

CCASE:  
SOL (MSHA) V. SOUTHERN OHIO COAL  
DDATE:  
19890907  
TTEXT:

~1705

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
PETITIONER

CIVIL PENALTY PROCEEDING

Docket No. WEVA 88-187  
A.C. No. 46-03805-03846

v.

Martinka No. 1 Mine

SOUTHERN OHIO COAL COMPANY,  
RESPONDENT

DECISION

Appearances: Therese Salus, Esq., Office of the Solicitor, U.S.  
Department of Labor, Philadelphia, Pennsylvania,  
for the Petitioner;  
David M. Cohen, Esq., American Electric Power  
Service Corporation, Southern Ohio Coal Company,  
Lancaster, Ohio, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for two alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed a timely answer and contest, and a hearing was held in Morgantown, West Virginia. The parties filed posthearing briefs and proposed findings and conclusions, and the arguments presented therein have been considered by me in the course of this decision.

Issues

The parties settled one of the violations, and the settlement was approved from the bench during the hearing, and my settlement decision has been reaffirmed. With regard to the remaining contested violation, the issues presented include the fact of violation, the appropriate civil penalty assessment for

~1706

the violation, taking into account the civil penalty criteria found in section 110(i) of the Act, and whether or not the inspector's S&S and unwarrantable failure findings were properly made. Additional issues raised by the parties are identified and disposed of in the course of this decision.

#### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. 30 C.F.R. 75.1704.
3. Commission Rules, 20 C.F.R. 2700.1 et seq.

#### Stipulations

The parties stipulated to the following (Tr. 11-13):

1. The respondent and the subject mine are subject to the jurisdiction of the Act, and the presiding judge has jurisdiction to hear and decide this matter.
2. The contested order was properly served on the respondent by a duly authorized representative of the Secretary of Labor.
3. The alleged violation was abated by the respondent in a timely fashion.
4. The subject mine produced approximately 2.8 million tons of coal as of March, 1989, and the respondent company produced approximately 12.2 annual tons as of March, 1989.
5. The proposed civil penalty assessment will not affect the respondent's ability to continue in business.
6. The records obtained from MSHA's Office of Assessments reflects that the respondent was issued 55 section 104(a) violations citing violations of mandatory safety standard 30 C.F.R. 75.1704, over the 2-year period preceding the issuance of the contested order in issue in this case.

The respondent agreed that there is no dispute with regard to the section 104(d) procedural "chain" concerning the preceding section 104(d) citation relied on by the inspector to support the subsequently issued section 104(d) order (Tr. 17).

Discussion

Section 104(d)(2) Order No. 2895079, January 6, 1988, 30 C.F.R. 75.1403-9(c).

The parties agreed to settle this alleged violation, and they presented their oral arguments on the record in support of the proposed settlement, and a reduction of the initial proposed civil penalty assessment from \$1,000 to \$50.00.

Petitioner's counsel stated that the inspector based his order on his belief that the respondent exhibited a high degree of negligence in allowing a tripping hazard to exist along a shelter hole for two to three shifts. However, counsel confirmed that there is no credible testimony to support this conclusion and that the order should be modified to a section 104(a) citation because the unwarrantable failure finding cannot be supported, and there is no support for any finding that the respondent exhibited aggravated conduct in connection with the violation. Counsel also asserted that the condition was not entered in any preshift examination reports, and that the respondent immediately abated the cited condition. Counsel confirmed that the respondent's history of prior violations includes no previous violations of the safeguard provisions of 30 C.F.R. 75.1403-9(c), (Tr. 5-8).

Petitioner's counsel confirmed that she discussed the proposed settlement disposition with the inspector who issued the order on many occasions, and that he agreed with it (Tr. 10). After due consideration of the proposed settlement, it was approved from the bench (Tr. 10). My ruling in this regard is herein reaffirmed.

The remaining contested section 104(d)(2) Order No. 2895499, issued on January 6, 1988, cites an alleged violation of 30 C.F.R. 75.1704, and the condition or practice states as follows:

Additional roof supports are needed in the intake escapeway for the North Mine butts (031) section at Sta. #17845 where the roof is loose, broken and some spalling has occurred from around existing supports. The location has been reported in the examination book since 12/2/87 and no action has been taken to correct this condition since being reported.

In her opening statement at the hearing, petitioner's counsel asserted that on January 6, 1988, MSHA Inspector Frank Bowers, accompanied by UMWA Fire Boss Gary Pastorial, and the respondent's safety representative David Stout, conducted a regular inspection of the mine, and in the course of the inspection walked along the North Main Butts section belt into the

~1708

entry. At Station No. 17845, the inspector observed a danger tag that had been hung on or about December 2, 1987, by Mr. Pastorial. In the vicinity of the tag, Mr. Bowers observed cracked and broken roof and falling roof materials on the mine floor at the crosscut at the station in question. The condition covered an area of approximately 16 feet long and 2 to 3 feet wide. Based on his observations, and the fact that the danger tag had been placed there for more than a month prior to the inspection, with no indication of any remedial measures taken by the respondent to correct the conditions, the inspector issued the section 104(d)(2) order, with special S&S findings, citing a violation of section 75.1704.

Counsel stated further that after the inspection was concluded, the inspector went to the surface and reviewed the respondent's weekly examination books which contained references to the cited roof conditions since early December, 1987. This confirmed the inspector's belief that the conditions had existed for more than 1 month, and supports the issuance of the order (Tr. 15-16).

Respondent's counsel agreed that the cited conditions had been reported in the weekly examination books since December 2, 1987. However, he asserted that the book entries repeatedly, reflect that the area was "safe to travel" (Tr. 16).

Counsel asserted that section 75.1704, requires that at least two separate and distinct travellable passageways be maintained in a safe condition, and since the UMWA fire boss repeatedly noted in the book that the cited area was safe, no violation has been established. Further, even if it were to be determined that the cited area was unsafe, since the condition was never reported to mine management as unsafe, the unwarrantable failure finding by the inspector is not justified (Tr. 17).

#### Petitioner's Testimony and Evidence

MSHA Inspector Frank Bowers, testified as to his background and experience, and he confirmed that he issued the contested order during the course of his mine inspection on January 6, 1988 (Tr. 24). He stated that he observed that loose and broken rock had fallen from the roof in and around the existing roof supports in the area which had been tagged by fire boss Gary Pastorial on December 2, 1987. Mr. Pastorial informed him that he had continued to report the condition in his examination book since that date but could not get anything done about it (Tr. 26).

Mr. Bowers stated that the cited regulatory section 75.1704, requires that two separate and distinct escapeways be marked and maintained in safe condition at all times, and that one of them must be on the intake air. He confirmed that the cited area was on the intake escapeway, which was required to be isolated from

~1709

the belt and track with permanent cinder block stoppings, and that the track was used as the secondary escapeway. He also confirmed that the danger tag had Mr. Pastorial's initials on it, and the tag stated that "additional roof support needed here at Station No. 17845" (Tr. 27).

Mr. Bowers stated that the tagged roof area was not roped off or closed off in any way, and that the area was required to be examined weekly. He described the loose and broken roof, and stated that the roof materials on the floor were approximately a foot deep and extended across the entire entry which was approximately 16 feet wide (Tr. 28).

Mr. Bowers stated that he cited section 75.1704, rather than the roof control regulatory series under 75.200, because it is MSHA's policy to cite roof falls in the intake escapeway under section 75.1704 (exhibits G-3 and G-4; Tr. 29-31).

Mr. Bowers stated that roof "spalling" consists of rock that is breaking up around the existing roof bolts and plates, leaving the bolts and plates hanging down and no longer against the roof top. He confirmed that he observed the roof spalling, and also observed roof cracks approximately 2 feet wide and 16 feet long across the entry. The fallen roof materials were on the floor directly under the cracks, and he assumed that the conditions had existed since December 2, 1987, the date which was on the tag (Tr. 32). He described the sizes of the fallen materials, confirmed that the 4-1/2 to 5 foot spacing between the roof bolts was not a problem, but that the existing roof needed additional support "due to the roof deteriorating, broken and cracked and falling" (Tr. 33-34).

Mr. Bowers confirmed that he observed no other problems with the roof or the width of the escapeway, and that the materials on the floor did not impede travel through the escapeway. He estimated that the cited escapeway was 2,000 feet outby the working section. He confirmed that abatement was achieved by installing roof support posts, and that this took approximately one-half hour to an hour, and he considered this to be prompt (Tr. 35).

Mr. Bowers did not believe that his safety or health was in jeopardy when he walked into the cited area and stated that "it seemed to me it was just becoming unsafe to be traveled and the area needed attention. They had to install additional supports." He confirmed that the only person in the area would be the examiner who would be in the area once a week, and the only others exposed to any hazard would be miners travelling through the area in an emergency (Tr. 35).

Mr. Bowers stated that after his inspection, he travelled to the mine surface and reviewed the weekly examination books, and

~1710

he identified exhibit G-6 as copies of the examination records he reviewed with respect to Station No. 17845, and confirmed that from December 2, 1987 to the date of his inspection, different fire bosses, including Mr. Pastorial, noted that the escapeway in question needed additional roof support at the cited location (Tr. 40-42).

Mr. Bowers stated that he was not certain why the fire bosses noted in the examination book that "the area can be traveled," or whether or not they believed it could be physically traveled. He believed that one could physically travel the area, but was not sure whether the examiners believed that it was safe to travel the area. It was not clear to him what specific areas the examiners were referring to since several places were referred to in the examiner's notations (Tr. 42).

Mr. Bowers stated that he issued the unwarrantable failure order because the roof conditions he observed were a violation of the law, and he found that the respondent had known about the condition because it had been reported in the weekly examination book and took no action during this time to correct it (Tr. 44). He identified exhibit G-7, as MSHA's new policy guidelines, effective July 1, 1988, with respect to the issuance of unwarrantable failure orders (Tr. 45). He explained the factors he considered in issuing the order as follows (Tr. 46-49).

A. One here where it includes the amount of time the violation has been left uncorrected.

Q. And in this case, what facts do you feel justified an unwarrantable finding?

A. I feel from January 6 through December the 2nd was over a month was more than enough time to correct the condition, especially when it comes to a roof.

Q. How long did it take to correct it?

A. Approximately a half hour to an hour, probably, after they got the material over there.

Q. Were special materials necessary?

A. Well, they had to bring posts over. They set posts.

Q. Were they available at the site?

A. Somewhere along in the area they've got the posts, yes.

Q. The next factor, what is that?

A. "Whether the hazard created by the violation is particularly serious, thus warranting increased attention from the operator to vent or correct it."

Q. And in your opinion, what facts would support that, if any?

A. Well, you have an area here that you're going to use in event of an emergency for people to escape. You may have between your weekly examination, you could have a roof fall in the area which would then impede the travel for these people to get through this entry or it's possible that if a person would be walking down through there and spalling rock would hit him, it could cause serious injuries.

Q. Had a roof fall occurred or a more substantial fall occurred, would the operator have known about it?

A. In weekly examination.

Q. Only during the weekly examination?

A. Unless someone would go down through there, chances are they wouldn't detect it for the following week.

Q. And what about the next factor?

A. Okay, that's "Whether the violation is repetitious of a previous violation."

Q. And to your knowledge, was this?

A. Yes, it is repetitious.

Q. How do you know that?

A. I've issued several violations and orders at this mine, in particular, where they had stuff in the books and not taking action to correct it.

JUDGE KOUTRAS: The what? I'm sorry. I didn't hear that.

THE WITNESS: I say I've issued several violations and orders at this mine over the years, Your Honor, where they hadn't taken action to correct, it had been left in the books.

~1712

BY MS. SALUS:

Q. To your recollection were any of these conditions that you observed that have been left uncorrected, did any of them relate to intake escapeways?

A. I can't recall if it was just on intake escapeways. I've had some on track. I've had some in return entries, different areas, I'm sure possibly if I would go back through the records, I may find some on 1704.

Q. What about the next factor?

A. That's "Whether the violation was a result of deliberate activities by the operator."

Q. Did you consider that factor?

A. No, I didn't. I don't think there was any deliberate activities there.

Q. What about the next one?

A. That's "Or whether the operator knew or had reason to know that its actions violated a mandatory standard."

Q. And in your opinion, were the facts --

A. Well, I feel that they did know because it was being reported in their weekly examination book which by law the mine foreman and the superintendent or his assistant signs it and reads this book on a daily and weekly basis.

Mr. Bowers stated that he could have issued a section 104(a) citation, rather than an order, but did not do so because he found that the condition had been reported in the examination books and the respondent knew about it. He did not believe that the condition presented an imminent danger, and if he had issued a citation, he would have allowed the respondent an additional day to correct the condition (Tr. 50).

Mr. Bowers stated that at the time he walked the area, he did not believe that it was likely that the roof would fall in on top of him, but believed that anyone making an examination in the area would reasonably likely sustain serious injuries if pieces of spalling roof rock were to hit him, and that he could suffer broken bones, crushing injuries, or possible death. He believed that this was reasonably likely because "over the years we've had several people that have been hurt through roof falls and rock that's hit them and anywhere from serious injuries to death." He

~1713

also believed that the deteriorated top, which was "already loose and broken and spalling out," and the fact that the conditions were next to an intersection which was a bigger area and where the roof is weaker, were all factors contributing to the likelihood of a roof fall. He also considered the length of time that the conditions had existed as increasing the likelihood of a fall because "it's gradually going to deteriorate to where it will get worse" (Tr. 50-51).

Mr. Bowers stated he based his "high negligence" finding on the fact that the condition was noted in the weekly examination books, and the mine foreman or assistant superintendent signs the book on a daily or weekly basis, and "he sees what is there so I'm taking that they did know the negligence was there and should have been taken care of" (Tr. 52). When asked whether mine management "knew" or "could have known" that the condition posed a hazardous or dangerous condition, Mr. Bowers responded "that I don't know whether they would or not" (Tr. 52). However, he confirmed that he observed nothing which would lead him to conclude that any remedial action had been taken.

Mr. Bowers stated that he considered the violation to be S&S for the following reason (Tr. 53):

A. Well, anywhere where you have bad roof conditions where people are required to work or travel in these areas, you have the likelihood of a person being hurt or injured seriously in these areas from falling rock or roof, and that's what I base that on to be significant.

Mr. Bowers stated that the weekly examiner would be exposed to a roof fall hazard, and although he would be aware of the hazard, anytime he travels through the area, he would be exposed to the hazard. Although others on the section would also be exposed to a hazard, this would only occur if they had to use the entry to escape from the mine in an emergency (Tr. 55). Mr. Bowers confirmed that none of the respondent's representatives indicated that they had been aware of the cited conditions (Tr. 53).

On cross-examination, Mr. Bowers stated that with a roof spalling condition, the roof would come down in pieces, rather than in a massive fall, and that the falling material may be from 1 to 3 inches in thickness. He confirmed that most of the roof pieces he observed on the floor were broken up where they had fallen out between and around the bolts and plates (Tr. 56-58).

Mr. Bowers stated that the examination book notations "can be traveled" may or may not mean "safe to travel," and while this is unclear, he believed that "anytime you have an area where you need additional roof support it needs immediate action" (Tr. 60).

~1714

He confirmed that a person would not be in the area for a long time, and that he issued no other violations in the intake escapeway at the time of his inspection (Tr. 61).

Mr. Bowers stated that "If I find where it's being reported to you and you know about it and you're not taking any action to correct it, that to me is unwarrantable" (Tr. 62).

In response to further questions, Mr. Bowers confirmed that he made no measurements of the fallen materials, that the roof was 6 feet high, and that the materials will break when they hit the ground (Tr. 64). He saw no evidence of any falls above the roof bolts, saw no problems with the roof bolting pattern, and did not believe that the spalling affected the effectiveness of the bolts which were in place, except that the roof was starting to deteriorate and needed additional support (Tr. 65).

Mr. Bowers stated that the examination books do not indicate that the cited area was "safe to travel," and while the statements indicate that "it can be traveled," he was not sure what the examiners meant by this statement. He did not believe that the two statements mean the same thing, and he explained the difference as follows (Tr. 66):

A. Well, like I said a while ago, you could go through the area, but that does not make it safe due to this condition that you may have throughout the area. It may be like I'm reading in here where they're speaking of excessive water and one place here where it's over his boots, I don't know whether this examiner this date was talking about the water, but he's stating -- if the water is over your boots and it may be that that's what he meant, and it needs to be taken care of, but yet you can go through it.

Mr. Bowers did not know how many posts were installed to abate the condition, and he stated that someone walking through the area may never see the danger tag, which he described as "little," approximately 4 to 6 inches long, and 3 inches wide (Tr. 69). He confirmed that the roof-control plan itself would not require the respondent to address the spalling, loose and broken roof condition (Tr. 71). He could not determine why additional support was not installed sooner, and stated that Mr. Pastorial told him that he had advised the general mine supervisor about the condition (Tr. 72).

Mr. Bowers confirmed that MSHA's regulations do not explain the kind of danger tag which was at the cited roof area, and do not require such a tag. He agreed that one could interpret the tag to mean "I can walk through this area, but I'd better be careful" (Tr. 74). He confirmed that the tag was not an official MSHA danger tag such as those used by inspectors to prohibit

~1715

persons from walking through such an area. The tag was a company tag, and he could not say whether it would prohibit anyone from walking through the area (Tr. 75-76). He confirmed that the entryway was well marked and designated with reflectors.

Joseph Gary Pastorial, confirmed that he was the union fire boss at the time of the inspection, that his duties include the examination of the intake escapeways and the return airways, and that this is his full time job. He confirmed that he is required to travel the areas in question in their entirety, once a week, not exceeding 7 days (Tr. 78-81). He confirmed that any observed conditions which need to be corrected are entered in the weekly examination book. If he observes a condition that does not pertain to his particular area, or is not a violation, or a hazardous condition, but has a potential to be one, he communicates it to mine management, and usually to Mr. Metz, sometimes in writing, and sometimes verbally. He stated that this usually happens "maybe a couple of times a month" (Tr. 82).

Mr. Pastorial stated that he accompanied Mr. Bowers during his inspection and he confirmed that Mr. Bowers cited the "bad place in the roof" at Station No. 17845. Mr. Pastorial also confirmed that he had previously examined the area, and found that the roof had cracked and had loose rock, and had deteriorated to the point where it needed additional roof support to keep it from falling in. He tagged the area and recorded the condition in the weekly examination book (Tr. 84). He described the roof condition as a 3-foot "ripper" extending across the entry for approximately 16 feet. He stated that 4 to 6 inches of roof material had fallen from the center of the roof, and he estimated that it was "a couple of feet long by 2 or 3 inches thick and maybe 6, 8 inches wide." The roof was 6 to 6-1/2 feet high, and while he did not know the weight of the fallen material, he stated that "it was visible and you had to walk over it" (Tr. 85). He did not know the extent of the cracks, and described them as "gagged edges" and not smooth (Tr. 86).

Mr. Pastorial confirmed that he posted the tag in December, and wrote in the date, his initials, and noted that the area needed additional roof support. He obtained the tag from the mine safety department and it was the same type that is used to "danger out" electrical equipment (Tr. 86). He described the tag as 4 inches by 6 inches, and stated that he hung it just in by the roof where it was deteriorated, between the working face and bad place in the roof, and that he attached it to a roof bolt plate (Tr. 87).

Mr. Pastorial could not recall whether he advised anyone about the roof conditions other than entering it in the book, and although he does notify mine management in "a lot of instances" verbally or by written memo, he could not recall whether he did so in this instance (Tr. 87). Mr. Pastorial stated further that

~1716

he "sometimes" talks to Mr. Metz about the need for timbers, and while he thought he did in this case, he was not sure "so I don't want to testify yes or no" (Tr. 88).

Mr. Pastorial identified the notation entry which he made in the examination book on December 2, 1987, and he confirmed that while he noted that the roof needed additional support, he did not make any notation that he had dangered it off, because that is not standard procedure, and he had never done it before (Tr. 90).

Mr. Pastorial identified another entry which he made in the examination book on December 9, 1987, and he confirmed that he made a notation that the "North Main Butts Section intake escapeway needs additional roof support at Station No. 17845," and that he noted that the area "can be traveled" (Tr. 90). He explained that his notation "can be traveled" had the following meaning (Tr. 91):

A. It was my opinion that that area needed additional roof support just like it needed garbage cleaned and all those other violations corrected, but if a person had to get down through there in an emergency, it may or may not be safety (sic) but you could travel the entry.

Mr. Pastorial identified two additional examination book entries made by mine examiner Frank Latocha on December 17, and 26, 1987, where he noted "escapeway roof support at Station No. 17845" and that "intake escapeway needs additional roof support at Station No. 17845," and in both instances, Mr. Latocha noted that the area "can be traveled." When asked if he knew what Mr. Latocha meant by the notations "can be traveled," Mr. Pastorial responded "I can't speak for Mr. Latocha, but I believe it meant that people could get down through there if they had to" (Tr. 92).

Mr. Pastorial identified an examination book entry made by mine examiner Richard Eddy on December 28, 1987, which reflects that "escapeway needs additional roof support at Station No. 17845" and that the area "can be traveled." Mr. Pastorial stated that "I again cannot speak for Richard Eddy, but I believe that he means that there is a violation existing in this entry, but it can be traveled in the case of an emergency" (Tr. 93-94).

Mr. Pastorial stated that he finds nothing in the notations made by the other mine examiners which would lead him to conclude that they believed the area was safe to travel, and when asked whether "safe to travel" is the same as "can be traveled," Mr. Pastorial responded "absolutely not," and he explained his answer as follows (Tr. 95):

~1717

A. Safe to travel means to me that there are no violations, that you could travel that area without any problems whatsoever. Can be traveled means to me that you can get through that entry if you have to, but the violations, there are violations in the area that need to be corrected as soon as possible.

Mr. Pastorial stated that every entry that he has made in the examination books would reflect his opinion that the condition is either a hazard, or a violation, or both (Tr. 95). However, in response to certain bench questions, he responded as follows (Tr. 96-97):

JUDGE KOUTRAS: I notice a couple of entries that don't say anything. For example, Mr. Eddy made a notation for the period ending December 19th, which is the third page, "Grassy Run Mains intake escapeway safe to travel." That's all he said. What's that mean? Does that mean that he inspected that particular escapeway and found it safe to travel?

THE WITNESS: Which page was that, sir?

JUDGE KOUTRAS: Page 3 of the stapled fire boss books for the week ending 12/19 on line 1. Mr. Eddy says, "Grassy Run Mains intake escapeway safe to travel."

That's all he says.

THE WITNESS: Okay, as far as I know, if that was my entry, that would mean that he didn't see anything wrong there. It was perfect. It was well rock dusted, there was no loose roof.

JUDGE KOUTRAS: Well, why put it in there when it says the only thing you put in there is hazards noted.

THE WITNESS: Well, you have to indicate in the book that you traveled the area so that this is a record to prove that you made the weekly examination of the area. Generally, what I do now is put in the book, if I don't find anything in the area, I just put none observed.

JUDGE KOUTRAS: So it's not true that every entry that's made in here indicates a hazard or a violation? She asked you a question whether every entry that's made in these books indicates hazards or violations. Your response was yes. That's not accurate, is it. I mean, if someone just puts in there like he just did?

THE WITNESS: Yeah, technically, I guess you're right. I didn't mean to --

~1718

And, at (Tr. 98):

JUDGE KOUTRAS: In other words, what you're doing, the intent of this is to bring to the attention of someone various hazards?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: It might turn out that those hazards may not be specific violations of the standards, isn't that true?

THE WITNESS: That's possible, yes sir.

Mr. Pastorial confirmed that except for the fire boss who is in the area once a week, the only others in the area would be the section crew of 10 miners and their foreman, who would have to travel the escapeway every 90 days, and the crew who would have to travel the area in the event of a possible disaster (Tr. 99). He stated that he usually spends about 30 minutes inspecting the escapeway, that it would take him less than a minute to walk through the cited roof area, and that anyone else in the area would take less than a minute to walk through that area (Tr. 100).

Mr. Pastorial stated that to the best of his recollection, the roof condition in question had deteriorated between the time he tagged it on December 2, until the day of the inspection on January 6, because there was more spalling and more material on the floor. He speculated that there was some movement or shifting of the roof which was causing the material to fall. When reminded of the fact that examiner Eddy's notations were consistently the same, and did not indicate any worsening conditions, Mr. Pastorial responded "I can't speak for Mr. Eddy" (Tr. 101). He also stated that if he believes that an area which needs additional roof support is getting worse, he would normally tell Mr. Metz about it, but he was not sure that he informed him about this in this case (Tr. 102).

Mr. Pastorial confirmed that although he was in the cited area several times he did not feel that his safety was at risk because the roof had already fallen and was not cracking, popping, or working, but there was an indication that it had been, and that it took him only a couple of seconds to travel under it (Tr. 103).

Mr. Pastorial stated that he was not sure that an accident or injury was likely, and that it was possible that anytime a roof has deteriorated, a fall was possible. He did not believe that it was particularly likely that he would be injured "because I walked under it" (Tr. 103). He confirmed that he was more concerned that the escapeway would be blocked or would have

~1719

restricted escape in an emergency, rather than the roof falling and striking someone, and he recalled three or four instances in his experience where roof falls have restricted an escapeway (Tr. 104). He also believed that the intersection is the weakest part of the entry, and that a fall would likely occur at an intersection rather than in the entry itself (Tr. 106). He stated that 8 to 10 posts were set on each side of the "ripper" to provide additional roof support, and that these materials were readily available in the mine (Tr. 107).

On cross-examination, Mr. Pastorial stated that he did not danger the area off, and that he uses the tag "to identify the area and caution the people in that area." Had he dangered it off, he would have entered this in the book and "would have contacted Mr. Metz and had him withdraw his people" (Tr. 109). He confirmed that he has worked with Mr. Metz for 14 years and tries to make it a practice to see him every day (Tr. 110).

Mr. Pastorial stated that "safe to travel" means "the people can go through there, but that doesn't mean -- there can still be a violation in the entry." He confirmed that he has never discussed this interpretation with Mr. Metz because he has had no occasion to do so and has never been questioned on his entries in the examination book (Tr. 110).

In response to further questions, Mr. Pastorial stated that roof falls are required to be reported, but that he did not consider the cited conditions to be a roof fall (Tr. 112). He acknowledged that he and the other examiners have used the terms "can be traveled" and "safe to travel" in some of their examination book entries, but that he has rarely used the term "unsafe to travel" unless there is a roof fall or deep water that impedes travel (Tr. 112). He indicated that the phrase "can be traveled" means "there are violations that exist in the entry, but you could still get down through there if you have to" (Tr. 113). He confirmed that he is reluctant to danger off every area that needs timbering and that he uses his own judgment "on how bad or how serious it is" (Tr. 114).

Mr. Pastorial confirmed that the examination book records which he testified about are signed daily by Mr. Metz, the mine foreman, and mine superintendent Wesley Hope. He commented that "if they read them, they'll know what's in there" (Tr. 118). He confirmed that while he did not inspect the cited area from December 9, 1987, to the day of the inspection by Mr. Bowers, he discovered that the area had deteriorated during the second week that he traveled there and when he was with Mr. Bowers (Tr. 119).

#### Respondent's Testimony and Evidence

Dave Stout, safety assistant, confirmed that he observed a "ripper" going across the entry at the cited intake location in

~1720

question, and he described a "ripper" as an area where the roof spalls due to shifts in the laminated shell that causes it to break and spall out. He described the ripper as 41 inches wide, and 8 to 12 inches deep into the roof, and extending to within 18 inches of the left-hand rib line. He did not consider the condition to be imminently dangerous because rippers are common in the mine, no roof bolts were disturbed, and the bearing plates on both sides of the ripper were "intact and tight to the top" (Tr. 123). The spalling which he observed was between the bolts, the roof had not been dislodged around the bolts, and there were no gaps between the plate on the roof bolt and the roof. The roof was broken, and there was some loose rocks within the immediate shell inside the crevasse or the ripper. The escapeway appeared to be travelable at the time of the inspection (Tr. 124).

On cross-examination, Mr. Stout stated that after the order was issued, he informed section foreman John Bevilock to withdraw miner's from the face. He confirmed that he had no occasion to be in the cited area prior to the inspection. He confirmed that he observed rock materials on the floor which had fallen from the ripper, and that there were some big pieces of flat shale or slate on the floor. He also confirmed that the existing roof bolts were not affected by the conditions, and were not disturbed since materials fell from between the bolts and not from around them. The bearing plates were intact and tight, against the top (Tr. 125-127).

Mr. Stout stated that he was with Mr. Bowers when he reviewed the examination books, but that he (Stout) does not review the books, and that he spends most of his time accompanying mine inspectors and taking the necessary remedial action by contacting the appropriate foreman. His duties do not include the review of the examination books, and to his knowledge the respondent took no action to remedy the cited conditions prior to the inspection (Tr. 129). He stated that the roof on each side of the ripper was intact and that he observed no broken roof in these locations (Tr. 131).

John C. Bevilock, day shift supervisor, confirmed that while the cited escapeway location was not an area that he generally inspected during his shift, he would have to travel it every 90 days with two men. He could not recall when he was last in the area prior to the inspection, and he stated that it was located approximately 2,400 feet from the face area. He confirmed that the area is examined once a week by someone else, and that he never observed the cited roof conditions during December, 1987, and no one ever advised him that additional roof support was required in the area. He also confirmed that he never observed the condition prior to the inspection by Mr. Bowers, and first saw it when he was called to the area to correct the violations (Tr. 132-134).

~1721

Mr. Bevilock stated that he observed that the top had spalled out approximately 6 to 8 inches above the top and that "it was just a ripper running across the entry" and he did not consider the condition to be hazardous because the roof was supported with resin roof bolts and the bolts on each side of the ripper had not been disturbed. He did not believe that the area was dangerous for people to travel through in the event of an emergency (Tr. 135).

On cross-examination, Mr. Bevilock stated that it took approximately an hour and a half to correct the conditions, and that support posts were available in the area. He confirmed that he observed approximately 6 to 8 inches of loose rock which had spalled out of the top on the floor, and he did not know how long it had been there. He considered the condition to be safe, and he did not feel threatened that he would be struck by falling roof because the roof "drips and works" before it falls, and this was not the case (Tr. 137). He had no indication as to when the roof "last worked," or when it would "next work," and he stated that "we usually have indications of roof falls that are major falls that can occur before they fall." He did not consider the fall to be major, and that small falls would normally be indicated by small pieces of roof falling or breaking at the top. He did not observe such conditions in this case (Tr. 138).

Mr. Bevilock stated that when he observes a violation or hazardous conditions he takes immediate corrective action if materials and manpower are available, and if not, he records it in the preshift examiner's book which is different from the weekly examination book. He stated that he has no occasion to review the weekly examination book, and although he would not normally be assigned to correct the conditions, he did so because his section was the nearest available production section. The cited location is not his responsibility because he supervises production only from the end of the track (Tr. 140).

Mr. Bevilock stated that he "sounded" the roof after he was called to the area, and that it sounded "solid on both sides of the ripper," and he would have been able to tell if it were hollow and cracked (Tr. 141). He confirmed that the roof was cracked and broken in parts, and although he sounded it on both sides of the ripper to determine if it was hollow on either side of the crack, he did not sound the cracked or broken area (Tr. 142).

Mr. Bevilock stated that he observed the roof, and that the roof bolts "looked good" and he saw no indications that any material had fallen away from the roof bolts. The spalling took place 6 to 8 inches in by one set of supports and 3 to 4 inches from the other set of supports (Tr. 142).

~1722

John Metz, general mine supervisor, confirmed that with the exception of one report ending December 28, 1987, the other examination book reports are signed with his signature at the place indicated as "superintendent or assistant." He stated that he countersigns approximately 30 records or books each day, and in most cases, the records require no less than six signatures in each book. He countersigns about 180 documents each day, and is required to read them all (Tr. 144-145).

Mr. Metz stated that in his view, the statement "can be traveled" which appears in the examination books, means that the area "can be traveled, that there's nothing there to keep a person from going down that entry," and that "one would assume that it would be safe to travel" (Tr. 145).

In response to questions as to whether anyone ever advised him that the cited area was not safe to travel, Mr. Metz responded as follows (Tr. 145-146):

Q. Did anyone ever tell you that the area referenced in this Order 2895499, which is in front of you as Government Exhibit 2 was not safe to travel during December, 1987?

A. I can't recall that anyone specifically said it was not safe to travel.

Q. Or prior to, as I say, during 1988, the first 6 days of 1988, did anybody ever tell that to you?

A. No, sir. I can't say that they did or did not.

Q. Does Gary Pastorial report to you?

A. Yes, sir, he does.

Q. When it is important for work to be done as a result of something that Mr. Pastorial has determined during his examination, does he generally do something more than write a line in the examination book?

A. Normally, there has been opportunity and under normal situations when Gary encountered something in the mine in general or specifically in the intakes and returns that he feels needs immediate attention, in most cases he fills me out a piece of paper or calls me on the telephone and says, hey, you need to get jumping on this and take care of it, and in most cases there is some type of immediate communications.

Mr. Metz confirmed that he generally speaks with Mr. Pastorial daily, and that if he discovers anything in the

~1723

intake or returns that he believes needs immediate attention, in most cases he will put it in writing or call him on the telephone. Mr. Metz could not recall Mr. Pastorial saying anything to him about the cited conditions and stated that "he could have very easily and I'd not remember it because he does give me quite a few documents" (Tr. 146). Mr. Metz stated that he was not in the area when the order was issued, and he could not recall being there prior to that time (Tr. 147).

On cross-examination, Mr. Metz confirmed that he never saw the cited roof conditions, and that "ripper's" involve movement in the roof top but do not affect the bolt itself unless the top moves (Tr. 148). He stated that he has known Mr. Pastorial for 15 years, and has been his supervisor in one capacity or another. He also confirmed that Mr. Pastorial does a good job and that he respects his judgment with respect to roof conditions and "anything else that he might tell me that needs taken care of" (Tr. 149).

Mr. Metz confirmed that he and Mr. Pastorial have observed conditions that he records in the books "hundreds of times," and stated that "we don't view each thing identically. I have to set priorities and try to determine what is put in the book as far as what needs to be done first, what is most important, or what is dangerous" (Tr. 149). He also stated that he has no reason to question Mr. Pastorial's entries in the examination books, and that entries made by the examiners in the books are matters that they view as necessary to be taken care of, or they know are violations, and that as a general rule they do not make entries that do not fall into these categories (Tr. 150).

Mr. Metz stated that while Mr. Pastorial in most cases brings to his attention conditions that need to be taken care of immediately, such as an imminent danger, matters which do not need immediate attention, or which present a potential problem, are normally documented in the appropriate book. Mr. Metz could not recall that Mr. Pastorial directly contacted him with respect to the cited roof conditions (Tr. 151).

Mr. Metz stated that based on his experience with the mine top, not all roof rippers are serious. Based on the fact that the roof bolts in this case were intact, he would not view this as a serious condition (Tr. 153). When asked for his reaction to the fact that three different examiners considered that station 17845 needed additional roof support, Mr. Metz responded as follows (Tr. 154):

A. Ma'am, at our coal mines we have over 500 miles of entries that we have mined. Out of these entries I would assume that we probably have somewhere in the vicinity of 60 miles of travelable entries. To get overly excited about a ripper, it just would indicate

to me that there was something there that needs some attention. I read entries of those natures day in and day out and again, relying on my experiences as working at that mine, I don't always make the right decision or the proper judgment call.

Mr. Metz confirmed that the term "ripper" is not included in any of the book entries, and that the time to provide additional support would be "as fast as possible," taking into consideration the other priorities noted in the 28 to 30 books which he must sign. He confirmed that he gave no instructions to take care of the cited roof conditions (Tr. 155). He also confirmed that time does not allow him to refer back to any particular book entry, and he was aware of mandatory safety section 75.323, which requires that hazardous conditions be corrected promptly (Tr. 157).

In response to further questions, Mr. Metz stated that the notations "can be travelled" indicates to him that "a person could get down through there. In the case that they needed to travel, there was nothing there to totally eliminate them from traveling that entry." If the notations had indicated "bad top," he would consider this to be a more serious condition, but that none of the records indicated any bad top in the cited area. He did not consider the reported conditions to be "bad top," and the notations "needs additional support" describes a cure rather than a hazard (Tr. 162). He could not recall discussing Mr. Pastorial's entries concerning the roof with him. He also believed that the notation "needs additional support" indicates that the roof condition was relatively stable in the cited area (Tr. 163).

Mr. Pastorial was recalled by the court, and when asked why he did not include the spalling, loose roof, and broken rock on the ground in his entries in the books, he responded that he has never included a description of the particular conditions in the books because he assumes that management knows what "additional roof support" means (Tr. 164). He also indicated that he and Mr. Metz generally discuss the materials needed to correct a condition and how much timber is needed, but he did not have any note that he may have given Mr. Metz, and stated that "I don't want to say one way or another" (Tr. 165).

Mr. Pastorial stated that if he makes a notation that additional roof support is needed, "then the top is bad," and "it means the same thing." He stated that in the future, he will include such information in his notations (Tr. 166). Mr. Pastorial stated that he cannot disagree with Mr. Metz's opinion that "can be traveled" means "its safe to travel," and he explained his current procedure for making book entries (Tr. 166-168).

Findings and Conclusions

Fact of Violation - Order No. 2895499, 30 C.F.R. 75.1704

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 75.1704, which requires designated escapeways to be "maintained to insure passage at all times of any person, including disabled persons" and "maintained in safe condition and properly marked." The evidence establishes that the escapeways were properly marked and identified, and that they were passable. MSHA's assertion at page 8 of its brief that the rocks which fell from the roof and were lying on the ground "could have impeded escape in an emergency or by disabled miners" is rejected. I find no such condition or practice cited in the order, and the inspector who issued it testified that the rock materials on the floor would not have impeded travel along the escapeway in question (Tr. 34). Therefore, the only issue here is whether or not the escapeway roof area cited by the inspector was maintained in a safe condition.

The respondent argues that even though some spalling had taken place at the cited roof area, it was nonetheless maintained in a safe condition. In support of this conclusion, respondent states that all of the witnesses testified that the roof conditions did not pose an imminent danger, and that they did not believe that their safety was in jeopardy when they were in the area. The respondent further points out that the roof area was not closed by the fire boss to prohibit people from walking there, that the roof bolts and bearing plates on either side of the roof crack were intact, undisturbed, and snug against the roof, and that the section supervisor who visited the area sounded the roof on either side of the crack, and found that it was solid and "not working."

The fact that no one considered the roof conditions to be an imminent danger requiring the closing of the area is immaterial. It is clear that a violative condition may be established regardless of the presence of any imminent danger or closure action by a fire boss. With regard to the condition of the roof bolts and bearing plates which had been installed in the roof area in question, while there is no credible evidence to establish that the bolts and plates had separated from the roof, the fact remains that the roof had obviously deteriorated over time, and spalling had recently occurred. "Spalling" is a condition caused by rock which is subjected to excessive tension, causing it to break off in pieces. See: A Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, 1986 Edition, at page 1049.

In addition to the spalling condition of the roof, the inspector's credible testimony establishes the presence of cracks in the roof, approximately 2 feet wide, and extending for some

~1726

16 feet across the entry and next to an intersection, a location described by the inspector "as a bigger area where the roof is weaker." The inspector believed that the roof was deteriorating, and he characterized it as "already loose and broken and spalling out." Although he saw no evidence of any falls above the existing roof bolts, observed no problems with the spacing of the bolts, and did not believe that the spalling affected the effectiveness of the roof bolts which were in place, he nonetheless concluded that the roof was starting to deteriorate and needed immediate additional support. Additional roof supports were in fact installed to abate the condition.

The inspector stated that the rock which had fallen from the roof area in question had fallen out between and around the roof bolts and plates, and he described the sizes of the rocks as "from small pieces, one to two inches, to three inches, maybe thickness, to a foot or so in diameter" (Tr. 33). Given the approximate 6 foot high roof, the inspector indicated that the rocks may or not break up once they hit the ground, and he believed that any rock, which he described as slate, may weigh "several pounds." The inspector believed that anyone struck by a piece of spalling rock from the roof could suffer severe injuries.

Union Fire Boss Pastorial, corroborated the inspector's observations of the roof conditions in question, and the respondent's general mine supervisor, John Metz, confirmed that he has known Mr. Pastorial for 15 years and that he respected his judgment with respect to roof conditions. Mr. Pastorial confirmed that when he first observed and tagged the roof area in question on December 2, 1987, and when he visited it later, he found that it had cracked, had loose rock, and had deteriorated to the point where it needed additional support. He described some of the rocks which had fallen from the "center of the roof" as 2 feet long, 2 or 3 inches thick, and 6 to 8 inches wide, and he observed a crack or "ripper" approximately 3 feet wide which extended some 16 feet across the entry. Mr. Pastorial believed that during the intervening period when he first observed the roof, and the day of the inspection, the roof had deteriorated further. He observed more rock materials and evidence of further spalling on the mine floor, and he speculated that this was the result of some movement or shifting of the roof. He believed that a roof fall was possible anytime deteriorated roof conditions are present, and he agreed with the inspector that a roof fall would likely occur at an intersection because it is the weakest part of the entry.

The inspector's observations with respect to the roof conditions are also corroborated by the respondent's safety assistant Dave Stout. Although he characterized the crack in the roof as a "ripper," Mr. Stout confirmed that this condition is the result of roof spalls due to the shifting of the laminated roof shell

~1727

which causes it to break and "spall out." Mr. Stout stated that the roof was broken, that rocks had fallen from between the bolts, and he observed loose rocks within the immediate "ripper" shell, and "big pieces of flat shale or slate" on the floor. Although Mr. Stout stated that the roof on either side of the ripper was intact and unbroken, and shift foreman Bevilock, who went to the area after the order was issued, stated that he sounded the roof on both sides of the ripper, he did not sound or otherwise test the roof area which was cracked and broken, although it was customary to do so.

Mine Supervisor Metz, who never viewed the conditions, confirmed that the mine roof top is so unpredictable, that rocks falling from the roof top are not uncommon occurrences (Tr. 163). He also characterized a "ripper" as "some type of movement in the bolt or in the top," and stated that the roof bolt itself does not move unless the top moves (Tr. 147-148).

Foreman Bevilock, who viewed the conditions for the first time after the order was issued, did not consider the roof to be hazardous because "it wasn't a place that was working at the time" (Tr. 137). He described the term "working" as movement within the roof, and he had no idea when the roof had "last worked" or when it would next "work." He did not consider the rocks which had fallen to be a "major fall," and although he confirmed that small pieces of rock falling or breaking off from the top of the roof is an indication of "falling materials," he did not observe any materials falling while he was there. In my view, the fact that Mr. Bevilock did not actually observe rocks falling from the roof area at the precise moment he was there is immaterial to any determination as to whether the roof had deteriorated to the point where it was not safe and posed a reasonable potential for additional "working" and fall of additional rock materials. I venture a guess that if Mr. Bevilock had observed rocks falling from the roof while he was there with the inspector, they would have beat a hasty retreat from the area, and the inspector would have issued an imminent danger order.

Section 75.1704 contains two basic requirements with respect to escapeways. The first requirement is that an escapeway be maintained to insure passage of miners at all times. The evidence in this case reflects that the escapeway was passable and could be travelled, and that there were no physical obstructions to prevent miners from using it in an emergency. The rock materials which had fallen from the roof did not block the escapeway, and the inspector confirmed that this would not have impeded travel.

The second requirement found in section 75.1704 is that escapeways be maintained in a safe condition. While it is true that the area was not endangered off, and the witnesses all indicated that they did not believe their safety was in jeopardy

~1728

while they were in the area during the inspection, the fact remains that the roof was deteriorating and was apparently shifting and taking weight, resulting in spalling and the breaking of rocks from around the roof bolts and plates. The roof also contained a "ripper" or crack which had not been tested or otherwise supported with timbers, and the credible testimony of the fire boss Pastorial establishes that additional rocks had fallen, and that the roof had deteriorated further from the time he first noted it and the time of the inspection. Under all of these circumstances, and given the existing roof conditions found by the inspector at the time of his inspection, I conclude and find that the roof area at the cited Station No. 17845, was not maintained in a safe condition as required by section 75.1704. I further conclude and find that a violation of this standard has been established by a preponderance of the credible testimony and evidence, and the inspector's finding in this regard IS AFFIRMED.

#### Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there

is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

The respondent argues that the violation was not significant and substantial, and in support of this conclusion it cites the testimony of the witnesses who were of the opinion that their safety was not in danger in the roof area in question. It also cites the testimony of fire boss Pastorial who indicated that while it was possible, he did not feel that it was particularly likely that he could have been injured, and his testimony that he saw no reason for closing the area and only put the tag up to caution people to be careful, but would have closed the area if it were "a more dangerous situation." Respondent also cited the fact that the weekly examination books did not indicate that the roof condition had gotten progressively worse, and the testimony by the section foreman and Mr. Pastorial that the roof was not "popping or cracking," thus indicating that the condition did not pose an immediate danger.

The respondent discounts the inspector's testimony that he considered the violation to be significant and substantial because a fire boss could be hit by pieces of spalling rock while he walked in the area, and takes the position that such an occurrence was not reasonably likely because the weekly mine examiner, the only person who would have travelled the area, other than an inspector, was aware of the condition and would only be in the area "a few seconds a week." With regard to any miners using the escapeway in the unlikely event of a mine disaster, respondent asserts that they only would have been in the roof area "for less than a minute."

With regard to Mr. Pastorial's testimony, while it is true that he did not believe he was exposed to a roof fall hazard, his testimony was qualified and must be considered in context. His belief that he was not exposed to any hazard was based on the fact that rock had already fallen, that the roof was not "working" when he passed under it for a few seconds, and that the roof had not fallen on him. He went on to state that "it could have fell on me," and the fact that it did not "doesn't mean that it

~1730

couldn't have fell in between the time I did the examination and the next week" (Tr. 103). As for the inspector's testimony that a weekly examiner would have been aware of the condition, he further explained that notwithstanding this fact, a hazard exposure still existed "anytime you travel through" the area, and that the section work crew consisting of approximately 10 miners would be exposed to the hazard in the event they had to use the escapeway in an emergency (Tr. 54).

The Commission has taken note of the fact that mine roofs are inherently dangerous and that even good roof can fall without warning. Consolidation Coal Company, 6 FMSHRC 34, 37 (January 1984). It has also stressed the fact that roof falls remain the leading cause of death in underground mines, Eastover Mining Co., 4 FMSHRC 1207, 1211 & n. 8 (July 1982); Halfway Incorporated, 8 FMSHRC 8, 13 (January 1986); Consolidation Coal Company, supra.

In the Consolidation Coal Company case, supra, the Commission affirmed my "S&S" finding concerning an over-wide roof bolting pattern which had existed along a supply track for a period of 6-months, and stated that "[T]he fact that no one was injured during that period does not ipso facto establish that there was not a reasonable likelihood of a roof fall."

In U.S. Steel Mining Company, Inc., 6 FMSHRC 1369, 1376 (May 1984), Judge Melick found that a hazardous roof condition was significant and substantial notwithstanding testimony from a mine foreman that it was unlikely that the roof would fall "right away," and his belief that the condition was not unsafe because he and the inspector were under the roof while taking certain measurements. In R B J Coal Company, Inc., 8 FMSHRC 819, 820 (May 1986), Judge Melick cited Mathies Coal Company, 6 FMSHRC 1 (1984), in support of his finding that a hazardous roof condition constituted a significant and substantial violation even in the absence of an "immediate hazard."

In Halfway Incorporated, supra, the Commission upheld a significant and substantial finding concerning a roof area which had not been supported with supplemental support, and ruled that a reasonable likelihood of injury existed despite the fact that miners were not directly exposed to the hazard at the precise moment of the inspection. In that case, the Commission stated as follows at 8 FMSHRC 12:

[T]he fact that a miner may not be directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood for injury existed. The operative time frame for making that determination must take into account not only the pendency of the violative condition prior to the citation, but also continued

~1731

normal mining operations. National Gypsum, supra,  
3 FMSHRC at 825; U.S. Steel Mining Co., Inc., 6 FMSHRC  
1573, 1574 (July 1984).

In the instant case, although Mr. Pastorial indicated that he was concerned that a roof fall may have impeded the exit of miners down the escapeway, and that roof falls have occurred on three or four occasions in escapeways resulting in the restriction of the escapeway, he was also aware of prior instances where miners have been injured by rocks falling from the roof. He also believed that since the intersection is the weakest part of the entry, any roof fall would likely occur at such a location.

Inspector Bowers testified that it was reasonably likely that anyone struck by a piece of spalling or falling rock would suffer serious injuries, and that during his experience as an inspector, he was aware of serious injuries and death resulting from people being struck by falling rocks. In making his significant and substantial finding, he confirmed that he considered the fact that the roof had deteriorated, and that it was loose, broken, and spalling. He also considered the fact that the cited roof area was located next to an intersection which was larger than the entry, and where the roof would be weaker, and the fact that the existence of the deteriorating roof conditions during the time period prior to his inspection increased the likelihood of further deterioration and worsening of the condition (Tr. 51). As noted earlier, mine supervisor Metz confirmed that the mine roof top is so unpredictable that rocks falling from the top are not uncommon occurrences, and that the existence of a roof "ripper" indicates that there is some type of movement in the roof bolt or the top.

After careful consideration of all of the testimony and evidence adduced in this case, I agree with the inspector's significant and substantial finding. I conclude and find that the cited roof conditions, which clearly establish that the roof was deteriorating to the point where rocks had spalled or fallen from between the existing roof supports and/or from the "ripper" or crack which extended across the entry at the intersection in question, posed a discrete roof or rock fall hazard. I further conclude and find that the hazard contributed to by this hazardous roof condition would likely result in an injury, and that anyone struck by rock falling from the roof for an approximate distance of 6 to 6-1/2 feet, which was the approximate height of the roof area in question, would likely suffer injuries of a reasonably serious nature. Accordingly, the inspector's significant and substantial finding with respect to the violation in question IS AFFIRMED.

~1732

## The Unwarrantable Failure Issue

The governing definition of unwarrantable failure was explained in *Zeigler Coal Company*, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." *Energy Mining Corporation*, 9 FMSHRC 1997 (December 1987); *Youghioghney & Ohio Coal Company*, 9 FMSHRC 2007 (December 1987); *Secretary of Labor v. Rushton Mining Company*, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the *Emery Mining* case, the Commission stated as follows in *Youghioghney & Ohio*, at 9 FMSHRC 2010:

We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In *Emery Mining*, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention."

Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. \* \* \*

The issue here is whether or not the respondent's failure to address the roof conditions in the cited escapeway location constituted aggravated conduct exceeding ordinary negligence. Inspector Bowers made a finding that the violation was the result of "high negligence," but did not result from any "deliberate activity" by the respondent. He confirmed that he based his negligence finding on the fact that the roof condition had been noted in the weekly examination books which are required to be read and signed by the mine foreman and superintendent. He also confirmed that his unwarrantable failure order was consistent with MSHA's recently published guidelines which became effective on July 1, 1988, after the order was issued. These guidelines are found in MSHA Program Policy Manual, Volume I, Section 104, pg. 6, (exhibit G-7), which state in relevant part as follows:

\* \* \* \* \*

Factors to look for when making an unwarrantable-failure-to-comply determination include the amount of time the violation has been left uncorrected, whether the hazard created by the violation is particularly serious thus warranting increased attention from the operator to prevent or correct it, whether the violation is repetitious of a previous violation, whether the violation was a result of deliberate activity by the operator, or whether the operator knew or had reason to know that its action(s) violated a mandatory standard. Citations and orders should clearly document the facts relied upon by the inspector in making the determination. Any one of the circumstances above may constitute sufficient grounds for an unwarrantable failure citation or order.

Mr. Bowers reviewed the aforementioned "factors" which he believed justified the unwarrantable failure order. Since the condition had existed and had been noted in the examination books for over a month from December 2, 1987, to January 6, 1988, he believed that the respondent had more than enough time to take corrective action, and he noted that abatement was achieved within one-half hour to an hour after the available timbers were brought to the area (Tr. 47).

Mr. Bowers stated that he also considered the fact that a roof fall could have occurred during the intervals in the weekly examinations, and in the event of such a fall, it could have impeded travel through the entry, and that it was possible that anyone walking through the area could be struck by a spalling

~1734

rock and suffer injuries (Tr. 47). He also considered the fact that the violation was repetitious, and he explained that he had previously issued several violations and orders at the mine because of uncorrected conditions which had been noted in the mine examination books. He was not certain that any of these prior citations or orders related to intake escapeways, but did recall that some of them were issued for uncorrected conditions in the track, return entries, and other different areas of the mine (Tr. 47-48).

Mr. Bowers concluded that the respondent "knew or should have known that its actions violated a mandatory standard" because the roof condition had been reported in the mine examination books which are required to be read and signed by the mine foreman or superintendent (Tr. 49). He confirmed that while he could have issued a section 104(a) citation, and allowed the respondent at least 1 day to correct the conditions, he did not do so because the condition had been noted in the books and the respondent knew about it. He did not believe that the condition constituted an imminent danger because "I didn't feel that it was imminent at the time that I seen it" (Tr. 49). When asked whether or not the respondent "knew or could have known that the condition posed a hazard or presented a dangerous condition, Mr. Bowers responded "That I don't know whether they would or not" (Tr. 52).

Fire boss Pastorial testified that his usual practice after observing further deterioration in a roof area which he had previously noted in the examination books as requiring additional support is to speak with the mine foreman and superintendent and ask them to take care of the matter, or write a note to Metz (Tr. 102, 108). Mr. Pastorial could not recall that he did this and I find no credible evidence to support any conclusion that he personally contacted mine management and apprised them of the fact that the roof area which he had previously tagged and observed had deteriorated further. In hindsight, Mr. Pastorial commented that "when it went over a week or two weeks, I should have contacted MSHA and told them that I have a place that needs timbered and I can't get management to timber it and I didn't do that" (Tr. 117).

Mr. Pastorial confirmed that it was not his usual practice to describe the specific roof conditions requiring additional support when he makes such an examination book entry because he assumes that mine management understands the meaning of a notation "needs additional roof support." He explained that he and superintendent Metz generally discuss the logistical arrangements and roof support materials required to correct such a recorded roof condition, but he could not document that this was done in this case (Tr. 165). He stated further that "If I indicate in that book that it needs additional roof support, then the top is bad. Why would I put in there that it needs additional roof

~1735

support if the top wasn't bad? To me that means the same thing" (Tr. 166). When asked whether he disagreed with Mr. Metz' conclusion that an examination book entry "can be traveled" means that "it is safe to travel," Mr. Pastorial responded "No. If that's the way he feels and that's how he understands, that's his opinion and I can't disagree with that" (Tr. 166).

Mine Supervisor Metz confirmed that he did not view the roof conditions at the time the order was issued, and he could not recall being in the area prior to the inspection. He also could not recall whether anyone specifically told him that the area was not safe to travel, or whether he ever personally discussed the condition with Mr. Pastorial. Mr. Metz was of the opinion that the phrase "can be traveled," which appeared as notations by the fire bosses in the mine examination books, meant that there was nothing to prevent anyone from travelling the escapeway, and he assumed that the phrase also meant "safe to travel." In commenting on the notations made by three fire bosses in the examination books that the cited location required additional roof support, Mr. Metz alluded to the many entries in the mine and the fact that he reviews many such notations on a day-to-day basis. He conceded, however, that a notation "needs additional roof support" would indicate to him "that there was something there that needs some attention." He explained that given the priorities dictated by notations in the 28 to 30 examination books which he must sign, corrective action to provide the additional roof support would be taken "as fast as possible," taking into account "other priorities" and his mining experience. He candidly conceded that he does not always make the right decision in addressing such matters.

When asked about any affirmative steps he would normally take in response to an examination book entry that a roof area "needs additional roof support," Mr. Metz stated that he has had occasion to speak with Mr. Pastorial in such instances in order to seek clarification or to determine whether the condition needed to be addressed immediately, or whether it could "wait a week or ten days," but he could not recall doing that in this case (Tr. 163). Mr. Metz confirmed that as a normal practice, the entries made in the mine examination books by Mr. Pastorial and the other fire bosses with respect to any mine conditions only relate to conditions that they view as necessary to be taken care of, or conditions which they know are violations, or may present potential problems, and that as a general rule, they do not make entries which do not fall within these categories (Tr. 150-151).

Mr. Metz conceded that he was familiar with mandatory standard 30 C.F.R. 75.323, which requires that any hazardous conditions noted in the daily and weekly mine examination books be corrected promptly. The respondent's defense to the unwarrantable failure order is based on its assertion that Mr. Metz had no

~1736

reason to believe that the "needs additional roof support" notations made by the fire bosses in the examination books indicated a hazardous roof condition requiring immediate attention, and that based on the fact that all of the witnesses agreed that the notations "can be traveled" were unclear, it was not unreasonable for Mr. Metz to believe or conclude that the escapeway was safe to travel, and that the roof area in question was not hazardous, and did not require further immediate attention.

Copies of the mine examination books concerning the escapeway examinations conducted by three different fire bosses during the period December 2, 1987, to January 4, 1988, contain notations that additional roof support was required at the North Mains butts intake escapeway Station No. 17845, the identical location cited by the inspector in the contested order. The first notation was made by Mr. Pastorial on December 2, 1987, and subsequent identical notations were made by fire bosses Latocha and Eddy on December 8, 20, and 28, 1987, and January 4, 1988. All of the examination book pages on which these entries appear are signed by Mr. Metz. Mr. Metz confirmed that he is required to read or review all of these records, and he confirmed that he signed each of the pages in question. When asked whether he reviewed the specific pages in question, Mr. Metz responded that he was required to "read and countersign all books" (Tr. 145). Although he alluded to the fact that he is required to review approximately 180 examination book entries each day, I nonetheless conclude that Mr. Metz had actual or constructive notice of the conditions noted in the books by the fire bosses. I also find and conclude that from December 2, 1987, the day the roof condition was initially noted and tagged by Mr. Pastorial, until January 8, 1988, the day the order was issued, Mr. Metz was aware of the fact that the cited roof area was in need of additional roof support.

With regard to the hazardous nature of the cited roof area, I have concluded and found that the conditions were unsafe, and that the violation was significant and substantial. I take particular note of the fact that Mr. Metz' opinions and conclusions concerning the hazardous nature of the roof area in question were based on his after-the-fact evaluations of the terms "needs additional roof support" and "can be traveled" as they appear in the examination books. Mr. Metz confirmed that he did not observe the conditions at the time the order was issued, and he had no recollection that he visited the area or viewed the conditions at any time prior to the issuance of the order. Although Mr. Metz indicated that he had 19 years of underground mining experience, he conceded that he does not always make the right decision, and since he did not view the roof conditions in question, I have serious doubts that he had any factual basis for making any informed judgement decision as to the actual hazards presented by the prevailing roof conditions without the benefit of personally observing the conditions. Under the circumstances,

~1737

I have given little weight to his suggestions that the cited roof conditions were not hazardous.

Although Mr. Metz was of the opinion that roof "rippers" are nothing "to get overly excited about" because they are common occurrences in the mine, he nonetheless conceded that such a condition would indicate to him that the roof required attention, and that the existence of such a condition indicates some type of movement of the roof top. Coupled with his admission that the roof is unpredictable, that rocks falling from the roof are not uncommon in the mine, and his knowledge that fire bosses normally do not make examination books entries unless they believe a violation has occurred, or the condition noted presented a potential problem, I have difficulty comprehending why Mr. Metz failed to at least visit the roof area in question at some time during the 30-day period that the condition existed prior to the inspection and issuance of the order, why he failed to take timely follow-up action to insure that the roof was provided with additional support, or why he failed to timely seek out Mr. Pastorial to discuss the matter with him.

Although Mr. Metz stated that he would normally take corrective action "as fast as possible" when reviewing examination books entries which indicate that additional roof support was required in any area of the mine, he explained that any decision as to when such action would be taken would be based on "other priorities." Since he failed to elaborate further, or to explain what these other priorities may have been, I find nothing that may serve to mitigate Mr. Metz' failure to address the roof conditions in a more timely manner.

MSHA's assertions that the violation was repetitious is unsupported by any credible evidence, and I have given it little weight. Although the computer print-out detailing the respondent's prior history of violations reflects 55 prior section 104(a) citations for violations of section 75.1704, none of these violations were unwarrantable failure orders, and since none of the citations were produced, the facts and circumstances surrounding these violations were not forthcoming. With regard to the inspector's testimony that he had previously issued citations and orders to the respondent for recorded conditions that had been left uncorrected, no further details were forthcoming from the inspector, and the facts and circumstances connected with these allegations are not known.

After careful consideration of all of the testimony and evidence in this case, I conclude and find that the inspector's high negligence and unwarrantable failure findings were justified. I further conclude and find that the passage of 30 days from the time the roof conditions were initially noted in the examination book until the order was issued, without any action

~1738

whatsoever being taken by the respondent to address those conditions, was an inordinate amount of time, and that Mr. Metz' failure to act was less than what would reasonably be expected from a mine supervisor, and that his failure to act was inexcusable and constituted a lack of due diligence and failure to take reasonable care. Under the circumstances, the inspector's unwarrantable failure finding IS AFFIRMED, and the contested order IS LIKEWISE AFFIRMED.

#### Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

Based on the stipulations by the parties, I conclude and find that the respondent is a large mine operator and that the civil penalty assessments for the violations in question will not adversely affect the respondent's ability to continue in business.

#### History of Prior Violations

The respondent's history of prior violations, as reflected by an MSHA computer print-out, reflects that for the period January 1, 1986 through December 31, 1988, the respondent paid \$346,794, for 1,592 violations issued at the Martinka No. 1 Mine. One-Thousand five-hundred and fifty (1,550), of these paid violations were for violations found to be significant and substantial (S&S), and fifty-five (55) were for violations of mandatory safety standard 30 C.F.R. 75.1704. For an operation of its size, the respondent does not have a very good compliance record, particularly with respect to the escapeway requirements found in section 75.1704. Although I have given little weight to these prior violations for purposes of my unwarrantable failure finding, I have considered them for purposes of the civil penalty assessment which I have made for the contested violation which has been affirmed.

#### Good Faith Compliance

The parties have stipulated that the violation was abated in good faith by the respondent, and I conclude and find that the respondent timely abated the violation in good faith after receiving notice of the violation.

#### Negligence

On the basis of my unwarrantable failure findings and conclusions, which are herein incorporated by reference, I conclude and find that the violation resulted from a high degree of negligence, and an unwarrantable failure by the respondent to comply with the requirements of the cited standard.

~1739  
Gravity

In view of my "S&S" findings and conclusions with respect to the contested order, I conclude and find that the violation was serious.

#### Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of \$2,000, is reasonable and appropriate for a violation of mandatory safety standard 30 C.F.R. 75.1704, as stated in section 104(d)(2) Order No. 2895499, January 6, 1988.

#### ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$2,000, for the aforementioned violation of 30 C.F.R. 75.1704, and a civil penalty assessment in the amount of \$50, in settlement of the modified section 104(a) Citation No. 2895079, 30 C.F.R. 75.1403-9(c), January 6, 1988. Payment of these civil penalty assessments shall be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this proceeding is dismissed.

George A. Koutras  
Administrative Law Judge