The fallen bolts meant that the anchorage zone where the strata was secured had weakened and the strata were not tightly held together (Tr. 45). Roof erosion had exposed rock which allowed subsequent layers of the roof to shift (Tr. 88). When support weakens in the center the roof drops down and sags (Tr. 86). The inspector expressed the view that the violation in this area was significant and substantial because of all these factors (Tr. 115). Also he relied upon the fact that the crosscuts on either side of the intersection required additional supports (Tr. 115). He believed that these serious conditions could cause a failure of the roof and a fatality (Tr. 115). The second inspector remembered the fallen bolts, sagging roof and broken boards (Tr. 133-134). Here again, the operator's ventilation foreman disputed the inspectors on all important points. He admitted there were fallen bolts, but said they had been on the floor for 10 years (Tr. 183-184). He saw no sign of sagging and stated that the roof was merely potted out, but standing just as nice as it was (Tr. 184, 193). I find convincing the proof offered by the Secretary because it is based upon the exact and consistent recitals of the two inspectors. Also, the issuing inspector gave a comprehensive explanation of why the strata were not holding together. In light of the Secretary's evidence, the foreman's denials are not credible. I do not accept the argument that the bolts had been lying on the floor for ten years and that the roof was standing just as well as it had been.

According to the issuing inspector the roof had broken down around a crib in the fifth intersection so that the crib was no longer supporting the strata of the roof for a distance of 60 feet (Tr. 41-42, 86-87, 91-92). There were no additional supports and the roof was loose (Tr. 33, 93). The roof was sagging which indicated the consolidated strata was broken (Tr. 41-42). The fact that the roof was down over the crib meant the roof was weakened and not supported (Tr. 41-42, 87). Bolts were not effective which was why the crib had been built (Tr. 98-99). Head coal and shale were gone for a depth of 15 to 17 inches (Tr. 95). The inspector believed the violation in this area was significant and substantial because the crib no longer supported the roof and it was reasonably likely that the roof would let loose and somebody would be killed (Tr. 116). These observations were seconded by the accompanying inspector who also said that the roof was sagging around the crib and that fallen rock had pushed the head coal out (Tr. 131, 135). As with the other locations the ventilation foreman disagreed with the inspectors, asserting that he saw no broken cribs or sagging roof in the cited area (Tr. 185, 189, 209-210). According to the foreman the cribs were in another place (Tr. 185). The company safety

inspector testified that during his walk through the area after the citation was issued he did not see anything like what was described in the citation (Tr. 222). Unlike the ventilation foreman he saw a crib in the area but said it was as good as when it was put in (Tr. 223-224, 229-230). I find persuasive the descriptions, explanations and conclusions of the inspectors.

As appears from the testimony set forth above, a conflict exists between the inspectors and the ventilation foreman over the conditions at the various cited locations. At one point the foreman characterized these differences as a judgment call (Tr. 199). I do not accept this characterization. When one party sees several adverse conditions and the other party denies their existence, the issue is not one of judgment but rather one of credibility. In light of the detailed and precise recollections of both inspectors, I cannot find that they did not see what they reported. Nor can I find that they fabricated the conditions about which they testified. Their testimony and the manner in which they gave it simply are too direct and convincing. This is why as trier of the facts, I find the Secretary's evidence more persuasive.

In addition, other factors cast doubt upon the operator's case. The foreman's allegation that the travelway remained unchanged for ten years strains credulity, because it is premised upon the mine being impervious to atmospheric, climatic and seasonal changes for a decade or more (Tr. 167). Far more telling is the evidence of the accompanying inspector that the roof conditions had deteriorated drastically since the prior quarter or two when he last visited this area of the mine (Tr. 141). In addition, the testimony of both inspectors that the winter is especially hazardous due to drying out in the mines is supported by the fact that this inspection itself was part of a winter alert (Tr. 28, 42, 120, 130).

In light of the foregoing, I find that the conditions and practices existed as charged in the citation and described by the inspectors. It is therefore, my conclusion that the roof was not adequately supported or controlled to protect persons from hazards related to falls of the roof.

Under the mandatory standard, quoted supra, the area required to be adequately supported or controlled is one where persons work or travel. Both inspectors testified that the weekly examiner would go through this travelway weekly in order to make the examination mandated by 30 C.F.R. ' 75.364 (Tr. 33, 102, 137). They also said that rock dusters could be in the area (Tr. 47, 108-109, 138). The foreman agreed that for the past ten years he had walked the travelway weekly in his capacity as weekly examiner and that when he was going to be unavailable he

found someone else to do it (Tr. 158). He also said that in his absence the general mine foreman performed the exam or assigned someone else (Tr. 211). The foreman initially emphasized that he usually did the weekly examination by himself (Tr. 158-159). However, when asked if he then would be the only one who would know about unreported conditions, he responded that the general mine foreman travelled the area at least once a month and that because the mine had been on strike, in the last year he had performed the weekly inspections only 50% of the time, while another man did the rest (Tr. 211-214). Upon consideration of the testimony, I find the area was one travelled weekly by examiners, at least monthly by the general mine foreman and occasionally by rock dusters. The cited travelway is, therefore, covered by the mandatory standard and a violation existed in all locations described by the inspectors. Tunnelton Mining Company, 12 FMSHRC 2602 (December 1990).

As set forth above, the issuing inspector found that the violations in the third, fourth and fifth intersections were significant and substantial. The Commission has determined that a violation is significant and substantial if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature. Peabody Coal Company, 17 FMSHRC 508 (April 1995); Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981); U.S. Steel Mining Company Inc., 6 FMSHRC 1573, 1574, (July 1984). In Mathies Coal Company, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth the requirements necessary for a finding of significant and substantial as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

I have found a violation of the mandatory standard. The inadequately supported or controlled roof contributed to a measure of danger because the roof could fall in the third, fourth and fifth intersection. The recital by the issuing inspector why there was a reasonable likelihood of a fall in these areas was based upon cogent explanations of what was happening to the roof and what could reasonably be expected to happen. The serious deficiencies in roof support and control and



the consequences of these shortcomings satisfy the reasonably likely requirement. Finally, it was reasonably likely that a roof fall would result in reasonably serious injuries or even death. Accordingly, I conclude that the violation was significant and substantial in the three intersections identified by the issuing inspector. Based upon these considerations and the evidence regarding the first two intersections, I conclude that for purposes of determining the level of gravity under section 110(i), the violation was serious in all cited locations.

With respect to negligence, another factor to be taken into account under section 110(i) in determining the appropriate amount of penalty, the issuing inspector believed the level was only moderate (Tr. 48-49). He found negligence was mitigated because before the citation was issued, the foreman had taken steps to change the route of travel away from the cited area by bringing a man door into the area (Tr. 49, 73). The accompanying inspector agreed that a man door had been moved to the area, but not yet installed (Tr. 139, 152). Both inspectors reported that the foreman told them he intended to reroute because of the bad roof conditions (Tr. 48-49, 124, 125, 140). However, because the foreman had denied the existence of all the adverse conditions, he was placed in the curious position of having to deny that he had any prior intention of changing the travelway or that he had brought up a man door for that purpose (Tr. 166, 171). I find the testimony of the inspectors more credible on these points and based thereon I conclude that because of the dangerous state of the roof, the foreman had decided to move the travelway before the citation was issued. As the foreman acknowledged, it took only one shift to reroute and the distance to the injection point was much shorter the new way (Tr. 169). However, I do not agree with the inspector that bringing one man door into the area is sufficient reason to reduce the level of negligence to moderate.

The severe conditions in the area had existed for some weeks or months (Tr. 47, 140-141). Moreover, the weight of the evidence demonstrates that the ventilation foreman must have been aware of the state of the roof for some time. His failure to take corrective action created risks for other examiners, the general mine foreman and rock dusters. Therefore, I find that the foreman was highly negligent and that in view of his position his negligence is imputable to the operator. Nacco Mining Co., 3 FMSHRC 848 (April 1981); Southern Ohio Coal Co., 4 FMSHRC 1459 (August 1982); Rochester and Pittsburgh Coal Company, 13 FMSHRC 189, 194-198 (February 1991); Mettiki Coal Co., 13 FMSHRC 760, 772 (May 1991); Virginia Crews Coal Co., 15 FMSHRC 2103, 2106 (October 1993).

In accordance with the stipulations of the parties which I have accepted the operator is found to be large in size; imposition of a penalty will not affect its ability to engage in

business; there was good faith abatement, and the operator's history of prior violations is as it appears in evidence submitted by the Secretary.

One final matter. In its post hearing brief, the operator questions the credentials of the issuing inspector because he had not been in the Pittsburgh seam for eight years (Tr. 55-56). The inspector was a trained expert in roof support systems and conducted roof control inspections twice a week in the years he had been in the west and away from the Pittsburgh seam (Tr. 58-59). He returned to the Pittsburgh seam as the roof control supervisor (Tr. 61). I find the inspector fully qualified. In this respect I note that the operator's ventilation foreman maintained that conditions in the subject travelway had not changed for 10 years.

Upon consideration of the foregoing, a penalty of \$700 is assessed for this violation.

Citation No. 3304287

Citation No. 3304287 dated January 12, 1994, charges a violation of 30 C.F.R. ' 75.364(h) for the following alleged conditions or practices:

An inadequate weekly examination was conducted in that a record of the hazardous conditions and there locations were not recorded in the weekly examination book. There were several locations where the roof was not adequately supported or controlled as identified in Citation No. 3304285 dated 1/12/94. There was also float dust extended for a distance of 22 blocks as referenced in citation 3305609, dated 1/12/94. These conditions occurred in the entries into the 1 East injections point.

30 C.F.R. '75.364(h) provides as follows:

(h) Recordkeeping. At the completion of any shift during which a portion of a weekly examination is made, a record of hazardous conditions, their locations, and the corrective action taken, and the results and location of air and methane measurements shall be made.

The record shall be made by the person making the examination or a person designated by the operator and shall be countersigned by the mine foreman. If made by a person other than the examiner, the examiner shall verify the record by initials and date.

There is no dispute that the ventilation foreman did not record any hazardous conditions for the subject areas in the weekly examination book (Tr. 47). The issue is whether there were hazardous conditions which the regulations require to be reported. The underlying circumstances which the foreman had not reported were float coal dust and the inadequately supported roof (Tr. 51-52). The inspector testified that the float coal dust violation was not significant and substantial (Tr. 107). I note that the operator paid the assessed penalty of \$50 for this violation, an amount customarily reserved for non serious violations (Stipulation No. 10). Accordingly, I find that the float coal dust violation was not serious and that it was not a hazardous condition which was required to be reported.

The roof conditions are another matter. As set forth above, I have found violations of the roof in the third, fourth and fifth intersections to be significant and substantial as well as serious. Under these circumstances I reject the foreman's assertion that there was nothing hazardous to report (Tr. 203-205). I find that the roof conditions in these locations were

hazardous and should have been recorded. I also accept the inspector's testimony that the failure to record by the foreman increased the likelihood that someone could be injured by the roof (Tr. 48). Accordingly, I find that the failure to record the roof problems was a significant and substantial as well as a serious violation. Consolidation Coal Co., 15 FMSHRC 1408, 1415 (July 1993); Consolidation Coal Co., 15 FMSHRC 1264, 1272 (June 1993); Eagle West Inc., 14 FMSHRC 1800, 1802 (Nov. 1992); Kaiser Steel Corp., 5 FMSHRC 2224, 2229 (Dec. 1983). Because the dangerous state of the roof existed for an appreciable period of time and must have been known to the foreman, I find that he was highly negligent and that, as previously explained, his negligence is imputable to the operator. The remaining criteria under section 110(i) have been set forth above.

Upon consideration of the foregoing, a penalty of \$500 is assessed for this violation.

Citation No. 3304288

Citation No. 3304288 dated, January 21, 1994, and challenged herein, charges a violation of 30 C.F.R. ' 75.202(a) for the following alleged condition or practice:

The mine roof was not adequately supported or controlled in the old 1 East Loop, one car inby the explosive car. There is a hanging rock approximately 10' high x 8" to 2' wide x 3' long and 2" thick in a roof cavity area the wire side of the tracks. There are also large rocks causing the screen to sag to the extent that the wire is broken on one side. This is an inactive area. The rock is located so that when it falls it could knock the trolley wire into the cars; causing a hazard to the person installing the line switch.

The inspector who issued the citation testified that the roof in the Old East Loop was inadequately supported. This area was a side track that ran off the main entry where supply cars and lowboy cars were kept (Tr. 237-238, 253, 295-296). An earlier roof fall had created a cavity in the roof of this track (Tr. 257-258). The cavity was covered with a wire mesh screen (Tr. 236). According to the inspector, the wire was broken in places and the screen was loaded with rocks, some of which had fallen out of the screen to the ground (Tr. 238-240, 274, 280). The broken wires were on the tight or wire side of the entry (Tr. 277-278). In addition, a large rock, 2'x 3'x 2", was hanging in the cavity behind the broken wire and on the tight side of the entry (Tr. 236, 237, 276-277). The inspector who accompanied the issuing inspector confirmed that there were broken strands in the

mesh and that loose material was hanging suspended in the screen with large and small rocks (Tr. 282-283). The operator's safety supervisor agreed that a mesh screen covered the cavity and that a large rock of the dimensions given by the issuing inspector was hanging inside the cavity (Tr. 298-299, 315-317). However, the supervisor did not see any breaks in the mesh wire or any rocks on the ground (Tr. 311). He expressed the opinion that what the inspector thought were breaks was only overlapping pieces of wire (Tr. 296-298). Upon due consideration, I am convinced by and accept the testimony of the two inspectors that there were breaks in the wires and that rocks had fallen through and were lying on the ground. The presence of the large hanging rock in the cavity was acknowledged by all the witnesses.

There is no dispute that the fireboss walks through the cited area on his preshift examination and I so find (Tr. 268, 302). The issuing inspector believed supplies would be stored in this side track and that people would go there to get them (Tr. 241-243, 270). However, he did not remember the type of cars in the side track (Tr. 256-257). The safety supervisor testified that the car under the fall was a lowboy and there was another flat car in front and six or seven cars behind (Tr. 302). The safety supervisor did not know why the lowboy was parked in the side track, but said it could be used to carry equipment and was low to the ground so a piece of equipment could be put on it (Tr. 303-304). I find that individuals would enter this area to use the lowboy for transport of equipment.

In light of the foregoing, I conclude that a violation of ' 75.202(a) existed. The roof was not adequately supported or controlled due to the large hanging rock as well as the other rocks which were either held by the mesh or had fallen through to the floor. Clearly, this was an area where people worked and travelled.

The issuing inspector believed it reasonably likely that a serious injury would result if the hanging rock fell (Tr. 243). He stated that the rock could fall at any time without any intervening conditions, just some vibrations or further deterioration (Tr. 244). The safety supervisor did not believe the roof was inadequately supported or that there was a reasonable likelihood of substantial injury (Tr. 296-297). His opinion is based upon wire mesh holding the rocks (Tr. 300). However, I have found that the wires were broken and that some rocks were on the ground. In view of these circumstances, I accept the view of the inspectors that it was reasonably likely the rocks could fall and hit someone (Tr. 243, 285-286). I further conclude this hazard was reasonably likely although the broken mesh and the rocks were on the wire side of the entry. When rocks broke through the already damaged mesh, persons in the

entire entry would be at risk not just those who might be directly under the cavity. I am persuaded by the evidence that falling rocks could hit the lowboy car and give a glancing blow to an individual in the entry (Tr. 245-246, 285).

The inspectors also were of the view that it was reasonably likely that a falling rock could hit the energized trolley wire in this track causing the wire to fall on the car leading to a shock or a burn (Tr. 263-264, 285-286). I reject this suggestion. The issuing inspector admitted that the preshift examiner would not have to energize the trolley wire when he entered the area (Tr. 269). There is no showing when or how often the trolley wire would be energized by other people going into the area. In other words, the reasonable likelihood of a hazard from an energized trolley wire would depend upon the occurrence of intervening events, the likelihood of which was not shown by the Secretary.

I have found a violation of the mandatory standard. The inadequately supported or controlled roof contributed to a measure of danger because the roof could fall. As explained above, there was a reasonable likelihood the hazard would result in injury and there can be no doubt that the injury would be serious. Accordingly, I conclude that the violation was significant and substantial. Mathies Coal Company, supra. Based upon these considerations, I also conclude that for purposes of determining gravity under section 110(i), the violation was serious.

With respect to negligence, another factor to be taken into account under section 110(i) in determining the appropriate amount of penalty, the issuing inspector found moderate negligence. Although he did not know how long the conditions had existed, he estimated that they occurred over a couple of shifts to a couple of days (Tr. 251-252). He did not know how long the cars had been in the side track (Tr. 256). The evidence supports a finding of nothing more than moderate or ordinary negligence and that is what I find.

In accordance with the stipulations of the parties which I have accepted the operator is found to be large in size, imposition of a penalty will not affect its ability to engage in business, there was good faith abatement, and the operator's history of prior violations is as it appears in evidence submitted by the Secretary.

Upon consideration of the foregoing, a penalty of \$350 is assessed for this violation.

POST HEARING BRIEFS

The post-hearing briefs filed by the parties have been reviewed. These briefs have been most helpful. To the extent the briefs are inconsistent with this decision, they are rejected.

ORDER

It is ORDERED that Citation Nos. 3304292, 3116375, 3305650, 3304289, 3304285, 3304287, and 3304288 be AFFIRMED.

It is further ORDERED that the findings of significant and substantial for Citation Nos. 3304285, 3304287, and 3304288 be AFFIRMED.

It is further ORDERED that Citation Nos. 3304292 and 3116375 be MODIFIED to delete the significant and substantial designations.

It is further ORDERED that the negligence findings for Citation Nos. 3304285 and 3304287 be assessed as high.

It is further ORDERED that the following penalties be ASSESSED:

Citation No. 3304292	\$693
Citation No. 3116375	\$ 94
Citation No. 3305650	\$235
Citation No. 3304289	\$288
Citation No. 3304285	\$700
Citation No. 3304287	\$500
Citation No. 3304288	\$350

It is further ORDERED that the operator PAY the above penalties totaling \$2,860 within 30 days of the date of this decision.

Paul Merlin  
Chief Administrative Law Judge

Distribution:

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