

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
**601 New Jersey Avenue, N.W., Suite 9500**  
**Washington, D.C. 20001-2021**  
Telephone: (202) 434-9933  
Fax: (202)434-9949

August 1, 2011

HILDA L. SOLIS, Secretary of Labor,	)	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	)	
ADMINISTRATION (MSHA),	)	
Petitioner	)	DOCKET NO. KENT 2010-354
	)	A.C. No. 15-19270-203618-01
v.	)	
	)	
	)	
ROAD FORK DEVELOPMENT	)	MINE: LOVE BRANCH SOUTH
COMPANY, INC.,	)	
Respondent	)	

**DECISION**

Appearances:     J. Malia Lawson, Esq., Robert E. Motsenbocker, Esq.  
                    Nashville, Tennessee, on behalf of the Secretary of Labor

                    Carol Ann Marunich, Esq., Dinsmore & Shohl, LLP  
                    Morgantown, West Virginia, for the Respondent

Before: Judge Moran

At issue in this proceeding under the Mine Act are two section 104(d)(1) Orders. One involves an alleged failure by the Respondent, Road Fork Development Company, Inc., at its Love Branch South Mine, to comply with its roof control plan by failing to have the required support where multiple hill seams were encountered. The plan requires timbers and cross collars to be installed under such circumstances and the inspector found various instances of non-compliance regarding those supports. The other (d)(1) Order alleges a related violation by virtue of those non-compliances with the roof control plan not being noted in the preshift examination book. Both Orders included special findings asserting that the violations were “significant and substantial” and unwarrantable failures. A hearing was held in Pikeville, Kentucky on April 11, 2011. For the reasons which follow, the violations and the associated special findings are affirmed and the civil penalties imposed are the same as those originally assessed, totaling

\$9,774.00.<sup>1</sup>

**Order No. 7446458**

On September 16, 2009, while conducting an E01 inspection at the mine, Inspector Larry Wolford issued the Respondent a section 104(d)(1) order for not complying with its roof control plan.<sup>2</sup> Ex. S 2, and S 3, the Order and the continuation form for that order, respectively.<sup>3</sup> Tr. 13-14. The evidence associated with this matter is as follows. Inspector Wolford arrived on the working section at about 10 a.m. on September 16<sup>th</sup>, accompanied by mine employees John Urconis and Ed Hatfield. Tr. 20. After attending to other matters, Wolford stated that he found “multiple hill seams” which were not being supported, contrary to the requirements of the mine’s roof control plan.<sup>4</sup> The inspector described “hill seams” as a “crack in the mine roof that goes near the surface of the mine . . . [that is to say a crack that goes] up to the surface.” Tr. 20-21. These are problematic because if one has “multiple hill seams, which [are] two cracks going down an entry, there’s separation between the roof on the sides; and it will allow the roof to fall out in between those cracks.” Tr. 20-21. Accordingly, hill seams are significant as, where two

---

<sup>1</sup> Both post-hearing briefs, together with the reply and response were fully considered. The absence of a specific reference to a contention made means that the Court considered that it was unnecessary to particularly address such matter or that it was inferentially addressed in the decision.

<sup>2</sup> Inspector Wolford has been an MSHA inspector for approximately 3 ½ years. In addition, he has had about seven years of experience as a coal miner, working in Kentucky and West Virginia. Tr. 11-12. In that latter work, his experience included working as a ventilation man, scoop operator, continuous miner operator and as a section foreman

<sup>3</sup> Wolford identified Gov.Ex. S 2A, relating to Docket KENT 2010-354, for the violation numbers in issue, numbers 7446458 and 7446459, which exhibit reflects the proposed penalties for those, with the former assessed at \$2,000 and the latter at \$7,774, for a total of \$9,774. Respondent stipulated to the admission of Government Exhibits S 3, 4, 5 and S 6, the inspector’s notes related to his Orders in this matter. Tr. 17.

<sup>4</sup> An additional factor of concern, the Inspector referred to the map, Ex. S 8, and the listing of “Sunny Ridge Surface Mine,” an area marked with perpendicular yellow lines. The witness marked this area on the exhibit with a blue pen and added his initials. Tr. 38. That mine is a surface mine which is next to, that is to say, close to, the Respondent’s mine. The significance of that, according to Wolford’s unchallenged testimony, is that activity at that surface mine, such as blasting, affects the Respondent’s mine because that is likely to weaken the roof of the Respondent’s mine. Wolford stated that the overburden, that is the amount of mountain one has above the mine, is important because, as the overburden lessens, more hill seams may be present as one gets closer to the surface. Tr. 35. In this area, the inspector stated that the amount of overburden in that area is between 1 to 200 feet. Tr. 36.

cracks are present, the rock in between such cracks may fall out. Tr. 26. That hill seams are a significant concern is also attested to by virtue of their inclusion in the mine's roof control plan.

Wolford noted that the roof control plan provides the *minimum* control requirements. Tr. 25. Pursuant to the mine's approved roof control plan, when multiple hill seams are encountered, for support, the plan requires the installation of cross collars or channels *together with posts*. Tr. 24-25. Wolford spotted this condition because "they were going parallel with the entries . . . [that is the cracks were] going in line with the entries that they [were] driving." Tr. 22. As just mentioned, the roof control plan<sup>5</sup> requires that cross collars or a T 5 channel<sup>6</sup> across the entries and posts (also referred to as 'timbers') are to be installed in such circumstances. Exhibit S 7A. Wolford stated that in some instances the mine had "half way" installed such collars and in other instances they had not done anything.<sup>7</sup> Tr. 22.

Wolford further explained his findings of the violations by referring to Ex. S 12, a computer generated printout, which was used by the Secretary as demonstrative evidence to depict the section where Inspector Wolford found the violations.<sup>8</sup> On that exhibit the inspector

---

<sup>5</sup>Ex. S 7 is the mine's approved roof control plan, dated August 21, 2009. Tr. 23.

<sup>6</sup>Cross collars and T 5 channels are a 3 inch by 8 inch piece of wood or a piece of metal that "goes across that entire entry," that is from rib to rib and, with those, posts are installed under each end of the wood or metal and these have to be installed on four foot centers. The four foot centers requirement means that the wood or metal supports must be installed every four feet as one progresses in an entry as long as such hill seams continue. Tr. 22-23, 46. Besides adding support, the presence of such timbers can serve as a warning since, if they bow or sag, it shows that the roof is sagging and that the timbers are taking on weight. Tr. 47. Timbers therefore provide required support and can serve as a warning too.

<sup>7</sup> Although the issue was raised by the Respondent at the hearing, there is no question but that the Inspector was certain about his location in the mine where he found the conditions cited. Exhibit S 8 is a mine map of the Love Branch South mine, dated October 28, 2009, and Wolford identified on that map the location where he found the hill seams. He knew the location because he included the survey station numbers in his notes at the time of the inspection and compared that with a mine map that had such numbers on it. S 8 did not have the survey numbers included on it and for that reason Wolford consulted another map of the mine which did have those numbers. Tr. 29. The inspector marked the area here he found the hill seams on the exhibit, circling the area with a red marker, listing "hill seams" and adding his initials, "LW." Tr. 32, 34-35. The Respondent did not pursue this issue in its post-hearing briefs. The Court finds that the inspector knew his location in the mine where he found the conditions cited.

<sup>8</sup> The Court determined that the demonstrative evidence, which was certainly material, had explanatory value and did not create prejudice nor confusion, nor did it mislead. Accordingly, using its discretion in such matters, the Court admitted the exhibit. *Rogers v.*

marked the eight entries and the coal feeder<sup>9</sup> location. Tr. 44, 48. The inspector's order stated that the number 1, 2 and 3 entries and the connecting crosscuts had multiple hill seams. While it was noted that wooden cross collars were installed, no timbers were present under each end of the cross collars. This problem began adjacent to the coal feeder and it extended two crosscuts inby.<sup>10</sup> Tr. 44. In that area, while the collars<sup>11</sup> were present, no timbers had been installed. Tr. 49. The inspector marked four additional collars located between the 3 and 4 entries, where the same problem existed.<sup>12</sup> Wolford testified that in those areas where the collars were present, there was not a single timber installed. Tr. 51. As further explained in the discussion of the testimony, the Court finds this to have been the case and makes this as a finding of fact.

Following that, on the same demonstrative exhibit, the inspector then marked on heading number 3 where there were neither collars nor timbers.<sup>13</sup> Tr. 53. Inspector Wolford stated that he found hill seams in every location where he marked red lines on the exhibit. Tr. 56. Using a silver ink marker, he then marked on the exhibit additional areas where he found hill seams. Those silver markings were in every area where the inspector had previously marked red and blue lines on the same exhibit, S 12. Thus, Exhibit S 12 provides a helpful guide to the hill seams the inspector found together with the roof control plan deficiencies associated with them; the silver ink markings representing the areas with hill seams; the blue line markings showing those areas with collars but without timbers (posts) and the red line markings identifying those area which had neither collars nor timbers present.<sup>14</sup>

---

*Raymark Indus.*, 922 F.2d 1426, 1429 (9<sup>th</sup> Cir. 1991), *Wright v. Redman Mobile Homes, Inc.*, 41 F.2d 1096, 1097-98 (5<sup>th</sup> Cir. 1976).

<sup>9</sup> The coal feeder is a machine on which coal is dumped and it transports the coal to a conveyor belt. Tr. 43. A shuttle car hauls the coal to the coal feeder. On the exhibit, the coal feeder was identified by a triangle. Tr. 44.

<sup>10</sup>The inspector marked this area missing the timbers with diagonal blue lines on the exhibit. Tr. 44-45.

<sup>11</sup> The collars are held up by roof bolts and by the timbers on each end. Tr. 49.

<sup>12</sup> The inspector's *notes* indicated those areas, but his original order did not. For that reason he issued a "continuation" to his order to reflect those additional problem areas. Tr. 50-51.

<sup>13</sup> The inspector's red markings on the exhibit reflected areas with neither posts nor collars. Tr. 54.

<sup>14</sup> Referring to his markings on S 12, the inspector confirmed that the red marks indicated there were no collars installed. Tr. 93. Thus, in Entries 2 and 3, there were areas with no collars, as indicated by the red marks, nor did the areas of 7 and 8, as marked, have collars. Wolford, reading that his notes made no reference to it, did not know if cable bolts had been installed in

Inspector Wolford's Order, No. 7446458, was issued as a D1 Order because the mine was already on a D sequence<sup>15</sup> and because he determined that the failure was unwarrantable. Tr. 59 and Ex. S 2. Wolford marked the order as "reasonably likely" because miners were working in the area of the hill seams. Eleven (11) men were working in that section. Tr. 60-62. He considered that any such injuries would be permanently disabling because of crushing from falling rock. He marked the number affected as one, as it was likely that only one miner would be hit if rock were to fall, although 11 would be exposed to the risk. Wolford also noted that, if normal mining operations had continued, miners would have been in every entry, because each heading is cut into. Tr. 135. The inspector marked the violation as "high negligence" because the section foreman, Randall West, told him that he was aware of the problem when the inspector brought the subject up. West was on the section at the time that Wolford raised the matter and the conversation with him occurred within 10 minutes after Wolford detected the problem.<sup>16</sup> Tr. 64. As Inspector Wolford expressed it, "[t]hey was (sic) running coal at the time [he] got up there, and they was (sic) making no effort to correct them." Tr. 63. The Inspector did not retreat, during cross-examination, from his assertion that both Urconis and West told him, as reflected in Wolford's notes, that the mine would have continued to mine coal, had the inspector not pointed out the hill seams and shut them down. Tr. 130-132.<sup>17</sup>

---

the area. Tr. 95. For clarification, the Court asked the inspector about his red line markings on the exhibit, inquiring whether, if one were standing at 7 and 8, where the inspector marked the "no collars" lines, mining had occurred. The inspector confirmed that in that area the coal had been removed from 7 and 8. Tr. 129. Continuing with that area, Wolford agreed that when standing there, no collars were present and one could see the hill seams. Tr. 129-130.

<sup>15</sup> The underlying section 104 (d)(1) citation was issued on August 26, 2009. Tr. O59-60, citing Citation Number 8226728. That citation placed the mine on a 104(d) sequence. Under that, any further unwarrantable failure violations within a 90 day period results in the issuance of 104(d)(1) orders being issued. To stop the D sequence chain, a mine must have a 90 day period free of any unwarrantable failures. Tr. 60. If a violation is not "S & S" but is unwarrantable, the D sequence continues until such a 90 day period free of unwarrantable failures occurs.

<sup>16</sup>Wolford first spoke of the problem with Mr. Urconis, the mine's superintendent, as that individual was traveling with him. Urconis was present when Wolford spoke to Mr. West about the problem. Tr. 65. Neither individual denied the problem, and as noted, West admitted to it, according to Wolford. Urconis, according to Wolford, only asked that the inspector not write up the violation as an unwarrantable failure. Tr. 66. Wolford added that Urconis was concerned that his job could be in jeopardy if the violation was listed as an unwarrantable failure. Tr. 68.

<sup>17</sup> Respondent's Counsel tried to diminish the impact of the inspector's remarks by noting that he did not recommend that the two be subject to reckless or intentional violations, nor did he issue an imminent danger order. However the inspector did order that the miners be withdrawn from the area and while Respondent's counsel noted that the men were then right back in the area, albeit to correct the hazard, the inspector observed that they were allowed back in that area

The inspector issued the violation as an unwarrantable failure because “the operator had been warned previously in the past about repeatedly violating this condition [ that is, the inadequately supported hill seams Tr. 67]; and they knew about it and was (sic) aware that the men was (sic) working in those conditions, and they failed to correct them.” Tr. 66. He had also warned both Urconis and Mitch Salmons that if unsupported hill seams continued to recur, he would put the mine on a “D sequence.”<sup>18</sup> Tr. 72.

Wolford also considered the violation unwarrantable because of its extensiveness. As indicated on the exhibit on which he marked the deficient areas, S 12, he expressed that it covered “quite a bit of area across the section.”<sup>19</sup> Tr. 68. It was the inspector’s estimation that the hill seams without the cross collars had been up for two days or longer. Tr. 70. That estimate was based on his view that it would have taken them at least two days to mine the coal to where they were. Tr. 70. Further, Wolford noted the condition immediately upon arriving at the section, and thus it was obvious. He described the lack of the corrective action in the presence of such hill seams as posing a “high risk” of danger because the miners are working in top that is not adequately supported. The rock could fall out at any time. Tr. 71.

In correcting the problem cited in Ex. S 2, the operator moved all eleven of the men out of the section and then used all of them to correct the deficiency. They proceeded to set up 80 timbers and they installed 16 cross collars up, using D 5 metal channels. Tr. 74. It took them from the time he issued his order until quitting time to fix the problems.<sup>20</sup> Tr. 74. The inspector

---

*only* to correct the problem. Tr. 133.

<sup>18</sup>Wolford stated that from approximately January through September 2009 he had issued four or five instances of failure to comply with the roof control plan where hill seams were present. Tr. 73. In contrast, government exhibit S1, a violation history of the mine’s roof control violations, was admitted, but the Court deemed it to be of low probative value because it dealt with such violations generally, not specifically to hill seam violations. Tr. 88. That being said, the uncontested testimony from Inspector Wolford that there had been four or five hill seam related violations from January through September of the same year establishes the chronicity of this violation.

<sup>19</sup> Each blue line Wolford marked on the exhibit is about 20 feet, as the entries between the coal pillars are about 20 feet wide. Tr. 69.

<sup>20</sup> Respondent’s Counsel tried to diminish the large amount of time it took to install the corrective measures by asking questions relating to the length of time it would take for the supplies to arrive from the surface and thereby suggesting that was a mitigating consideration. Tr. 111-112. When asked if the time to get the supplies to the area should be considered, Wolford responded that when the miners first arrived on the section the problem was already there; it had not developed after their arrival. Tr. 100. Posing a hypothetical to the inspector, Respondent’s Counsel asked the inspector to assume that West was in the face area mining

counted the 80 timbers and 16 T-channels as they were installed. Tr. 106. He did not leave the section during that time.<sup>21</sup> Tr. 107. Wolford reiterated that T-channel had to be installed in entries 2 and 3 and in 7 and 8. Tr. 109.

Noting again that Mr. Randall West, as the section foreman, is part of management, Wolford repeated that West was on that section the entire morning. Therefore, his knowledge is imputed to the mine operator. In addition, West admitted to Wolford that he knew about the problem. Wolford also expressed that he would have reached the same conclusion, even apart from West's statement and presence on the section, because the condition "was very obvious, extensive, and they knew about the one hill seam because they had put cross collars up but hadn't set the timbers under them." Tr. 77.

Wolford agreed that he met West in by the feeder in the face area at the time in issue. The inspector could not recall if the belts had been turned off prior to his arrival *on the section* that morning. Tr. 98. While he couldn't recall if coal was actually running when he arrived at the section, he did recall that it had been running as he saw "there was coal coming off the belts *when [he] arrived* at the mine." Tr. 99 (emphasis added). The inspector did not believe there were any mitigating factors. Tr. 99. When asked to assume that the belts had been turned off after a couple of cuts of coal had been made, whether that would be a mitigating factor, Wolford acknowledged it would be, *if* that had been done. Tr. 100. However, Wolford distinguished that what he would consider it to be mitigation would be if they "actually [had] start[ed] to correct the problem." Tr. 100. The Court agrees that, if the belts had been turned off, that would be a step preparatory to any true act of mitigation. Real mitigation, for example, would exist if the mine were in the process of setting some of the 80 timbers that were eventually needed.

---

entries 4, 5, 6, 7 and 8 of an active working section and that, after making a couple of cuts, finds the adverse roof conditions and takes steps to control it. The Inspector agreed that, under such a hypothetical, that would be affirmative action to deal with the problem. However, the inspector did not feel that the need to have supplies brought down from the surface was a mitigating factor because they should have kept the supplies in the area, as they knew there were hill seams. The inspector's point was that the supplies should have been handy, as they knew they would be needed since they were aware of the continuing hill seams issue. Tr. 103. Although part of the lengthy period it took to correct the problem was attributable to the time to have the supplies delivered from the surface to the section, the Court does not view this as diminishing the seriousness of the failures. Tr. 75. The extent of the problems, as depicted on S 12, and the number of timbers that had to be installed, show this by themselves.

<sup>21</sup> Wolford's markings on the demonstrative exhibit, S 12, did not represent each collar, nor the exact number that were installed. Rather they showed, in a useful illustrative manner, the area where they were installed. Tr. 110.

## Defenses Raised by the Respondent to the Order

In defense of the (d)(1) Order, the Respondent called John Urconis. At the time of the orders in issue here he was the mine's foreman and presently he is the mine superintendent at the Love Branch South Mine. Tr. 138. He described the mine as a "hilltop mine," with an inherently wet seam and he conceded that they do encounter "what some interpret to be a hill seam from time to time throughout the mine."<sup>22</sup> Tr. 140

Urconis did not disagree with the inspector's statement of the requirements under the roof control plan when hill seams are encountered.<sup>23</sup> Thus, he agreed that if that condition is encountered, one must install a four foot strap and if there are two seams, running parallel, one must first put up the primary support and then install 3 inch by 8 inch wooden cross collars or T 5 metal channel and these are to be installed on four foot centers.<sup>24</sup> Then, he further agreed, timbers must be installed under each end. Tr. 146.

Urconis concurred that he was with Inspector Wolford on September 16, 2009. When they arrived on the section, they started at the Number 1 entry and worked their way across into entry number 2 and 3 and so on until they reached the No. 8 entry. Tr. 151. Urconis stated that there were "some timbers installed" in entries 1, 2, and 3. He added that some had been knocked down but he could not recall where, stating only that they were "more on the left side of the section." Tr. 152. Urconis also stated that when the MSHA inspector issued the orders in issue here, he was underground with the inspector.

It was Urconis' testimony that he specifically recalled that when he and the Inspector arrived at the section, they were not producing coal and that the belts had been turned off. Tr. 155. However, he could not recall *when* those actions had stopped. It was Urconis' testimony that Randall West had "found hazards, and . . . he was fixing the hazards." Tr. 156. He continued, stating that "Randy and them was focusing (sic) on the right side," by which he was

---

<sup>22</sup> Although the Court considers it immaterial to the issues here, Urconis added that the mine has never liberated methane and that the draw rock was rare. Tr. 140-141. Draw rock, he informed, is found in roof with different thicknesses and the upper side of the strata, that is, the roof, is slick. That characteristic is important because, being slick, it won't adhere to the roof that's above it, and consequently it will drop out. Tr 141.

<sup>23</sup> Urconis reviewed the mining process: the continuous miner comes in, removes the coal, and then the roof bolting crew comes in to bolt the area where the coal was just removed. Tr. 147.

<sup>24</sup> Straps, which are different from collars, come in 48 inch lengths and have slotted holes on their ends, allowing one to anchor them to the roof. Tr. 149. They are required to be installed if hill seams are found. The plan provides, "[c]ross bars or metal channels will be secured to the roof using a roof bolt, metal straps, chains, or other effective means." Ex. S 7A.

referring to the 5, 6, 7 and 8 entries. Tr. 156. As this was a split air section, MSHA classifies it as an 001 and an 002 section. Urconis stated that both were shut down, again, because West, according to Urconis, had identified some hazards and he shut down so that they could be fixed. Tr. 157.

Urconis could not remember all of the cracks, as the event was two years ago. Tr. 185-186. As a primary contention of the Respondent is that the cracks found by the Inspector were stress cracks and not hill seams, it is significant that Urconis also could not recall whether a particular area had stress cracks or hill seams. Tr. 208. In terms of timbers being installed in Entries 1, 2, and 3, Urconis recalled “some timbers being installed” and “some timbers that had been dislodged.” Tr. 186. Urconis could not recall, but neither did he challenge, that the inspector was present and watching the timbers being installed, nor could he speak to whether the inspector counted the number of timbers installed. Tr. 187-188. Urconis maintained that “to his knowledge” there were no miners in entries 1, 2 or 3. Tr. 189. As to entries 7 and 8, Urconis stated that they had cut coal there early that morning but that they “encountered some more conditions on the right side, and that’s when Randall West decided to shut the section down. Tr. 189.

As to a critical question, when Respondent’s Counsel asked if either he or West told the inspector that had he not shown up they would have kept running coal, Urconis answered, “I don’t remember saying that, no, I don’t. I really feel confident in saying I didn’t say that.” Urconis’ confidence in that regard was that to make such an admission to the MSHA inspector “would be the stupidest thing I could ever say in my entire life.” Tr. 190. Then, when asked if he told Inspector Wolford that he was in fear for his job if the violation were to be issued as an Order, Urconis stated: “I don’t recall.” Tr. 191. Later, he added, “I may have said it. I don’t know.”<sup>25</sup>

When shown R1, the pre-shift and on-shift reports for the mine for September 14, 2009, it shows that timbers were needed for No. 1, 2, 3, 4, 5, 6, 7, and that they were all “dangered off” but none for 8 and 9. Tr. 158. Thus, Respondent contended that these problems were identified at least two days before Wolford issued his order. For the next day, the 15<sup>th</sup>, Mitch Salmons was the pre-shift examiner. His exam noted that the No. 5 entry needed timbers and was dangered

---

<sup>25</sup> Neither of these statements were helpful to the Respondent’s contentions. While Urconis’ remark that such an admission would be “the stupidest thing [he] could ever say in [his] entire life,” made it less likely that he said it, it was not an outright denial, nor did it reflect that safety was the paramount concern. As to his other response, that he could not recall if he expressed fear for his job and his alternative statement that he may have made the remark, the Court finds those responses to be conflicting. At once stating that he could not recall about the job security remark and then admitting he may have said that, fits with his alleged remark that he may have told the inspector that they would have continued to run coal. When paired with the question about continuing to run coal, the Court concludes that Urconis was not generally credible.

off, the 6 left needed the same, and the 7 left needed straps. That infers that no violations were noted for Entries 2, 3, and 4. Turning to the pre-shift for the 16<sup>th</sup>, Salmons was also the pre-shift examiner. At that date he noted only the need for timbers in the No. 2 entry and that it needed to be dangerous off. Tr. 162. Urconis stated that he countersigns the books to see if the corrective action was taken for the listed problems and that is part of his duties as a mine foreman.<sup>26</sup>

Urconis agreed that the pre-shift report of September 16, 2009, for 5:00 to 5:45 a.m., reflects what Salmons recorded at that time. Tr. 169. Shown R 2 the mine's production report for September 15, 2009, Urconis stated that no hazards were listed on Salmon's report. At that time equipment was being serviced. Tr. 170. Urconis also stated that the section was shut down for some periods of time, putting up collars and timbers. Tr. 171. Urconis further commented that cable bolts were installed because the person believed he had encountered a situation requiring more support and that this action was beyond that required under the roof control plan's minimum requirements.

In what Urconis described as an "MSHA citation order rebuttal form,"<sup>27</sup> which form is used by the mine to explain "the situation that went on with the citation," that form indicated to him that the section had been shut down, and that shuttle cars had knocked down the timbers because the entries had been reduced to 18 feet in width. Tr. 173-174. Urconis also read from the same form that "[t]he cracks inspectors are finding are almost non-existing." Tr. 175.

Based on the production report, R 2, Urconis, did not agree with the claim that the condition had existed for two days. As he interpreted that report, they had finished mining in that area: "[t]hey had worked in that area and mined it." Tr. 179. However, when later directed to the same production report, R 2, and to the bottom right hand portion, where the pillars are marked, Urconis agreed that the area that had been mined on that shift is indicated by L3, and L 5 and all those numbers. Tr. 209. He also affirmed that the last open crosscut had been previously mined. Tr. 209. He then conceded that miners were going through the area where blue hash marks appear on Ex S 12 on Entry 1. Tr. 209-210. While his testimony was unclear at first, he

---

<sup>26</sup> Urconis, who has known Salmons from 2004 to 2009 as a pre-shift examiner, stated that he considered that Salmons "has always been pretty thorough." Tr. 164. R's Exhibit R1.

<sup>27</sup> This rebuttal form was filled out by Kenneth Hunt, who was the mine superintendent then. Mr. Hunt was not present when Urconis and the Inspector were looking at the problem that resulted in the Inspector's issuance of the Orders here, nor did he testify. Tr. 199. Beyond the assertions in the form proving nothing by themselves, further diminishing its reliability and contrary to the Court's prehearing exchange order, the document was not disclosed until the hearing. The Court, noting that it should have been disclosed, still admitted the document. Exhibit R 3, Tr. 176-178. However, admissibility and probative value are distinct considerations and in the latter regard, for the reasons just mentioned, the Court was not impressed with the rebuttal form.

then maintained that, for entry 1, there were collars and timbers installed. Tr. 210. Yet, when asked if that was his testimony, Urconis then stated that he “wasn’t there, so [he couldn’t] completely vouch for it.” Tr. 211. Speaking still to Exhibit to R 2, and its statement that “No. 2 seams idled 8:30 to 12:40 putting up collars and timbers,” Urconis admitted that the statement does not indicate *where* those collars and timbers were put up and that it could refer to anywhere on the right side, meaning entries 5, 6, 7 or 8. Similarly, he agreed that where it indicates that the continuous miner was idle from 12:10 to 12:40, setting timbers cleaning and dusting, there is no indication where that occurred and that it could have been anywhere on the left side. Tr. 212. He also concurred that Inspector Wolford did not write any violations for entries 5 or 6. Tr. 211-212. Thus, Urconis agreed that, based on that R’s exhibit R 2, one could not determine where collars and timbers were placed. More critically, as noted, Urconis conceded that he wasn’t there at that time, so he could not speak from personal knowledge. Tr. 212. Consequently, the Court finds that the production report is far less persuasive than Inspector Wolford’s direct observations.

As to the special findings, Urconis did not consider that the condition cited was “S & S” because he did not believe the cracks would have caused an injury, stating: “I mean, the cracks that we had was not open and weathered.” Tr. 180. By that he meant a crack that was open enough so that one could stick something in it. Tr. 180. However, he took no measurement of the cracks. Tr. 180. He maintained that the cracks were so small that they were “very difficult to find.” In terms of whether miners were in the affected area, Urconis did not think so, but he was not completely certain about that. He agreed that miners would have no need to be in Entries 1,2, and 3 if they were actively mining in Entries 5, 6, 7 and 8. Tr. 181. He stated that there had been no reportable injuries from hill seams and he added that there had been no draw rock. Tr. 184. Accordingly, Urconis’ opinion was based on his view that the problems identified by the MSHA Inspector were stress cracks. The Court finds otherwise. The Inspector found hill seams.

Urconis also did not believe the violation was unwarrantable, because for him that special finding applies only if the mine had done nothing. Here, he noted that the mine had installed collars and cable bolts. Tr. 185. Urconis did not feel that the mine had acted recklessly because they were identifying hazards and collars had been installed. Tr. 191. He also observed that, per Exhibit R 2, the 002, or right side of the section, had been idled for 270 minutes as they were putting up collars and timbers. Tr. 185. Urconis maintained that R 1 shows, via the preshift and onshift reports, all that the mine had been doing as to identifying hazards and correcting them. Tr. 185. The Court does not view it that way. All of the activity cited by Urconis demonstrates the wide scope of the problem, as identified by Inspector Wolford, was in fact as stated by the inspector during his testimony and even Urconis allowed that some of the conditions, that is to say, cracks cited by Inspector Wolford may have been obvious. Tr. 185.

Section foreman Randall West also testified and he was asked about the violation alleged in Order No. 7446458. He was working on the relevant date, September 16, 2009, and Mr. Urconis was his boss. Tr. 271. When West got underground he observed some timbers that had been knocked down but he couldn’t remember the crosscuts where he made that observation, nor

could he recall which entries they were mining that morning. Tr. 250-252. When asked what he did when he saw that condition he stated: “Well, the miners - - we went on and went in places that had no hazards, and they started running [coal]; and I just kind of just started setting some timbers and my scoop man went to go get timbers and we started trying to fix it.”<sup>28</sup> Tr. 251. West stated that two continuous mining machines *were working* at that time but he asserted that no hill seams were present.<sup>29</sup> Tr. 252.

When asked if he encountered any roof control problems that morning, it was West’s testimony, as just noted, that no hill seams were present. Instead, he advised that: “[b]efore the inspector showed up, as my miners cut, they cut their first cut. They backed out. The guys bolted it and informed me that had hit some stress cracks is what I call them. So they proceeded to fix those and the miners went in two more places that were good, and they hit the same thing and I quit. I shut the section down.” Tr. 253. Thus, West implied by his testimony that the situation was getting out of hand. He expressed, “Because that’s too far ahead of me. You know, I can handle fixing one place at a time, but now you’re looking at four places; so I went and shut the belt off and we started working on the roof.” Tr. 253. They were working on four different cuts at the time he took that action. Fixing four places, he noted, “you’re going to fall behind big time.” Tr. 253. “You know,” he added, “I had a few timbers to set, and then those places were going to need the same work.” Tr. 253-254.

The Court finds that this testimony shows that the problems with the roof remained even as the mining continued. That West acknowledged this problem should not distract one from remembering that Wolford’s orders pertained to areas that had been previously mined.

West asserted that he did not know the inspector was coming to the area when he shut the section down and stopped the belts.<sup>30</sup> Tr. 254. In any event, the testimony was unclear as to how soon the inspector arrived at the section after West asserted that he had shut things down, but he admitted that the inspector “found some more cracks that we didn’t get.” Tr. 255. Despite having to fix the problems, West maintained that these problems were “stress cracks,” not “hill

---

<sup>28</sup> The Court takes note that West shifted from stating there were timbers that had been knocked down to stating that his scoop man had to go get timbers. One would not need to go get timbers unless timbers were missing, not simply knocked down.

<sup>29</sup> Respondent’s Counsel stated: “So then they started running, correct?” West answered, “Yes.” Tr. 252.

<sup>30</sup> While it is not necessary to make a finding of fact, it does seem unlikely that the section foreman would not know that the MSHA inspector was coming to the area where he was. Typically, MSHA’s presence at a mine becomes known quickly.

seams.”<sup>31</sup> Tr. 256.

Critically, when asked if he told the inspector or if Mr. Urconis told the inspector that had the inspector not shown up, they would have continued to run coal that day, the best West could offer was “I can’t recall that statement.”<sup>32</sup> Tr. 257. In an indirect fashion, West supported Wolford’s version, because he admitted that problems were addressed on a spot basis. That is, West admitted that without the inspector they *would’ve fixed a place and then continued running coal*, but with the inspector present they “fixed everything.” Tr. 257. Consistent with his perspective that, until the inspector arrived, it was sufficient to fix things on a spot basis, West did not consider the violation to be unwarrantable because “we were repairing the problems.” Tr. 262.

As with the view of his boss, Mr. Urconis, West also did not consider the problem to be “S & S” because they “weren’t producing coal at the time. We were up there fixing things.” Tr. 260. As best he could recall there was one area “needing some timbers under collars” in the Number 3 entry. Nor did West feel that there was a reasonable likelihood of a permanent injury occurring because they were dealing with “stress cracks,” and he did not recall their being hill seams there. Tr. 261.

---

<sup>31</sup> Referring to Exhibit S 12 and upon being advised that the red lines signified where timbers were not present, West stated that for 3, 7 and 8, they would *not* have had timbers, pursuant to the informal agreement the mine had with MSHA. Tr. 266. As for 1, 2 and 3, West asserted that he didn’t think that one would see “that many collars up and not timbers. . . a few of them would but not near that many.” Tr. 266. Accordingly, while offering a reason for their absence, West conceded that at least some areas did not have timbers. The Court inquired about West’s recollection regarding another aspect of Exhibit S 12, asking if, in his view, everything listed on that exhibit were stress cracks and not hill seams. He maintained there were no hill seams present anywhere, thus placing his estimation in direct conflict with the Inspector’s observations. Tr. 269. As noted, where testimony conflicted, the Court has found Inspector Wolford’s account to be the more credible one.

<sup>32</sup> And with that response, both Urconis and then West had memory lapses as to whether they told the inspector they would have continued to run coal. In both instances, the “can’t recall” formulation is found to be dubious. It is more likely that one would recall whether or not such a statement was made. When asked if he agreed with Inspector Wolford’s assertion that the conditions had existed for at least two days, West responded, “It’s been a long time. I’ll have to look in your on-shift book and see as far as me just saying did it last two days.” Tr. 263. Again, as noted earlier with his inability to recall, when it came to critical questions, Mr. West’s memory failed him. As another example, when asked about the Inspector’s finding in his order that the No. 2 entry one crosscut outby Survey station 519 had no collars installed, West answered, “I can’t recall that.” Tr. 262.

The Court does not adopt West's version of the situation. In addition, West's story conflicts with the claim that only stress cracks were present. If that were the case and, as the Respondent does not view them as a problem, West would not have needed to shut things down. Thus, the Respondent's own actions, addressing some of the roof control problems, refutes its claim that they were merely encountering what they characterized as the negligible condition of stress cracks.

**The claims that compliance with the roof control plan was impossible and dangerous and that there was an agreement regarding knocked timbers.**

In attempting to explain the mining difficulties experienced where hill seams are found, Urconis stated that the entries are narrowed down to 18 feet and with the T channel or cross collar that width is reduced to 16 feet. At that width, he stated that it becomes impossible for a shuttle car to operate without knocking down timbers. Thus, essentially, Urconis stated that knocking down the timbers is unavoidable. Tr. 153. Urconis contended "that's when we was (sic) told set the timber. Don't destroy the timber. Set it out of the way. Keep it out of the roadway to keep from destroying the timber. And then after you get done using that particular haul road before you advance to your next cut, stop and set the timber back to keep from destroying the timber." Tr. 154.

When asked if he ever received any violations for that practice, Urconis stated: "Not that I can recall. I mean, I don't really recall." Tr. 154. Given the problems of the narrow width and the associated issue of timbers being knocked down, one would think that Mr. Urconis would have recalled if the mine had or had not received violations for the practice of deferring the installation of timbers.

Somewhat modifying his initial remark, Urconis expressed that shuttle car operators have to be very careful, because the entries are so narrow, or they will knock down timbers, yet he then added that to turn the corner with a shuttle car, "it's impossible." Tr. 205. Counsel for the Respondent also elicited from Urconis his view that shuttle car operators were subject to potential injuries if they were to run over a timber. Tr. 154-155. Urconis stated that to deal with this problem, the mine offered to MSHA that it would not set timbers if only stress cracks were encountered but they would install timbers if a hill seam was encountered. Tr. 205. Further, the mine wanted to defer installing timbers until after the feeder had moved inby. Tr. 206. However MSHA rejected these proposals. Tr. 206.

West asserted that the agency and the mine had a "little agreement" that knocked timbers could be left that way for the last one from the face where the actual continuous miner will be sitting. Tr. 261. The inspector spoke to the issue as to whether there was any sort of informal agreement regarding setting timbers. He admitted that *now* there is such an informal agreement<sup>33</sup>

---

<sup>33</sup> Though, for the reasons stated, it does not impact this decision, the Court hopes that MSHA will avoid such informal agreements. Such arrangements do a disservice to the roof

but that there was not one present, at least between him and the mine at the time of the violations in this docket. Tr. 277-278.

As the Secretary correctly notes, at the critical time in this proceeding, that is, when the Orders were issued, the Inspector was not aware of any such informal agreement. Sec. Reply at 2. Further, the Secretary notes that there is no evidence in the record as to the identity of any MSHA official who made the claimed agreement and it observes that it is unusual that none of the three Road Fork witnesses could identify the source for the purported agreement, nor its details. *Id.* Also contradicting the claim of the informal agreement, MSHA rejected Road Fork's attempt to allow a delay before setting timbers. *Id.* at 3.

In the Court's view, the problem with this contention is that it is an indirect attack on the roof control plan's requirements for these timbers to be installed when hill seams are encountered. However, if that was a genuine issue, it should have been addressed through modification of the plan. As noted, the Plan, the only official statement of the minimum roof control requirements, does not recognize such an exception. In fact, as noted, MSHA rejected the proposals. Last, attention to this issue is a distraction from the violation. Even if, for the sake of argument only, such an informal arrangement were considered, it would not impact the significant breadth of the shortcomings identified by the Inspector. Restated, the informal agreement would not allow the installation of 80 timbers to be deferred.

#### **The hill seams/stress cracks issue and Jenmar testing of the roof**

As noted, much effort was expended by the Respondent in an attempt to distinguish "hill seams" from "stress cracks," but at the end of the day, this effort collapsed. Associated with the seam versus crack distinction raised by the Respondent was the "scoping" of the mine roof by Jenmar. Neither were persuasive avenues.

Urconis distinguished hill seams as "something that is open and weathered . . . that would be broken from basically inside the mine to the surface." Tr. 141. He agreed that most of the time one will know if there is a hill seam and thus they are not something that shows up a later time, nor would rock dusting disguise the presence of a hill seam. Tr. 142. Continuing with his distinction between the two, he added that one would see where water has come down from the surface and weathered the crack and there will be an orangish-colored tint in the crack. Tr. 144. A stress crack, he advised, is not even open and is so narrow one could not put a 4,000ths feeler gauge in such a crack and it is something "that mostly comes in after the coal is removed . . . it's just [the] stress of the roof settling . . . stress cracks rarely go up." Tr. 143, 145. In contrast, Urconis repeated that hill seams are "an open weathered crack that is broke (sic) from inside of the mine up to the surface." Tr. 143. However, he admitted that the seam at this mine has *both* stress cracks and hill seams. *Id.*

---

control plan provisions and invite enforcement problems.

Mitchell Salmons also weighed in on the issue of stress cracks and hill seams. Salmons too believed that there is a difference between hill seams and stress cracks. Tr. 223. He stated that while the mine had “several cracks,” most of them were very small, being hairline in nature. Like Urconis, a hill seam, according to Salmons, “would have separation with mud, the orange from the sulfur from the water; and it runs usually through the coal seam, not just the exterior or the top there. It’s usually through the whole seam.” Tr. 223. He could not recall any mud or colored water coming out of the cracks or conditions cited by Inspector Wolford in September 2009. Tr. 223.

Also, as noted, Section Foreman Randall West testified. His testimony included the hill seam and stress crack distinction and as with Urconis and Salmons, he expressed that there is a difference between a stress crack and hill seam. Unlike Urconis’ description, West identified a stress crack as a crack that has opened up. According to him, these can be large enough so that one could run one’s arm through it. Thus, not only would a feeler gauge fit, the crack would be so large as to make the gauge pointless. He acknowledged that a hill seam is a more serious problem than a stress crack. Tr. 269. Clouding his testimony that the two are distinguishable, he stated that “a hill seam or a stress crack is just a small crack that occurs in the mine itself as [one] mine[s].” Tr. 248. Responding to unobjected leading questions, he agreed that colored water can come out of a hill seam, that it is differentiated with mud and that one will see discoloration in the crack itself. Tr. 249. West maintained that the mine had more stress cracks than hill seams. Tr. 249. Perhaps most significant of all on the hill seam versus stress crack issue, West admitted that under the roof control plan when the mine encountered multiple hill seams, the requirement was “the *same thing* we do for stress cracks. . . . you install a T-channel or a wooden collar every four foot.” Tr. 267 (emphasis added). Upon questioning by the Court, West then backed away from that statement and tried to distinguish a “big hill seam” and how that condition is treated. Ultimately, however, he agreed that the mine treats stress cracks and hill seams the same way. Tr. 268-269. Further, despite his position that the inspector was finding “stress cracks,” not hill seams, West admitted that he never made that assertion to Urconis. Tr. 272. West’s answer when asked if it would have been natural for him to bring such an issue to Urconis was unsatisfying. He admitted that he could have missed one (i.e. hill seam) and so he would not raise the issue to Urconis unless the inspector was present at that time too. Tr. 273. Later, West again confirmed that the mine treats both hill seams and stress cracks the same way.<sup>34</sup> Tr. 273.

Speaking to the asserted distinction between hill seams and stress cracks, Inspector Wolford stated that “[a]ccording to the roof control department a crack like that in the mine roof is a hill seam.” Tr. 92. Indeed, the Court finds that Wolford found hill seams, not merely stress cracks. As this Court has previously noted, the mine’s own actions show they were encountering

---

<sup>34</sup> West also seemed to backtrack in terms of his earlier assertion that he saw no hill seams in 1,2, and 3 nor in 7 or 8, stating that he could not recall hill seams being present. Tr. 275. In an attempt to recover her witness, counsel asked if the mine treated hill seams and stress cracks the same “just out of concern for getting nailed with a D order.” The witness responded, “Yes, ma’am. Yes, ma’am.” Tr. 276. The Court does not adopt this attempted explanation.

hill seams. Collars, for the most part, had been installed and the mine would not have taken those measures absent its own recognition that the conditions they found required the supplemental support required under the roof control plan. The main problem, putting aside for the moment the instances where Wolford found neither straps nor timbers, was that the mine took only half the required measures as shown by the many instances where they installed the collars. This shows knowledge, that is, awareness of the problem, and therefore it speaks to unwarrantability and the fact that collars were installed in many, but not all areas, also informs about the significant and substantial element.

Turning to the issue of Jennmar's "scoping" of the mine roof on September 14, 2009, Urconis stated that Jennmar told him that the cracks the mine was encountering were "stress cracks" and that those cracks "went up into the roof roughly a foot to foot and a half." Tr. 194. He described the scoping process performed by Jennmar, a process that allows, after drilling a hole, to look into the roof and determine if it is layered. When asked if Jennmar's testing in September 2009 helped in identifying whether the conditions were reasonably likely to cause serious injury, Urconis replied, "[a]ccording to his findings, no." Tr. 196. West also maintained that Jennmar told them "everything was fine." Tr. 259.

Upon questioning by the Court about Jennmar, Urconis stated that he spoke with Wallace Bolton with that company. He spoke with Bolton about stress cracks but that conversation only occurred the day before this hearing. Tr. 198. Instead, it was Kenneth Hunt, the mine superintendent, who took Bolton underground two days before the orders in this case were written. Tr. 198.

The court took note that while the Respondent made frequent references to Jennmar, no report from that company was ever put into the record as an exhibit.<sup>35</sup> Tr. 280. Nor was their report part of the pre-hearing exchange. The rub was that Jennmar does not issue written reports. Tr. 281. When they come to a mine and do their 'scoping' no paper exists to record their findings. Instead, Respondent's counsel used the mine employees' testimony to relate what Jennmar ostensibly told them. As the Court noted in reaction to this arrangement, "Well that's an odd way to do business I have to say. They are there to evaluate roof conditions, and they won't put a word of it down in writing as to what their findings are?" Tr. 282. Accordingly, no stock can be placed in these Jennmar stories.

Despite these glaring deficiencies, the Respondent views the testimony concerning JennMar as "objective evidence" which "proved that this operator had met its duty of identifying hazards and properly controlling them." R's Br. at 12. According to the Respondent, JennMar found only cracks that "extended up for a foot to a foot and a half." *Id.* Respondent believes this "objective evidence" speaks for itself and that no written findings were needed. *Id.* at 13. For the Respondent, Jennmar's presence shows that "[t]he fact that the operator sought outside assistance with understanding the roof conditions proves that it was going above and beyond to

---

<sup>35</sup> Respondent's exhibits consisted of R1, 2 and 3. Tr. 280.

keep their mine safe.” *Id.*

In sum, *the record* provides no reliable information about Jenmar’s evaluation of the roof conditions at the mine for the areas cited by Inspector Wolford. Against that, the Inspector’s testimony about his observations, finding hill seams, coupled with the Mine’s own actions, installing collars in a large part of the cited areas, are more reliable sources for determining the conditions which existed.

### **Conclusions regarding Order No. 7446458**

In its post hearing brief, Respondent describes this issue as “whether Road Fork properly controlled its roof through the use of primary and supplemental roof support” and if not whether the failure was unwarrantable. R’s Br. at 1. Respondent believes that what Wolford observed were stress fractures, not hill seams, and it points to the collective experience of Urconis, Salmons and West in support of that assertion. R’s Br. at 4.<sup>36</sup> Respondent also points out that it had installed its primary roof support and that, from its view, the issue was whether the “secondary, or supplemental support systems” were adequate. R’s Br. at 5. Respondent then notes that when hill seams are encountered, and timbers installed because of that, the entry width is reduced to about 16 feet. R’s Br. at 6. At that width, shuttle cars knocking timbers down becomes impossible to avoid, and because of that there was an informal agreement between MSHA and the mine that felled timbers could be moved to the side of the entry and not reinstalled until the entry was no longer used as a haul road.<sup>37</sup> R’s Br. at 7. The Respondent then contended that non-compliance with the roof control plan made things safer because it eliminated the problem of shuttle cars striking timbers and running over fallen timbers.<sup>38</sup>

The Respondent has also contended that before Wolford issued his orders it was “in the process of reinstalling the missing posts.” R’s Br. at 9-11. Respondent further asserts that,

---

<sup>36</sup> Respondent’s Reply, for the most part, reargues the points made in its initial brief. As such there is no need to revisit the contentions.

<sup>37</sup> Apart from whether the informal agreement existed or whether it is a defense or mitigation, the Respondent’s characterization of it in its brief is broader than what the witness actually stated. Urconis statement was that the timbers were to be reset “*before* you advance to your next cut.” Tr. 154 (emphasis added).

<sup>38</sup> Respondent suggested that these hazards, such as running over a timber, presented the risk of a miner being impaled, but there was no evidence that accidents associated with these kinds of posed problems had occurred at this mine. In the same spirit, Respondent suggests that waiting to install the timbers didn’t pose any additional danger because the collars were attached to the roof with “grouted resin bolts.” R’s Br. at 8. This observation overlooks that Wolford found areas with *no* collars and that even where collars were present compliance with the roof control plan requires installing timbers where hill seams are encountered.

assuming 80 timbers were in fact needed, “only 160 feet of roof was temporarily affected”<sup>39</sup> and it challenges the contention that it took 11 men three hours<sup>40</sup> to install 80 timbers. R’s Br. at 11-12.

In large part, the Respondent’s contentions have already been addressed. The Court has found that Wolford observed hill seams in the areas he cited. Given that, the Respondent’s obligations under the roof control plan were clear but not met. The Court therefore agrees with the Secretary’s assertion that the Respondent’s claim that the Inspector was finding stress cracks, not hill seams, is without merit, and with the Secretary’s related observations that the mine treated both situations identically and that the testimony of both West and Urconis acknowledges that. Sec. Reply at 1-2. citing Tr. 195, and 266-269.

In addition, to the suggestion that West had no knowledge about the hill seams before the mine made the first two cuts, Wolford noted that the cross collars had been installed. Tr. 101. As for the suggestion that some mines might wait until all channels are installed before installing the timbers, Wolford had two ready answers. He acknowledged that some roof control allow this, but that as to this mine’s plan, he stated, simply: “It don’t.” Tr. 114. As for the issue of timbers making it difficult for shuttle cars to move, Wolford agreed that the mine could’ve sought an amendment to its roof control plan, but that they had not done so. Tr. 136.

Although, also upon cross-examination, Wolford agreed that the primary means of support, that is roof bolts, had been installed in the area, the fact that the violations dealt with the lack of *supplemental* support, does not impress the Court because the shortcomings were still part of the minimum roof control plan where such hill seams are found. To note that the situation could have been worse does not render the deficiencies less serious.

### **The unwarrantable failure issue.**

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. An unwarrantable failure is aggravated conduct constituting more than ordinary negligence.

---

<sup>39</sup> This assertion is debatable in that Urconis, as quoted by the Respondent in its brief, stated “there’s a total coverage area that is exposed, where the roof is exposed, anywhere from I’m going to say 17 to 1,800 feet. If we did set 80 timbers, that’s two posts under each collar. That’s just [a] 160 foot area.” R’s Br. at 11-12. It is unclear if the witness was referring to the area taken up by the 80 posts themselves, but what is not unclear is the area marked as being affected by Inspector Wolford on Exhibit S 12.

<sup>40</sup> The Court believes that it is more about the number of timbers, 80, that were needed than the precise amount of time it took to install them. It also rejects the assertion that the problem was merely a “few” timbers that had been knocked down, finding that Wolford correctly calculated the total number of timbers installed.

*Emery Mining*, 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of \*1336 reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (Feb. 1991); see also *Buck Creek Coal*, 52 F.3d at 135-36, approving the Commission's unwarrantable failure test.

The Commission has recognized that whether conduct is “aggravated” in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. See *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), rev'd on other grounds, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 43 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All relevant factors must be viewed in the context of the factual circumstances, and all material facts and circumstances must be examined to determine if a mine operator's negligence is mitigated. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

Respondent contends “there is no evidence that Road Fork is guilty of unwarrantable failure.” R’s Br. at 16. As mentioned, Urconis believed there was no unwarrantable failure on his part because it was not as if upon finding cracks they took no action. Tr. 196. Acknowledging that “certain timbers were missing,” Respondent asserts that “Road Fork was actively working to correct the condition *prior* to the issuance of the either Order.” *Id.* (emphasis in brief). As it describes the situation, “Road Fork had unilaterally ceased producing coal, and shut down the belt-lines, all without any directive from Inspector Wolford to do so and prior to his arrival on the section.”<sup>41</sup> *Id.* at 17. The testimony, both from the Inspector and from Respondent’s own witnesses, as previously discussed, does not support these claims.

On the same grounds, Respondent believes the negligence should be reduced. Road Fork further contends that the “informal gentleman’s agreement with MSHA” should be a mitigating factor. The problem with this argument is that it seeks to excuse a broader transgression from the roof control plan than the situation Inspector Wolford found. At best, the informal agreement,

---

<sup>41</sup> The Court appreciates the nature of arguments and that leeway is expected when they are advanced but there are limits too. Here, the Respondent contends that Inspector Wolford agreed in his testimony that Road Fork’s “corrective actions should be considered as mitigating factors.” The problem with this claim is that the Inspector did not buy into the Respondent’s version of the actions it claimed to have taken, nor does this Court. As the Inspector put it, those actions would be mitigating factors “*if* [the operator had] done that.” R’s Br. at 17, quoting transcript at 99- 100. (emphasis added).

which *was not* in place at the time of the Inspector's findings, applied to a short term abeyance from reinstalling fallen timbers. In another version of the informal agreement, West stated that MSHA would let them leave the last timbers out where the continuous miner would be sitting. This would be about five pieces and the last three might not have a timber. R's Br. at 18. This is decidedly not the situation the Inspector found.

As Wolford's statement and presence on the section attest, the condition "was very obvious, extensive, and they knew about the one hill seam because they had put cross collars up but hadn't set the timbers under them." Tr. 77. As noted, the fact that the Respondent had taken half measures supports the conclusion that it was aware of the problem but failed to fully comply with the Plan's requirements.

In sum, the unwarrantable findings are clearly supported by the record and the Court's findings of fact for that record. West, a member of the mine's management, did tell the Inspector he was aware of the problem, the mine was running coal, at least at the start of that day, the conditions had been present long before the start of the shift when Wolford arrived, and the actions to correct the numerous roof control deficiencies were not in progress when the inspector observed them. Those remedial actions occurred *after* Wolford issued his Order. The record testimony, also as previously discussed, shows that the mine would likely have continued to run coal, but for the inspector's presence and his identification of the roof control plan compliance failures. Further, the operator had been warned previously about inadequately supported hill seams. Wolford had so advised both Mr. Urconis and Mr. Salmons about this. Beyond these findings, the Court also concludes that the condition had existed for about two days, per Inspector Wolford's testimony on that issue. So, too, the condition was obvious. As the Inspector testified, he noted the condition immediately upon arriving at the section. Accordingly, the inspector's finding of "high negligence" is supported and found to have been the case and the failure to comply with the roof control plan was unwarrantable.

### **The Significant and Substantial ("S & S") issue**

With respect to the issue of S&S, as a general proposition, a violation is properly designated as S&S, if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC at 825. In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained: 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 [by the violation] will result in an injury; and

(4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4; see also *Austin Power Inc., v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

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

The Respondent’s assertion that the violation was not “significant and substantial,” is a contention that relies upon the same arguments that no risk of injury was created and that it was not reasonably likely to occur. In this regard it adds that the mine has no history of roof falls, and that miners have no reason to travel in the affected areas. As the primary support was installed, it argues that “the only conceivable hazard is of the collars falling from the roof.” R’s Br. at 21. Of course, other hazards can be readily conceived.

The Court notes that the roof control plan is in place to deal with roof falls, not with collars which could fall. If the latter were the issue, that would be solved by not having collars in the first place. Instead, the collars *and* the timbers are required in tandem to deal with the risk of a roof fall where hill seams are encountered.

As to the “significant and substantial” determination, for both Orders, the Secretary has shown, and, as expressed previously, the Court finds, the underlying violations of the mandatory safety standards. Plainly, there was a discrete safety hazard contributed to by those violations.<sup>42</sup> The lack of timbers, absent in significant numbers, by themselves establish this element. The missing collars, while fewer, only made the circumstances worse. Given that the hill seams present the acknowledged risk of a roof fall and that the timbers and collars are required parts of the roof control plan for addressing that risk, there was, clearly, a reasonable likelihood that the hazard contributed to by those violations will result in an injury. As discussed earlier in this decision, miners were working in the area of the hill seams and thus there was exposure. Notice can be taken, if a roof fall were to have occurred in these areas, it would more than meet the reasonably serious injury element.

---

<sup>42</sup> The Court describes these in the plural as violations because, where hill seams are present, had Wolford found a single instance of a missing timber or the absence of one collar, that would have been a violation of the roof control plan. The significant and substantial and unwarrantability analyses, on the other hand, take into account other circumstances, such as the number of instances of such failures and knowledge of them.

The same analysis applies to the inadequate preshift violation, because the roof control violations go hand in hand with them. As with the plan violations, there was established a violation of the preshift examination by the absence of notations reflecting the presence of hill seams in the cited areas and the need for the collars and timbers there. Those absences made the preshift inadequate. The discrete safety hazard element, obviously, is that by not noting those matters, they were not timely attended to and miners, being unalerted of the situation by that inadequate preshift, were exposed to the problems as they traveled in the affected areas. While an inadequate preshift cannot literally produce a roof fall, the detection and the remedy are inextricably related, so that the reasonable likelihood of an injury element is met and the same logic applies to the reasonably serious injury element.

Accordingly, the Court finds that the violation was “significant and substantial” as that term applies under the Mine Act and case law.

**Order No. 7446459, the inadequate preshift claim.**

Speaking to the second Order in this matter, Order No. 7446459, Ex. 5, Wolford stated that he issued it because the roof control hazards he identified were not listed in the preshift. Therefore, the foreman did not do an adequate examination and as a consequence the crew was unaware of the hazards they were working under. Tr. 79. He considered it reasonably likely that one of the eleven miners would suffer injuries due to their lack of awareness of the hill seam problems. Tr. 80. He stated that the length of exposure was about five hours.<sup>43</sup> As Wolford had examined the preshift records prior to entering the mine and subsequently found the roof control hazards, he knew that the preshift exam had been inadequate. For the same reasons he expressed for the roof control violation, Wolford concluded that the preshift failures would be permanently disabling, that the violation was “S & S,” and that the negligence was “high,” because the problems were obvious. Similarly, he listed the same number of miners affected. Tr. 84.

Beyond the preshift exam, the operator is required to do an on-shift exam too, prior to the start of coal production. Tr. 82. As Wolford had stated that the hill seam problems had existed for two days, the operator therefore would have had six opportunities to examine the area and detect the problems, as there would have been three preshift and three onshift examinations to conduct. Tr. 82. To abate the violation, the operator was required to enter the hazardous conditions in the preshift book and the miners were also made aware of these problems. Tr. 82-83.

---

<sup>43</sup> Regarding exposure, the inspector confirmed that miners were working on the section, with his best recollection being that they were “mining in the middle, maybe [in sections] 4 and 5.” Tr. 95. After consulting his notes and noting that they did not document *exactly* where the miners were working on that date, he conceded he could not recall exactly where they were when he issued his orders. Tr. 96, 97. However, Wolford pointed out that when miners work in a section they don’t simply stay in one entry. Instead, they work “all over the section.” Tr. 97. The Court finds this to be the fact.

In the Respondent's cross-examination dealing with the inadequate preshift exam, Wolford agreed that it had been conducted about five hours before the inspector arrived on the section. Tr. 121. However, he did not buy into the idea that hill seams could develop during such an interval. Hill seams, he explained, are present before mining commences and then encountered when one mines into them. The Court finds this to be the fact.

Wolford did not contend that no preshift was made; he agreed that Mr. Salmons went to the areas during his preshift. However, Wolford's contention was that the conditions were obvious and should have been noted. Although the inspector did not suggest that there was any intentional or willful conduct on the preshift examiner's part, he made it clear that, in his view, Salmon merely went through the motions during his preshift exam, that he was not really observing for hazards and that he failed to list any. As Wolford noted, Salmon merely listed for the hazards, "N/O" for "none observed." Tr. 124-126.

Urconis agreed that he relied upon Mitchell Salmons to identify hazards in conducting his pre-shift and he admitted that a pre-shift examiner is to be looking for the presence of hill seams. Tr. 168, 194. Directed to Exhibit R 1, the pre-shift or on-shift exam, for September 16, 2009,<sup>44</sup> Salmons related what he did on that date. There, he noted, he called out that the No. 2 heading needed timbers under the collars and that it was dangered off. Salmons stated that if he found a condition that he did *not* consider to be a hill seam, he would not write that in his pre-shift. This is because he only writes down hazards. Explaining further, Salmons stated that if he finds "just a single crack," one could use a thin metal strap, called a "bacon strap," to make that condition safe.<sup>45</sup> Such bacon straps are four feet long and they go from bolt to bolt. Tr. 229. But this condition is not entered in the book.

Addressing the Inspector's testimony that he found multiple hill seams and no timbers in the areas, marked in blue on Exhibit S 12, for the No. 1, 2, and 3 entries, Salmons asserted that "I'm going to say they had timbers in them or I would have called them out." Tr. 231. Similarly, for the No. 3 heading, and the No. 7 heading, the inspector stated collars and timbers were needed but in neither instance did Salmons find anything that needed to be corrected. Tr.232-233.

On cross-examination, Salmons agreed that if a condition needing correction continues to

---

<sup>44</sup> Salmons also stated that he did a pre-shift on September 15, 2009. This included entries 1 through 9. He noted that in entry No. 1 mining had stopped, although he did not know the reason for that. Tr. 227. Continuing, he noted that the No. 5 needed timbers and that the six left needed timbers and the seven left needed straps. Tr. 228. Referring to the rough drawing, Exhibit S 12, Salmons stated that mining had advanced into the areas of 7 and 8. Continuing with his notes, Salmons added that 6 left needed timbers and 7 left needed straps and such straps were installed. Tr. 230.

<sup>45</sup> As has been noted, there is conflict with this claim, at once admitting that something has to be done to make something "safe," but claiming that it is not a hazard.

exist, he will carry that problem forward. That is, it will be noted again. Tr. 233. However, Salmons' testimony was not a model of clarity in that regard, as he was indirect in his answer. He stated that if he comes upon the problem the next time, then he will correct it. Yet, he added that he writes it down too. Tr. 236. On redirect, leading the witness grossly, but with no objection lodged by the Secretary, Salmons agreed that if he keeps listing "needs timbers and collars" that refers to *a different* (i.e. a new condition in need of timbers and collars) condition, as the earlier noted problem would have been corrected.<sup>46</sup> Tr. 244. Salmons agreed that the on-shift report for the 15<sup>th</sup>, and the No. 2 heading noted that collars and timbers were needed and that a purpose of the examination book is to show that the corrective action was taken. Tr. 241- 242.

Respondent asserts that this Order should be vacated on the theory that the Secretary offered "no evidence" that the pre-shift was inadequate. R's Br. at 21. It makes this argument on the assumption that the conditions existed at the time of the preshift exam because the inspector found them when he conducted his inspection. Against that, in the Respondent's view, dubious deduction by the Inspector, it points to Mr. Salmons' testimony and his "impeccable record of conducting [pre-shift] examinations. Accepting that Salmons did not observe any of the conditions means they did not exist at the time of his preshift exam. On that basis, Respondent contends that the Order should be vacated. R's Br. at 22.

Respondent also believes that the hearing testimony calls into question the length of time that the conditions existed. R's Br. at 13. It notes that Inspector Welford expressed that it would have taken two days to mine the coal where he found the problem. Respondent's take is that the Inspector's premise was incorrect because he incorrectly believed the roof had hill seams but that in fact those were only stress cracks.<sup>47</sup> Shifting away from that contention, the Respondent then notes that most of the cited areas had collars installed.

The Secretary contends that, based on Inspector Welford's testimony, the preshift exam conditions were easily seen and extensive. Sec. Reply at 3. It contends that, because miners

---

<sup>46</sup> Salmons was directed to the on-shift for the third shift for the 14<sup>th</sup> of September where the Secretary's Counsel noted that the pages state either "pre-shift mine examiner's report" or "daily end on-shift report." Tr. 237. The witness noted that for Heading No. 2, it needed timbers under collars, dangered off. Tr. 237. He was then asked to turn to the next exam, the pre-shift for September 15<sup>th</sup>, from 5:00 to 5:45. The witness noted that for the No. 2 heading, it noted "None observed." Tr. 238. Salmons maintained that notation reflected that the problem would have been corrected on the 14<sup>th</sup>. Tr. 238. Thus, he maintained that the problem had been corrected on the first shift, the day shift, of the 14<sup>th</sup> and therefore it would not be noted again on the 15<sup>th</sup>. Tr. 238.

<sup>47</sup> Respondent also relies upon Road Fork's production report which, it believes, evidences that the conditions did not exist the prior evening. R's Br. at 14. Respondent also contends that preshift examiner Salmon's testimony supports its perspective and that he diligently performed his responsibilities.

were not alerted to the hazardous roof, they had no advance warning and therefore the risk to them was heightened. *Id.* at 4. Making the mine's culpability greater, management knew this to be a recurring problem at the mine. *Id.*

All of these matters have been previously discussed in this decision. Accordingly, the Order for the inadequate preshift examination is sustained along with the special findings made by the Inspector.

### **ORDER**

For the reasons set forth above, **Order Nos . 74446458 and 7446459 are AFFIRMED, along with the special findings associated with them.**

Respondent is **ORDERED** to pay a civil penalty in the amount of \$9,774.00. Upon payment of the penalty, these proceedings are dismissed.

William B. Moran  
Administrative Law Judge

Distribution:

J. Malia Lawson, Esq., Robert E. Motsenbocker, Esq., U.S. Department of Labor, Office of the Solicitor, 211 7<sup>th</sup> Avenue North, Suite 420, Nashville, TN 37219

Carol Ann Marunich, Esq., Dinsmore & Shohl, LLP, 215 Don Knotts Boulevard, Suite 310 Morgantown, West Virginia 26501