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SOL (MSHA) V. JIM WALTER RESOURCES
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 92-408
Petitioner : A.C. No. 01-01401-03905R
v. :
: No. 7 Mine
JIM WALTER RESOURCES, INC., :
Respondent :

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor,
U.S. Department of Labor, Birmingham, Alabama, for
the Petitioner;
R. Stanley Morrow, Esq., Jim Walter Resources,
Inc., Brookwood, Alabama, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

This proceeding initially concerned proposals for assessment of civil penalties 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 twenty (20) violations of certain safety standards found in Parts 75 and 77, Title 30, Code of Federal Regulations. The parties settled nineteen (19) of the violations, and I issued a Partial Settlement Decision on June 3, 1993, approving the settlement. The parties were unable to settle the remaining violation, section 104(d)(1) "S&S" Citation No. 3013115, May 20, 1991, alleging a violation of mandatory safety standard 30 C.F.R. 75.202, and a hearing was held in Birmingham, Alabama. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the condition or practice cited by the inspector constitutes a violation of the cited mandatory safety standard, (2) whether the alleged violation was "Significant and Substantial" (S&S), (3) whether the alleged violation was the result of an unwarrantable failure by the respondent to comply with the cited

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standard, and (4) the appropriate civil penalty to be assessed for the violation, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

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. 75.202.
3. Commission Rules, 29 C.F.R. et seq.

Stipulations

The parties stipulated as follows (Tr. 39-40):

1. The respondent is subject to the jurisdiction of the Act, and the presiding judge has jurisdiction to hear and decide this matter.
2. The respondent is a large mine operator and the payment of a civil penalty assessment for the violation will not adversely affect the respondent's ability to continue in business.
3. The issuance of the section 104(d)(1) citation was procedurally correct in that the mine was on a "(d)" chain.
4. The respondent has an "average" history of prior violations for an operation of its size.

Discussion

The section 104(d)(1) "S&S" citation No. 3013115, issued on May 20, 1991, by MSHA Inspector Terry Gaither, citing a violation of 30 C.F.R. 75.202, states as follows:

People on the No. 2 longwall, including managers, were traveling in the cross-cut between No. 3 and No. 4 entry inby the shields and the gob line. The longwall face was approximately 10 feet outby the outby corner of the intersection. The cross-cut was inby spad No. 7677, 1 cross-cut. The traveled area was not provided with additional supports and or otherwise controlled to protect persons from the hazard related to falls from roof or ribs.

Petitioner's Testimony and Evidence

MSHA Inspector Terry Gaither, testified as to his prior mining industry experience of 22 years, including his experience as an MSHA inspector. He confirmed that he is currently employed as a health specialist conducting underground respirable dust and noise surveys, and has engaged in this work for the past four years (Tr. 45). He confirmed that he had previously inspected all of the respondent's longwall sections during regular inspections, as well as longwalls in other areas (Tr. 46-47).

Mr. Gaither stated that he was at the mine on May 20, 1991, conducting a respirable dust technical investigation in connection with a dust plan submitted by the respondent (Tr. 48). Referring to a "representative" sketch of the number 2 longwall area (Exhibit G-1), Mr. Gaither explained the basic operation of the longwall, including the mining of the coal, the advancement of the face, and the operation of the shields as the face is advanced (Tr. 49-52). He confirmed that when the roof falls behind the shields as they are advanced, it will always fall all the way to the yield pillars inby and outby the area identified as crosscut A on Exhibit G-1 (Tr. 52). The yield pillars themselves remain intact depending on the yield and pressures, but they become "sloughed and oval shaped". He confirmed that many times, the roof fall will "ride over into the crosscut", and on many occasions he has observed it "fall plumb into the intersection". He further explained as follows at (Tr. 53-54):

You know, the question here is not if the roof is going to fall, but when is it going to fall in relationship to where the face and the shields are at because this thing is moving.

You wouldn't have any danger if the shield tips -- this tip right here and right here, you wouldn't have any problem using Crosscut A. But as that thing comes on out, the roof behind the shields is continuously falling.

I think when I read my notes the face was approximately ten feet outby, the outby corner on this yield pillar. The flat surface of this shield is approximately 13 foot the part that goes against the roof.

After that the shield breaks down in the back and the down to the base. Usually your roof at that break line -- I consider that the break line of a temporary support, and anything beyond that break line on that shield is subject to fall into the intersection. And

when that break line of this shield gets into this intersection there's no additional support. And that intersection is hazardous to anybody walking through there to roof bolting and the roof falls.

Mr. Gaither confirmed that he has observed a roof fall in between the face and the tip of the shields, and he explained what occurs during a "squeeze" when the roof falls between the coal seam and shields (Tr. 58). He confirmed that the entry is been bolted as it is driven and advanced, and that the roof falls behind the anchorage of the roof bolts as the roof begins to fall behind the shields (Tr. 59).

Mr. Gaither stated that he reached the longwall face by traveling up the number 3 entry and into intersection B, but did not go into crosscut A. He could see the gob in back of the shields that had advanced into the intersection, and he did not enter crosscut A "because it was hazardous due to roof rib rolls and subject to fall" (Tr. 61). He could see from intersection B that the roof had fallen behind the shields, and he observed no additional roof support or cribs in crosscut A. From his position at intersection B, he observed an electrician, the shear operator, the longwall manager, and the deputy mine manager travelling in crosscut A. After coming through the intersection he instructed the miners to block it off and quit using the crosscut. He then proceeded up the number 4 entry and observed that the roof had fallen in behind the shields, but he could not see "how tight behind" the shields it had fallen, and did not go into the area (Tr. 62).

Mr. Gaither stated that he has "pulled pillars" for years and knows what a "break line" is. He stated that once the shield advanced "out that far", crosscut A would be inby the break line and the roof would be subject to fall, and the crosscut would be hazardous for people to travel through due to rib rolls or falling roof. The potential rib rolls would be caused by the inby or outby ribs of the yield pillars sloughing off, and large lumps of coal or rock can roll off into the walkway. He stated that the pillar corners are usually oval shaped because of sloughage due to the weight of the soft coal seam that cannot support itself (Tr. 64).

Mr. Gaither confirmed that the miners in question were traveling in the crosscut between the Number 3 and 4 entries inby the shields and the gob line, which is the same as the break line. He explained that a break line is the point at which the roof is falling, and it could be over the shields or behind the shields (Tr. 65). Since he did not go into crosscut A, he could not state the exact location of the break line. He only knew

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that the roof had fallen "tight in behind the shields". He believed that a break line is predictable, and that it is normally behind the shields where the roof has normally fallen (Tr. 66).

Mr. Gaither confirmed that the miners were not performing any work inby the shields, were not removing any equipment through crosscut A, and were simply walking through the area (Tr. 67). He confirmed that he had recently observed (two weeks before the hearing), that crosscut A and intersection B had fallen in (Tr. 67). He also confirmed that he had observed roof falls in "typical" crosscut A's many times (Tr. 68).

Mr. Gaither confirmed that he did not rely on any MSHA policy in issuing the citation (Tr. 70). He believed that the violation was an "unwarrantable failure" because "management directing the work force, setting an example for the work force, knew or should have know that the crosscut, once the shields were advanced out that far, was hazardous to travel through, the hazard being rib rolls falls from the roof" (Tr. 69-70). He believed that cribs should have been installed as additional roof support in crosscut A, and that this was "typically" done on a longwall section.

On cross-examination, Mr. Gaither stated that crosscut A was approximately 20 feet wide when it was driven, but was probably 25 feet wide due to mining of the longwall and rib sloughage (Tr. 72). The face was approximately ten feet past the edge of the rib. He did not observe that the miners were directly behind the shield, but they were inby the break line in crosscut A behind the cave part of the shield and inby the shields going through crosscut A, and he marked their route of travel by a green dash-line on exhibit G-1 (Tr. 76). He also identified what he believed to be the location of the shield break line (Tr. 78). Since he did not go into crosscut A, he could not determine the actual crosscut roof conditions (Tr. 81).

Mr. Gaither considered the roof "break line" to be the cave area at the back of the shield, and it was his opinion that when the shield cave area, or backside of the shield, is in the crosscut, it would be hazardous to travel in the crosscut without additional support (Tr. 81-83). Assuming that cribs were installed at each corner of the crosscut, if the shield break line was outby the inby crib, he would still consider it hazardous to travel the crosscut and would issue a citation, and the respondent would have to submit a plan to use the travelway under emergency conditions (Tr. 84-85).

Mr. Gaither confirmed that his testimony concerning his recent observation of crosscut A and intersection B pertained to "typical and similar" longwalls, and that the existing areas as

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of the time the citation was issued have been mined through and are now inaccessible (Tr. 86-87).

In response to further questions, Mr. Gaither stated that when he observed the miners travelling through crosscut A, they were walking down the middle of the crosscut, in by the breakline identified on exhibit G-1 (Tr. 94-95). Mr. Gaither reiterated that he was not aware of any MSHA unwritten policy when he issued the citation and never discussed with anyone that he should cite a violation of 75.202 (Tr. 102). He explained his theory of the violation as follows at (Tr. 103-104):

Q. Okay. Let me understand your theory here now. If I'm to follow your testimony, whenever that shield gets into that crosscut into the cave line -- the break line into the crosscut, you would require them to take additional roof support precautions, correct?

A. If they wanted to travel through there.

Q. If they wanted to travel through there?

A. Yes, sir

Q. Now, my question always assumes that someone's going to travel through there. So, theoretically, as that break line advances through the crosscut, you would have them put a series of cribs up there?

A. I would do my best to try to get them not to -- to quit using it. Just go around the other way.

Q. To quit using it. All right. Fine. so, this sentence in 75.202 that says that the roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled - now, let me ask you this:

Notwithstanding the extent of support, you would interpret "otherwise controlled" to mean that thou shall not pass?

A. True.

Q. So, the other means of controlling then would be -- of controlling that area would be to prohibit anyone from going through there under any circumstances; is that correct?

A. That's correct.

JUDGE KOUTRAS: Is that your understanding of his position, Mr. Lawson?

MR. LAWSON: Judge, it's thou shalt not pass or thou shalt install additional support to permit the passage.

Tommy Boyd, union safety person employed by the respondent as a longwall helper and stage loader, testified that he has 21 years of underground mining experience, including approximately 19 years longwall experience. He confirmed that he works on the number one longwall, but that in his experience, he has observed roof falls and overrides caused by roof pressures in typical areas such as those described in crosscut A and intersection B in this case (Tr. 109-114). He confirmed that his testimony is not based on the conditions that existed on the day that Inspector Gaither issued his citation (Tr. 115). Petitioner's counsel conceded that this was the case, and that Mr. Boyd was not aware of the prevailing conditions at that time, other than the testimony that he has heard in this case, did not know whether the roof would fall that day or not, and that his testimony was offered to support the petitioner's position "that this is what usually happens and what might happen", in order to avoid roof falls by taking additional precautions (Tr. 116).

Mr. Boyd stated that on those occasions when he has observed crosscut A and intersection B roof falls, the face has been in the same relative vicinity of the inby corner of the yield as the face position described by the inspector in this case, and that depending on the roof conditions and override pressures, the roof could fall in less than ten feet from the advanced face (Tr. 119). He confirmed that the shields and pan line on the longwall where he currently works are advanced one or two times during the shift, but he has seen them advanced as much as nine times on the night shift. He has also observed the shields being lowered to advance the shields, and that the roof is broken and drops until the shields are raised again (Tr. 121). He confirmed that the respondent generally installs roof cribs, in addition to roof bolts, in single seams as required by the roof control plan, but does not do so in twin seams (Tr. 122).

On cross-examination, Mr. Boyd stated that there have been two roof fall fatalities in the No. 7 mine, but they did not occur on any longwall sections (Tr. 122).

Inspector Gaither was recalled by the presiding judge, and he confirmed that he spoke with the management personnel who walked through crosscut A and that they offered no explanation and indicated that they would stop using the crosscut in question (Tr. 124). He further explained the basis for his unwarrantable failure finding (Tr. 124-125), and he assumed that mine

management knew that traveling through crosscut A was hazardous (Tr. 136). Mr. Gaither confirmed that he had previously cited the respondent under similar situations, and the petitioner's counsel confirmed that the respondent paid the penalties and did not litigate those citations (Tr. 136). Respondent's counsel also confirmed that this was the case, but he did not know how many previous citations have been issued (Tr. 136-137).

Kenneth Ely, MSHA health and safety group supervisor, Birmingham, Alabama, sub-district office, testified that his duties include the review of roof control plans submitted by mine operators and the making of recommendations to the district manager in connection with those plans (Tr. 141). He has worked for MSHA since 1971, but had no prior underground mining experience. He has served as an MSHA mine inspector and is still an authorized representative of the Secretary. He has also inspected longwalls, has investigated roof falls, and has received training in roof and roof control measures (Tr. 142-144).

Mr. Ely was of the opinion that as the longwall face is mined and advances, and the coal is removed, roof stresses are placed in the area in front of the shields as the coal is extracted from the number 3 and 4 entries (Tr. 151). Evidence of these stresses would be cracks in the roof, or heaving of the floor and sloughing of the ribs between the number 3 and 4 entries (Tr. 152). However, there is no way to predict when the roof will fall behind the shields as the face is advanced (Tr. 153). Further, there is no guarantee that the roof will not "ride over" and fall into crosscut A, and he has witnessed longwall ride over pressures in front of a longwall face (Tr. 156). He further explained that the roof bolts in crosscut A may not be adequate to support the crosscut to prevent it from falling in because they are placed there during the initial development and it is difficult to determine when the roof bolts are subjected to roof pressures nearing their breaking point, and many times crosscut A and intersection B fall in above the roof bolt anchorage zone (Tr. 156).

Mr. Ely stated that with the face located approximately ten feet outby the inby the corner of the yield pillar, as depicted in exhibit P-1, it would be an unsafe practice to travel through crosscut A because of the stresses on the roof and the fact that unplanned roof falls frequently occur in such areas (Tr. 157-158).

Mr. Ely stated that he reviewed the respondent's supplemental roof control plan approved after Judge Fauver's decision in a prior case, and that MSHA permitted the respondent to take equipment through crosscut A after additional roof support was installed (Exhibit P-4, Tr. 159). He was not familiar with any occasion where MSHA prohibited the respondent

from traveling a crosscut as long as it submitted a plan to support the crosscut (Tr. 161).

On cross-examination, Mr. Ely stated that he would consider crosscut A to be unsafe to travel when the face line is in direct line with the inby corner of the yield pillar (Tr. 163-164). He was of the opinion that the "break line" was the line that the roof is expected to break on, and that the roof breaks up on top of the shields regularly (Tr. 166). He confirmed that the sub-district manager's policy was that unrestricted travel through crosscut A and intersection B was to be limited when the face came in line with the inby corner of crosscut A and that no one should be in the crosscut or the intersection (Tr. 168).

Mr. Ely stated that the gob roof area behind the shields will always fall, but that with respect to crosscut A, and whether or not it will always fall in, he stated as follows at (Tr. 190):

I can't--you know, I cant put a mark on it and say, no, it's not going to fall and, yes, it is going to fall. But from our practice it is an unsafe area for travel because it has a good degree of likelihood to fall.

* * * * *

Q. Do you know if crosscut A is going to fall in?

A. No, I don't. I can't testify that it will fall.

Mr. Ely confirmed that pursuant to section 75.202, MSHA would require additional roof support in crosscut A when such areas are to be used as travelways and that a mine operator would be required to submit an additional roof control plan explaining how it intended to supply additional roof support (Tr. 192-193). He explained how such a plan would be reviewed by MSHA and what would be expected of the operator submitting such a plan (Tr. 199-201).

Respondent's Testimony and Evidence

Greg Hendon, respondent's roof control manager, has a 1982 B.S. degree in mining engineering from the University of Alabama, and has been employed by the respondent since 1982. He was admitted as a roof control expert without objection (Tr. 221). He was of the opinion that the only way to determine if a crosscut such as the one in question is adequately supported is to visually observe it (Tr. 222). He stated that he is currently engaged in a study at the mine and recently walked up the mined out No. 3 entry adjacent to the one where the violation was

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issued for a distance in excess of 1,000 feet, and past seven crosscuts. None of the intersections were caved in, but half of the crosscuts had caved in, and half had not (Tr. 224).

Mr. Hendon stated that he could not determine from his examination whether or not the face would cave in and that this would be determined by the condition of the roof. He stated that he would not travel in those areas where the roof in the crosscut intersection was bad or thin. In his opinion, the roof break line is at the back of the shield canopy which is designed to break the roof off at the back of the canopy. In his opinion, people should absolutely not go behind the shields (Tr. 225).

Mr. Hendon stated that the break line at the rib line would "cave over to the edge of the pillar", and at some point it possibly comes back into crosscut A (Tr. 226). He explained the roof pressures that ride over the shields as follows at (Tr. 226-227):

- A. Basically, what you have is as you remove the coal, the roof above the coal line bends down behind you, which forms the gob, and that bending of the roof is what causes your pressures.

We've done a good bit of study putting pressure cells in those -- into this coal seam that's left and the yield pillar and the stable pillar, and what we've found is that as the face comes out at some distance out by the face, you have a buildup of pressure.

- Q. So, your higher pressure would actually be down below this face line?

- A. That's right. That's right.

- Q. So, there would be less pressure in Crosscut A than there would be, say, in the crosscut below Crosscut A?

- A. That's correct. And that is based on the physical monitoring that we've done. We've put pressure cells in there looking at the leg pressures. We actually have pressure gauges on the shields. And three or four shields at the headgate are historically the lowest pressurized shield that we have.

Mr. Hendon further explained that the yield pillars are designed and monitored not to accept additional loads and to redistribute them. He agreed that excessive pressure on the roof

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at crosscut A would cause it to fall in, and if the roof is still standing behind the shields and has not fallen in, there is a greater chance of pressure around the headgate. However, once the roof caves behind the shields, "we always see a pressure relief in front of us and beside us" (Tr. 228). In the instant case, it was his opinion that the fact that the roof had caved right behind the shields indicated that there was less pressure and less chance of a refall in crosscut A (Tr. 229).

Mr. Hendon stated that there was nothing unusual about the inspector looking through intersection B and crosscut A and seeing that rocks had fallen in the gob area, and that from his experience as a longwall foreman, "you see that everyday" (Tr. 22). He stated that he would be more concerned if he saw no rocks because this would indicate that crosscut A was subjected to more pressure than if it was caving behind the shields (Tr. 229). In response to a question as to when it would be safe to travel in crosscut A, Mr. Hendon stated as follows (Tr. 230):

- A. As a longwall person, you feel relatively safe under the shields. Any time you come out from under the shields, you're immediately looking at the roof and seeing what the roof conditions are. You'd look for cracks in the roof, plates bending, evidence of excessive weighting.
- Q. So, a visual or a hearing inspection would be the way to --
- A. If I came out from under number one shield, I would look at the roof and determine whether it was safe to walk out there or not.
- Q. Depending on what you see, you might travel through Crosscut A or you might not?
- A. That's correct. If the shield was -- if the face was 100 feet back toward the top and I looked in there and it wasn't safe, you wouldn't go in there.

On cross-examination, Mr. Hendon stated that he walked the No. 3 entry three or four months before the hearing as part of a study with British Coal to determine if two longwalls could be mined with only a yield pillar between them, and he explained where he traveled during the study, the monitoring of the roof, and the crosscuts that had fallen. (Tr. 231-234). He confirmed that the fallen crosscuts were observed from "intersection B", and he described the fallen areas as "basically rock flushing in from the gob", and the roof had fallen in from the sides of the yield pillars into Crosscut A (Tr. 235).

Mr. Hendon confirmed that longwall mining entails the controlled failure of the mine roof and that it is known that the roof will fall behind the shields and that the respondent wants to supplement the roof control plan to control the roof failure. Accordingly, the respondent has implemented a stable yield pillar system of assisting in roof support during longwall mining (Tr. 239). He agreed with inspector Gaither's description of a "break line" as shown on Exhibit G-1. He also agreed that from the break line inby, the roof will fall at some point in time, and that the roof behind the break line will fall over the sides of the yield pillars, and that given the pressures exerted on the mine roof, the roof bolts in the number 4 entry will not stop the fall of the roof behind the break line (Tr. 240).

Mr. Hendon confirmed that when he walked the No. 3 entry and saw evidence of the roof falling or "flushing" into crosscut A from the gob, the existing roof bolts did not stop this flushing into the crosscut (Tr. 241). Mr. Hendon agreed that if a miner were to enter crosscut A to get to the longwall and saw evidence that the roof was taking pressure, such as "popped off roof plates" and cracked roof, this should alert him to add more roof support or not travel the area (Tr. 241). He stated further at (Tr. 242):

Q. But would you agree, Mr. Hendon, that even mine roof without a roof bolt plate popped off or without a visible crack, even so-called good mine roof can fall without advance warning?

A. That's correct.

Q. And if a miner is traveling through Crosscut A, he does not know at what point in time, if at all, this flushing of the mine roof will take place, does he? He can't sit there and predict when the mine roof will fall, can he?

A. No, sir.

Mr. Hendon agreed that the yield pillar can slough off around the corners, and that it is common to see oval shaped pillars any place, and this could indicate rib sloughing from pressure or the soft coal sloughing off (Tr. 243). He was of the opinion that the location of the longwall face as shown in exhibit G-1, would have relieved any roof pressure according to his studies. However, he conceded that he was not present when the condition was cited, and that he did not monitor that particular location (Tr. 244).

Mr. Hendon stated that given the fact that the roof will fall behind the break line, and the flushing and breaking in

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crosscut A, a miner stepping out from under the No. 1 shield and walking through the crosscut inby the break line would have no assurance that the roof pressure on the roof which has fallen and is falling is not going to override into the crosscut and flush out the mine roof and fall (Tr. 244). He agreed that the roof falls behind the break line, and as the face continues to advance, it will fall all the way over to the yield pillars (Tr. 247).

Mr. Hendon stated that given the conditions depicted in exhibit G-1, he would not ask his crew to venture inby the break line into crosscut A and sit against the rib to eat dinner, and that he would be concerned about their safety (Tr. 247-248). He would not consider traveling inby the break line to be a good practice (Tr. 249-250).

In response to further questions, Mr. Hendon stated that during his study he walked inby the roof break line for a distance of one thousand feet and walked into crosscuts similar to crosscut A, but not through them (Tr. 253). He further explained as follows at (Tr. 253-255):

JUDGE KOUTRAS: Well, I thought you said that you didn't consider it a good mining practice to do that. My hypothetical was if you saw no visible evidence of a roof condition, such as cracks, you still wouldn't think it's a good mining practice for people to be walking in this area. That seems a little contradictory.

THE WITNESS: Well, let me base that on -- there would be -- I can't think of a reason why you would send anyone back there. In my case, I was looking for specific roof control, roof conditions, what was happening at the rib line, was it crushing out the yield pillar. I had a specific reason to be back there.

After visualizing it, looking at it, examining it, and felt like it was safe, I walked over to get a better view. There is no reason that I can think of that I would need to send somebody back there. There's not a hypothetical that I can think of that I would send my men back there.

* * * * *

JUDGE KOUTRAS: You wouldn't have any idea as to why these people were walking through there, the people that the inspector observed?

THE WITNESS: It would be purely speculation.

JUDGE KOUTRAS: What would it be, if you were to speculate?

THE WITNESS: If I came off the face, it's much easier to walk straight through the crosscut. Knowing those two men personally, they walked out. They probably walked in that way and didn't see any problems, came up into Intersection B, just as Mr. Gaither testified he did, examined the face, walked through there, came back out and saw no change in the conditions and walked back out the way they came in.

Mr. Hendon was of the opinion that any hazards associated with walking through crosscut A would have to be determined by the existing roof conditions, and he agreed that good roof can fall without advance notice, including the roof in crosscut A. However, the question of whether or not crosscut A is more likely to fall would depend on whether roof pressure has broken the roof, and if it has, it would more likely fall (Tr. 258-259). He confirmed that depending on the roof conditions, when he was a foreman he normally used crosscut A to travel in and out of the longwall area (Tr. 261).

Mr. Hendon stated that the corners of crosscut A would be the most hazardous place and that the respondent routinely installs two cribs at the corners for roof support (Tr. 262). However, based on his pressure surveys, he was of the opinion that intersection B is no more likely to fall in than the others, but there is no guarantee that when the roof falls it will do so evenly and not enter crosscut A (Tr. 265).

Mr. Hendon stated that his roof studies were made at the No. 4, 5, and 7 mines, and that detailed pressure studies are ongoing at the No. 7 mine, but he had no written findings with him. He stated further at (Tr. 268):

Q. Now, despite any studies you may have conducted, any trips you went up to the entry, when you have been a foreman or at any other time when you've been underground at Jim Walter in conditions similar to this as Plaintiff's Exhibit No. 1, you've seen Crosscut A fall in, haven't you, Mr. Hendon?

A. Yes.

Q. And you've seen the roof fall in on top of the shields, haven't you, when the shields have been lowered?

A. Yes, sir.

The Petitioner's Arguments

The petitioner states that after the longwall face has advanced outby crosscut A, that crosscut is not used as a regular travelway, and there is no reason for anyone to go inby the break line into the crosscut. The petitioner asserts that on two or three occasions in the past when the respondent has experienced mechanical breakdowns, and therefore needed to travel through the crosscut to transport machinery and equipment, it has submitted a plan setting forth the additional roof supports to be installed prior to such traveling. However, in the instant case, no such mechanical breakdown or emergency work existed, and respondent's management employees apparently decided to take the easiest path off of the longwall face, which was through crosscut A, but inby the cave break line of the shields. Petitioner concludes that there was no reason whatsoever for the employees to be going through crosscut A, because the longwall and all work associated therewith had advanced outby the crosscut, and that such a course of travel inby the break line is inherently dangerous and subjects the miners to the hazards related to roof falls and rib rolls.

Citing the Commission's decisions in *Eastover Mining Co.*, 4 FMSHRC 1207, 1211 n.8 (July 1982); *Consolidation Coal Company*, 6 FMSHRC 34, 37 n. 4 (January 1984); and the D.C. Circuit Court's decision in *United Mine Workers of America v. Dole*, 870 F.2d 662, 664 (D.C. Cir. 1989), the petitioner points out that roof falls have been recognized by Congress, the Secretary of Labor, the mining industry, and the Commission as one of the most serious hazards associated with coal mining.

The petitioner asserts that the respondent's expert mining engineer Hendon agreed with the inspector's definition of break line (Tr. 239), agreed that the mine roof falls behind the break line all the way over into the number 4 entry and over to the yield pillar (Tr. 246-247), admitted that the area inby the break line has higher roof fall potential and that he would not send his men into that area (Tr. 249-251), and admitted that the inby corner of the crosscut was "The most hazardous", and that the respondent normally places two cribs in the crosscut as additional roof support (Tr. 261-262). The petitioner further asserts that Mr. Hendon acknowledged the inherent dangers of crosscut A, confirmed that he has observed similar crosscuts fall in on past occasions, and that there would be no reason why anyone would send anyone inby the break line through crosscut A. Finally, the petitioner points out that safety Committeeman Boyd and inspectors Ely and Gaither confirmed that crosscut A was not a normal travelway.

The petitioner maintains that the respondent's managers were merely taking a convenient shortcut off of the longwall face and were caught by inspector Gaither. The petitioner argues that the

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respondent clearly recognized the hazards of travelling inby the break line, normally installs two cribs in the crosscut as additional support, and has no intention of traveling inby the break line through the crosscut on a regular basis.

The petitioner points out that it has not prohibited travel through crosscut A as long as the respondent has submitted a supplemental roof plan showing the additional roof support it would install prior to any travel therein. Given the inherent dangers of the crosscut, the petitioner asserts that it merely wants additional roof support installed prior to any work or travel in the area.

Citing a recent discrimination decision involving the hazards associated with crosscut A, Secretary of Labor on behalf of James Johnson and UMWA v. Jim Walter Resources, Inc., 15 FMSHRC 2367 (November 1993), the petitioner argues that the respondent recognizes the dangers of traveling through such crosscuts when the longwall face has advanced outby the crosscut, and that Judge Fauver noted that when the respondent removes an entire longwall from one section of the mine to another, it advances the face up to a crosscut that is in line with a track entry, and that its approved roof control plan requires additional roof supports such as "timbers set out to the track, cribs set in the No. 3 entry on both sides of the crosscut, timbers set in Crosscut B, additional roof bolts installed in Crosscut B, and the entire face meshed all the way to the tailgate." Petitioner concludes that under such circumstances, the respondent's roof control plan provides for the installation of additional support throughout the crosscut to be traveled, and that in the instant case the respondent failed to even install the minimum two cribs in the crosscut as was normally done, yet two managers were observed walking down the middle of the crosscut.

Citing previous litigation between the parties in Secretary of Labor v. Jim Walter Resources, Inc., 11 FMSHRC 2364 (November 1989), in connection with a ventilation violation of section 75.312, the petitioner states that Judge Weisberger had little difficulty in finding "that crosscut A was unsafe for inspection" in light of the testimony of the respondent's engineer (Franklin) that the advancement of the longwall face causes the roof to fall and transmits pressure on the pillar abutting crosscut A, 11 FMSHRC at 2366.

The petitioner maintains that the cited regulation section 75.202, is designed to protect against the hazards related to roof falls and rib rolls, and that the respondent has recognized these hazards as evidenced by the testimony of Mr. Hendon who described how the inby corner of the crosscut would be the "most hazardous", how the roof falls in from the sides through a process known as "flushing", and how the roof

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inby the break line had a "higher potential to fall." (Tr. 235, 251, 261). The petitioner further believes that the respondent's recognition of the hazards of roof falls in crosscut A are further documented by its engineer's testimony in the case decided by Judge Weisberger and by the fact that the respondent routinely installs two cribs in crosscut A for additional roof support (Tr. 70, 121, 171, 262).

The petitioner concludes that given the fact that inspector Gaither observed mine management employees walking down the middle of the crosscut inby the break line without any additional roof support, a violation of the cited standard has been established, and that it is undisputed that traveling inby the break line presents a hazard related to roof falls and/or rib rolls.

With regard to the gravity of the violation, the petitioner asserts that the fact that the roof had not yet started to fall does not minimize the seriousness of the violation. The petitioner cites Secretary of Labor v. Consolidation Coal Co., 6 FMSHRC 34, 38 (January, 1984), where the Commission was confronted with a situation where "every miner on every shift for six months was exposed to the hazard created by the over-wide bolts along the supply track," and held that "the 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 the instant case, the petitioner points out that it is by design that the mine roof falls in behind the shields inby the break line, and that it falls in all the way over through the No. 4 entry and up to the yield pillars, despite the presence of roof bolts in the No. 4 entry.

The petitioner further concludes that the crosscut A area is prone to fall in as well, and that Mr. Hendon testified that he examined seven (7) such crosscuts and about half of them had fallen in, and that the area inby the break line has a higher potential to fall and that he would not send anyone back there. Likewise, Messrs. Gaither, Ely and Boyd all testified as to the roof falls they have observe in such crosscuts. The petitioner concludes that such factors demonstrate the seriousness of walking inby the break line and are the same concerns which prompted Judge Weisberger to deem Crosscut A to be "unsafe for inspection".

The petitioner takes the position that it does not have to resort to rulemaking to prohibit the respondent's managers from walking inby a break line, and that the cited standard section 75.202, is expressed in general terms so that it is adaptable to myriad roof conditions and roof control situations. See generally Kerry-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). Petitioner asserts that a formal rule is not necessary to tell industry that walking inby a break line that is designed to

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fall is a hazardous practice. Similarly, petitioner believes that the decision to walk in by the break line through crosscut A should not be left to individual decisions, and that "Such a subjective approach ignores the inherent vagaries of human behavior." Secretary of Labor v. Great Western Electric Company, 5 FMSHRC 840, 842 (May 1983).

With regard to the inspector's unwarrantable failure finding, the petitioner asserts that the respondent was aware that MSHA considers crosscut areas in by the break line to be "gob" and not routinely travelable, and that for approximately 10 years, the local MSHA office had an enforcement policy of citing a violation if the forward longwall crosscut was used as a travelway without additional roof support or safeguards. Citing the prior cases concerning the location of the break line and crosscut A, and similar citations issued to the respondent in connection with travel in the crosscut, the petitioner concludes that it is clear that advancement of the longwall face exerts undue pressures on the roof in crosscut A, and the respondent is well aware of this principle of longwall mining, and that for mine management to disregard this and travel beyond the break line into crosscut A constitutes an unwarrantable failure violation.

The petitioner asserts that the prior litigation and the local MSHA policy put the respondent on notice that traveling through crosscut A without additional roof support was prohibited and would result in enforcement action. Citing Drummond Company, Inc., 13 FMSHRC 1362, 1368 (September 1991), and Eastern Associated Coal Corporation, 13 FMSHRC 187 (February 1991), the petitioner concludes that the respondent knew, or "had reason to know", or "should have known" that traveling through crosscut A was prohibited. Petitioner points out that the respondent implemented the practice of installing two cribs in the crosscut and the fact that no work is ever performed behind the break line simply underscores the flagrant conduct of management. Petitioner concludes that the individuals were simply taking a "shortcut" for their own convenience and got caught.

The Respondent's Arguments

In its posthearing brief, the respondent argues that the citation should be vacated because it was based on an MSHA policy that has no basis in law. Rejecting the petitioner's contention that the inspector relied on his experience, rather than on any MSHA policy or manual provision, either written or unwritten, the respondent maintains that it is impossible for an inspector not to be influenced by any "informal" policy, and that MSHA's attempts to enforce its "policy" with respect to the interpretation and application of the cited section 75.202, without proper rulemaking notice and hearing, including the

promulgation of an appropriate mandatory standard, or an amendment or modification of the existing standard, is unlawful.

The respondent further argues that the citation should be vacated because the standard sought to be imposed on it by MSHA is unenforceable due to vagueness because it is unwritten and different MSHA inspectors interpret it in different ways. The respondent states that "the standard" sought to be imposed by the inspector on the longwall in this case is that no miners are allowed to travel in crosscut A (And other typically similar crosscuts) when the break line, located where the canopy meets the cave shield, passes the inby corner of the crosscut. The respondent suggests that it is confused, and it cites a decision by Commission Judge William Fauver on March 10, 1993, affirming a violation of section 75.202(a), in which it contends that a different inspector testified that no miners could travel in the crosscut when the face line passed the outby corner of the crosscut, and a supervisory inspector testified that a violation would occur if anyone travelled in the crosscut, or the adjacent intersection, if the face line had passed the inby corner of the crosscut. Jim Walter Resources, Inc, 15 FMSHRC 432 (March 1993). Further, the respondent asserts that another inspector made a finding that it is not a violation if miners work inby the imaginary line (Attachment to brief).

The respondent argues that section 75.202, concerns the condition of the roof and ribs in question and that its expert witness Hendon testified that the only way to determine whether the roof is adequately supported is by visual observation, and that MSHA's assumptions concerning the pressures associated with longwall mining using yield pillars are erroneous. The respondent maintains that Mr. Hendon's studies proved that the areas prohibited to travel by MSHA actually were under less pressure than the areas through which MSHA desired for miners to be travel. Citing additional testimony by Mr. Hendon that he would not send his crew inby the break line into crosscut A, the respondent points out that he indicated that placing people at the critical rib corner would have to be determined by the existing conditions. Respondent also cites Mr. Hendon's testimony that it was not a good practice to be inby the break line without a reason, but points out that Mr. Hendon further testified that he has traveled similar crosscuts inby the break line after visually examining the roof and determining that it was safe, and that he would travel through crosscut A as long as he could, depending on the conditions.

The respondent concludes that Mr. Hendon was of the expert opinion that there should not be a per se rule that crosscut A is not supported based on the position of the breakline, and that each instance must be considered on its own merits. The respondent points out that in the instant case there is evidence of any adverse roof conditions in the area in question.

Assuming that a violation is established, the respondent takes the position that it was not the result of its unwarrantable failure to comply with the cited standard. In support of this conclusion, the respondent relies on its previous argument that the standard sought to be imposed by MSHA is based on various policies which are vague and differ from inspector to inspector, and asserts that it is ludicrous for the petitioner to argue that it knew or should have known which variation of this policy was going to be enforced at the mine on the day of the inspection. The respondent further states that the inspector admitted that he did not question mine management about why they were in the area or if they knew that they were violating his policy. The respondent concludes that the inspector's sweeping statement that "they were aware of the hazards" without further inquiry is not sufficient to raise their actions to aggravated conduct constituting more than ordinary negligence, citing *Emery Mining Corp. v. Secretary of Labor*, 9 FMSHRC 1977 (1987), *Secretary of Labor v. Gatliff Coal Co.*, 14 FMSHRC 1982 (1992).

Summarizing its position, the respondent asserts that the citation should be vacated because (1) it was based on an unwritten, unenforceable policy, (2) the standard sought to be imposed by MSHA is vague, and (3) there is no testimony that the roof in the cited area was not supported or otherwise controlled to protect persons from hazards related to falls of the roof, face, or ribs.

Findings and Conclusions

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 75.202, which provides as follows:

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

(b) No person shall work or travel under unsupported roof unless in accordance with this subpart.

The credible and undisputed evidence of the inspector establishes that he issued the citation after observing four miners, including the longwall manager, and deputy mine manager, walking through the cited crosscut in by the longwall roof support shield break or cave line. Although the roof at the crosscut had been supported by roof bolts when the entry was initially driven, it is undisputed that additional roof support such as cribs, was not installed at the crosscut corners. It is further undisputed that the inspector did not go into the crosscut to observe or otherwise determine the immediate roof conditions in the crosscut, but he did observe from an adjacent

entry intersection that the roof had fallen in behind the longwall roof shields.

The petitioner concedes that there is no evidence in this case of any adverse roof conditions, such as a cracked roof, brows, or falling roof around the existing roof bolts. However, the petitioner takes the position that it is an undisputed fact that in longwall mining, the mine roof is going to fall behind the roof shield break line and that there is a real potential for roof pressures and stresses to ride over into the crosscut and cause the roof to fall in that area. Under the circumstances, the petitioner believes that additional roof support must be installed before the crosscut in question is traveled by miners, and since no additional roof support was in place when the inspector observed the miners traveling through the crosscut, the petitioner concludes that a violation has been established and that the inspector was entitled to rely on his 21 years of mining experience in support of his conclusion that traveling through the crosscut without additional roof support in place was an extremely hazardous practice in violation of section 75.202.

The respondent takes the position that in the absence of any observable adverse roof conditions, section 75.202 does not require any additional roof support, and it suggests that MSHA is attempting to enforce a "per se" prohibition against traveling through a crosscut without additional roof support when the longwall canopy shield break line reaches a particular position, namely, just past the inby corner of the crosscut.

Although the respondent's assertion that the existing roof bolts that were installed when the heading was initially driven were in compliance with section 75.202, and its roof control plan, may be true, the question of whether additional roof or rib support was otherwise required pursuant to section 75.202(a), is a matter to be decided on a case-by-case basis. Indeed, the parties agreed that Judge Fauver ruled that MSHA policy is not enforceable, and that any future cases would have to be decided on the actual roof conditions in any given case (Tr. 173). Conceding that Inspector Gaither did not observe any deteriorated roof conditions because he did not travel into Crosscut A, petitioner's counsel nonetheless argued that the face that had advanced ten feet outby the crosscut, in combination with the roof pressures constantly being exerted on the crosscut, constituted a potential hazard that needed to be addressed by the installation of additional roof support if miners intended to travel the crosscut (Tr. 175).

When asked why the parties have not negotiated some agreement as to future roof support requirements, including MSHA's prohibition of any travel through a typical crosscut A on a mine wide basis, the petitioner's counsel stated that after Judge Fauver's decision the parties discussed the filing of a

plan, but that mine management took the position that no plan was required for travel through the intersection (Tr. 117). Respondent's counsel stated that MSHA could easily prohibit travel in the crosscut but that it does not want to do it legally through rulemaking and wants to rely on policy (Tr. 117).

The respondent's assertions that MSHA's insistence on additional roof support at the cited crosscut A was based on a locally or nationally applied policy that is unenforceable, and that Inspector Gaither relied on that policy in issuing the violation, are rejected. While it is true that in the prior litigation before Judge Fauver, MSHA did in fact have a local policy and practice of citing a violation of section 75.202(a), if the forward longwall crosscut was used as a travelway without additional roof support or safeguards, Judge Fauver recognized the fact that such a policy was unenforceable as a mandatory safety standard, and he affirmed the violation based on the evidence presented with respect to the actual roof and mining conditions, irrespective of any such policy. In the instant case, I find no credible support for the respondent's conclusion that the inspector relied on any MSHA policy, and his credible testimony that he was unaware of any such policy and never discussed with anyone that he should cite a violation of section 75.202, stands un rebutted.

I am not persuaded by the fact that the roof did not fall in this case, or that the immediate roof in the crosscut showed no obvious evidence of deterioration. As the U.S. Tenth Circuit has observed "it is clear that Congress intended the Mine Act to both remedy existing dangerous conditions and prevent dangerous situations from developing", *Mid Continent Coal & Coke Co. v. FMSHRC*, (10th Cir. September 24, 1981, 2 MSHC 1450). I agree with the petitioner's assertion that serious injuries or death from a roof fall is not a prerequisite to establish a violation in this case. Further, I do not find it unreasonable or onerous to expect a mine operator to take reasonable precautions to protect miners from potentially hazardous roof conditions in a crosscut area that is in close proximity to a roof area that is known to cave or fall in behind the longwall shields as the longwall face is advanced during the coal extraction process. The parties agree that the roof will fall, but disagree as to whether anyone can predict when it will fall.

The respondent's assertion that MSHA's "standard" prohibiting travel in crosscut A when the shield break line passes the inby corner of the crosscut is void for vagueness is rejected. As noted earlier, I have concluded and found that no such regulatory "standard" was in existence at the time the violation in this case was issued. In any event, I conclude and find that the cited section 75.202, language is stated with sufficient certainty to reasonably inform the respondent as to what was required to insure compliance. The regulatory language

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clearly requires the respondent to provide adequate protection to protect miners from any roof, face, or rib fall hazards, as well as hazards associated with coal or rock bursts, in areas where they may travel, by supporting or controlling the roof, face, and ribs.

As correctly argued by the petitioner, it is well recognized that roof falls constitute one of the most serious hazards in the coal mining industry, *United Mine Workers of America v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989), and 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 *Southern Ohio Coal Company*, 10 FMSHRC 138, 139 (February 1988), the Commission affirmed a violation of the roof control requirements of section 75.200, because of the operator's failure to adequately support two of four "brows", or edges, that were created by the excavation of a "boom hole". Roof bolts had been placed in the roof of the boom hole after it was excavated, and the bolts that were in the brows were those that had been placed in the roof of the intersection prior to the excavation of the boom hole. The inspector cited the violation because he believed that the two bolts in question were located too far from the edges of the brows as determined by his two-foot standard as the point at which he considered bolts to be too far from the edge.

In appealing the Judge's decision affirming the violation, SOCCO contended that the brows were adequately supported, that it did not violate its roof control plan, that there was no common industry understanding as to how close to the edge the brows of a boom hole should be bolted, and that all of the witnesses were in agreement that the brows were stable at the time the violation was issued, and that the roof was above average.

The Commission affirmed the violation, and it relied on the language of section 75.200, requiring that "The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs." This regulatory language is very similar to the language found in the cited section 75.202, in the instant case.

The Commission held that the fact that SOCCO did not violate its roof control plan was not controlling for purpose of determining the existence of the violation predicated on the

regulatory requirement that the roof and ribs be supported or otherwise controlled adequately. The Commission stated as follows at 10 FMSHRC 141:

Liability under this part of the standard is resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized that the roof or ribs were not adequately supported or otherwise controlled. Specifically, the adequacy of particular roof support must be measured against what the reasonably prudent person would have provided in order to afford the protection intended by the standard. Quinland Coals, Inc., 9 FMSHRC 1614, 1617-18 (September 1987); Canon Coal Co., 9 FMSHRC 667, 668 (April 1987), Cf. Ozard-Mahoney Co., 8 FMSHRC 190, 191-92 (February 1986); Great Western Electric Co., 5 FMSHRC 840, 841-42 (May 1983). Measured against this test, we hold that substantial evidence supports the judge's conclusion that two brows of the boom hole were not supported adequately.

I conclude and find that the question of whether the respondent failed to meet the requirements of section 75.202, must be measured against the standard of whether a reasonably prudent person familiar with all of the facts, would have considered the existing roof bolts that were installed when the entry was initially driven as adequate protection for the miners who were observed walking through Crosscut A, or whether such a person would have installed roof cribs, or other additional roof support, or taken other precautionary measures to protect the miners from roof or rib falls, including endangering off the area, or otherwise prohibiting travel through the crosscut. See: Westmoreland Coal Company, 7 FMSHRC 1338, 1341 (September 1985); United States Steel Corporation, 5 FMSHRC 3 (January 1983); Alabama By-Products Corporation, 4 FMSHRC 2128 (December 1982). In short, the adequacy of any particular roof support must be measured against what the reasonably prudent person would have provided in order to afford the protection intended by the standard. Quinland Coals, Inc., 9 FMSHRC 1614, 1617-18 (September 1987); Canon Coal Co., 9 FMSHRC 667, 668 (April 1987).

The evidence establishes that the respondent has routinely installed cribs at the crosscut corners as additional roof support under circumstances similar to those presented in this case, and it has done so as an added safety measure to protect miners from potential roof falls in the crosscut. Under the circumstances, there is a strong presumption that the respondent recognizes the real and potential hazards of roof and rib falls in those crosscut areas where the longwall face has advanced past the crosscut intersection and the roof is falling in behind the advancing shields.

Inspector Gaither, who has 22 years of mining experience, including the inspection of longwall mining practices, testified credibly that when the break line of the longwall roof support shield reaches the crosscut intersection, that area is hazardous to anyone walking through because no additional roof support is present. He further credibly testified that when the roof falls behind the advancing roof support shield as the coal face is mined and advanced, the roof will fall all the way to the yield pillars at the corners of the crosscut, and that he has on many occasions observed the roof fall in the intersection and "ride over into the crosscut" (Tr. 53-54). He also testified credibly that any travel inby the shield break line would be hazardous because of potential rib rolls caused by sloughage that results from roof pressures on the soft coal seam (Tr. 64).

Longwall helper and stage loader Boyd, who has 21 years of mining experience, including 19 years working on longwalls, testified credibly that he has observed roof falls and "overrides" resulting from roof pressures in areas typical to those described in the crosscut and intersection in question (Tr. 109-114). While it is true that Mr. Boyd did not observe the roof conditions at the time of the inspection, I find his testimony credible and relevant to the issue of the hazards typically presented at the crosscut area in question when the roof is falling behind the advancing longwall shields.

MSHA's Safety Supervisor Ely, who has over 20 years of mining experience, including the review of roof control plans, the inspection of longwalls, and the investigation of roof falls, testified credibly that roof stresses are present at the front of the roof shields as the face is advanced and the coal is removed, and that one cannot predict when the coal will fall behind the shields as they are advanced. He further testified credibly that he has observed roof "ride over" pressures at the front of a longwall face, and that it would be an unsafe practice to travel through the crosscut in question because of the roof stresses and the fact that unplanned roof falls frequently occur in such areas (Tr. 156-158).

Although respondent's expert witness Hendon was of the opinion that any hazards associated with walking through crosscut A would have to be determined by the existing roof conditions, he confirmed that good roof can fall at any time without advance notice, including the roof in crosscut A. He agreed that as the roof falls behind the shield break line as the face is advanced, it will fall all the way to the yield pillars, and that anyone walking inby the break line would have no assurance that the roof pressure on the roof which has fallen and is falling is not going to override into the crosscut and fall (Tr. 244-247). Given the conditions that existed, and as shown in the inspector's sketch, Exhibit G-1, Mr. Hendon who has worked as a foreman, stated that he would not ask his crew to travel inby the break line into

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crosscut A because he would be concerned for their safety and would not consider such travel to be a good practice (Tr. 249-250).

Although Mr. Hendon testified to certain roof pressure studies that he had participated in, none of them were produced or introduced for the record, and he conceded that he was not present when the citation was issued and that he did not monitor the particular crosscut location cited by the inspector (Tr. 244). Even so, Mr. Hendon testified that the corners of crosscut A would be the most hazardous place, and that roof cribs are routinely installed at those locations for roof support, and that there was no guarantee that when the roof falls, it will do so evenly and not enter crosscut A (Tr. 265).

After careful consideration of all of the evidence in this case, and the arguments advanced by the parties, I agree with the petitioner's position and conclude and find that it has established a violation of section 75.202, by a preponderance of the evidence. Although it is true that there is no evidence of any objective indications that the immediate roof area at the cited crosscut through which the miners were observed traveling was going to fall, or that the roof had visible signs of deterioration, I am persuaded by the credible testimony of the petitioner's witnesses, corroborated in critical part by the respondent's expert witness, that clearly demonstrates to me that in the course of longwall mining, roof pressures are exerted on the yield pillars as the roof breaks off and falls behind the shields temporarily supporting the roof, and to the edge of the pillars, and that there is a clear and present danger of a roof fall extending out into the crosscut, and that travel through the crosscut without additional roof support would be inherently unsafe and hazardous.

I conclude and find that a reasonably prudent person familiar with longwall mining should recognize that walking through a crosscut immediately adjacent to the face that is being mined, and in by the shield cave line, without the installation of additional roof support, is an unsafe practice that exposes miners walking through the area to hazards related to falls of the roof or ribs, and that such conduct constitutes a violation of section 75.202. Under the circumstances, the citation 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

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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); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, 3 FMSHRC 327, 329 (March 1985). Halfway, Incorporated, 8 FMSHRC 8, (January 1986).

In Consolidation Coal Co., 6 FMSHRC 34, 38 (January 1984), 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

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injured during that period does not ipso facto establish that there was not a reasonable likelihood of a roof fall." The Commission further noted that despite the generally good roof conditions, the over-wide bolting pattern created "a measure of danger to safety or health".

In the National Gypsum case, 3 FMSHRC 822, 827 (April 1981), the Commission noted that the word "hazard" denotes a measure of danger to safety or health, and that a violation "significantly and substantially" contributes to the cause and effect of a hazard if it could be a major cause of a danger to safety or health. "In other words", stated the Commission, "the contribution to cause and effect must be significant and substantial".

In Halfway Incorporated, 8 FMSHRC 8 (January 1986), 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 normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

Although traveling through the crosscut in question may not have subjected the miners to any immediate hazard, the inspector observed that the roof had fallen behind the shields, and no additional roof support had been installed. He also indicated that in the event of a roof squeeze between the coal seam and the shield, the roof will fall behind its roof bolt anchorage as the roof falls behind the shields (Tr. 59). Mr. Ely testified credibly that the existing roof bolts that were initially installed when the entry was developed may not be adequate to support the crosscut that is being subjected to roof pressures, and that on many occasions the roof falls above the roof bolt anchorage zone (Tr. 156).

I conclude and find that the failure to provide additional roof support before traveling through the crosscut in question contributed to a discrete hazard of roof or rib falls in that area. In the context of continued mining operations, I further conclude and find that a fall of roof or ribs was reasonably

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likely as the shields advanced further, and anyone walking through the crosscut would be exposed to injuries of a reasonably serious nature. Under all of these circumstances, the inspector's "S&S" finding IS AFFIRMED.

Unwarrantable Failure Violation

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); *Youghiogeny & 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 *Youghiogeny & 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. * * *

There is no evidence of any obvious readily observable adverse roof conditions in the immediate crosscut area in question, and it would appear that the hazard exposure was rather brief. Although the inspector alluded to past citations that he had issued for similar incidents, no further evidence was forthcoming with respect to the facts and circumstances surrounding those purported past events. In the absence of any credible evidence to the contrary, I agree with the petitioner's assumption that the miner's walked through the crosscut for their own convenience, and the respondent confirmed that one of the managers is no longer in its employ. None of the other individuals were called to testify in this case.

The inspector testified that he based his unwarrantable failure finding on his belief that the two "management" individuals should have set the example for the work force, and that they knew or should have known that it was hazardous to travel through the crosscut. I conclude and find that these are insufficient grounds for establishing "aggravated conduct" within the meaning of the Commission's precedent decisions. I further conclude and find that the petitioner has not established, through any credible, reliable, or probative evidence, that the violation was the result of the respondent's unwarrantable failure to comply with section 75.202. Under the circumstances, the inspector's finding IS VACATED, and the section 104(d)(1) citation IS MODIFIED to a section 104(a)"S&S" citation.

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

The parties stipulated that the respondent is a large mine operator and that the payment of a civil penalty assessment for the violation will not adversely affect its ability to continue in business. I adopt these stipulations as my findings and conclusions.

History of Prior Violations

The parties stipulated that the respondent has an "average" history of prior violations. In the absence of any evidence to the contrary, I cannot conclude that the respondent's compliance

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record warrants any additional increase in the penalty assessment that I have made for the violation in question.

Good Faith Abatement

The record reflects that the citation was terminated within two hours after the affected employees were reinstructed about traveling the crosscut, and the area was dangered off. I conclude and find that the violation was timely abated in good faith.

Gravity

Based on my "S&S" findings and conclusions, I conclude and find that the violation was serious.

Negligence

I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care amounting to a moderately high degree of negligence.

Civil Penalty Assessment

Taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of \$500, is reasonable appropriate for the violation that I have affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment of \$500, for the violation. Payment shall be made to the petitioner (MSHA), within thirty (30) days of this decision and Order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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