

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021

June 8, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2009-200
Petitioner	:	A.C. No. 15-18839-164793
	:	
v.	:	
	:	
EXCEL MINING LLC.,	:	Van Lear Mine.
Respondent	:	

DECISION

Appearances: Matthew Shepard, Esq., U.S. Department of Labor, Nashville, TN, on behalf of the Secretary

Gary D. McCollum, Esq., Excel Mining, LLC, Lexington, KY on behalf of Excel Mining, LLC

Before: Judge David F. Barbour

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) acting through her Mine Safety and Health Administration (“MSHA”) against Excel Mining, LLC (“Excel”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (the “Mine Act”) 30 U.S.C. §§ 815 and 820. In the petition the Secretary seeks the assessment of civil penalties for 10 alleged violations of the Secretary’s mandatory safety standards for underground coal mines. She charges that the violations occurred at Excel’s Van Lear Mine, an underground bituminous coal mine located in Martin County, Kentucky.

After the petition was filed, the company answered and the matter was assigned for hearing and decision. Upon the court’s order, the case was consolidated with two additional civil penalty cases (Docket Nos. KENT 2009-521 and KENT 2009-523), which also involved Excel. The parties conferred to determine whether they could settle the matters. As a result of their discussions, they resolved all of their differences regarding Docket Nos. KENT 2009-521 and KENT 2009-523. The settlements were approved and the matters were dismissed. The parties also settled all issues with regard to nine of the alleged violations in the subject docket, and on October 29, 2010, the court issued a partial decision approving the settlement. The court noted that the parties remained at odds over the alleged violation of 30 C.F.R. §75.202(a) set forth in Citation No. 8218342.

Citation No. 8218342 was issued pursuant to section 104(a) of the Mine Act. 30 U.S.C. §814(a). Section 75.202(a) requires in part that a mine operator protect persons in areas where they work or travel from hazards related to roof falls.¹ In addition to alleging a violation of the standard, the Secretary asserts that the violation was reasonably likely to result in lost workdays or restricted duty to one miner, that the violation was a significant and substantial contribution to a mine safety hazard (an “S&S” violation) and that the violation was caused by the company’s moderate negligence. The Secretary proposes a civil penalty of \$687.00. The issues were tried in Pikeville, Kentucky.

STIPULATIONS

At the commencement of the hearing the parties stipulated as follows:

1. At all times relevant to this proceeding [Excel] was the operator of the Van Lear Mine . . .
2. The Van Lear Mine is a “mine” as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. §802(h).
3. At all times relevant to this proceeding, products of the Van Lear Mine entered commerce, or the operations or products thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. §803.
4. Employees at the Van Lear Mine produced more than 800,000 tons of coal in 2008. Excel . . . is a large operator.
5. A copy of the citation at issue in this proceeding was served on Excel . . . by an authorized representative of the Secretary.
6. Excel . . . timely contested the citation.
7. Excel . . . is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the presiding Administrative Law

¹ Section 75.202(a) states:

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

Judge has the authority to hear this case and issue a decision regarding this case.

8. The proposed penalties will not affect [Excel's] ability to remain in business.

Jnt. Exh. 1 at 1-2; *See* Tr. 11-13.

THE TESTIMONY

Billy Ray Meddings is a federal mine inspector working in MSHA's Pikeville, Kentucky office. Meddings began working for MSHA in April 2007. Tr. 15. After being hired by the agency Meddings received inspector training at the MSHA academy in Beckley, West Virginia. Tr. 16. He also received on-the-job training by traveling with other inspectors for a little over a year. Tr. 16-17. Before becoming an MSHA employee Meddings worked for Excel for 26 years, beginning as a day laborer and rising to the position of a mine foreman. Tr. 17. Along the way he held the positions of section foreman, shift foreman and safety coordinator. Tr. 18, 22.

Most of Meddings's Excel-related experience was at the Excel Two Mine. The mine was located on the site of the present Van Lear Mine. Coal from the Pond Creek seam was extracted at the mine. Tr. 20. When the Pond Creek seam was exhausted, the company began mining the Van Lear seam which was located above the Pond Creek seam, and the mine's name was changed to the Van Lear Mine. Tr. 20-21. Meddings explained that the Van Lear Mine is at the "same location" and in the "same drift or slope" as the Excel Two Mine. Further, the Van Lear Mine uses the "same portal, same bathhouse, [and] same office" as the Excel Two Mine. Tr. 20. Approximately 150 miners are employed at the Van Lear Mine. Tr. 53.

The roof at the Van Lear Mine consists of "laminated shale, shale and sandstone." Tr. 24. Had the roof consisted primarily of sandstone, Meddings believed the roof would have "tend[ed] to stay together." *Id.* However, because of the laminated shale and sandstone mix, separation of the seams in the roof is always "a good possibility." *Id.* To keep the roof stable, the company uses two kinds of roof bolts: fully grouted resin bolts and cable bolts.² Tr. 23-24, 27. The resin bolts are five or six feet long. Tr. 27-28. The cable bolts used at the mine are 10 feet long.³

² Banks explained that resin bolts are used at the mine because when they are tightened, their resin is released and is forced into the cracks and seams of the roof. The resin sets and forms a solid "beam" in the roof's strata. Tr. 83-84. The cable bolts supplement the resin bolts by providing support higher into the roof. Tr. 84.

³ There is inconsistent testimony regarding the length of the resin bolts. Meddings testified that five foot resin bolts are used at the mine. Tr. 27-28. Darryl Banks, a company mine examiner, testified that six foot cable bolts are generally used. Tr. 84, 92. The actual length of the resin bolts is not critical to this decision.

According to Meddings, roof falls usually originate 10 to 12 feet into the roof. Tr. 28. In Meddings's opinion by using 10 foot cable bolts the company is "trying to keep from having major roof falls." Tr. 24.

Prior to inspecting the mine, Meddings reviewed the records of its reported roof falls. He found there were fourteen roof falls in the three-year period of 2005 through 2008. Tr. 27-28. In addition, from 2005 through 2008 the mine experienced 11 draw-rock injuries. *Id.*⁴ Meddings described draw-rock injuries as "a piece of draw-rock . . . falls and injures a person." *Id.*

On August 27, 2008, Meddings conducted an inspection of the mine. Meddings traveled with Daryl Banks. They rode on Banks's rubber tired permissible buggy. Tr. 33-34. The men proceeded along a return airway when they came to a part of the entry that was cribbed on both sides. Tr. *Id.*, 100. There was a swag in the entry.⁵ *Id.* Meddings estimated that the cribbed entry, which was located between the intersections of two crosscuts, was "probably 70 feet long."⁶ Tr. 37, see Tr. 99; Gov't Exh. 2 at 4. A cutter was visible in the roof of the entry. Tr. 35.⁷ On one side of the cutter the roof dropped two to eight inches. Tr. 36.

Banks did not think the deformity in the roof was a cutter. Although Banks agreed that the roof was uneven, in his opinion the roof area that Meddings thought was a cutter was simply a place where draw-rock had fallen making a two to eight inch difference in the roof's elevation. Tr. 103.

According to Meddings, draw-rock existed though out the entry, both along the cutter and along the middle of the roof. Tr. 43. He estimated that the draw-rock pieces weighed from five to 500 pounds. Tr. 73. Roof support in the entry consisted of cribs, resin bolts and 10 foot cable bolts. The resin bolts were installed and spaced according to the mine's roof control plan. Tr. 59. The 10 foot cable bolts were installed throughout the entry and the cribs were installed along the entry's sides. Tr. 43, 44, 59-60. Normally cable bolts would have been installed in the intersections, not in the entry. Tr. 44. Meddings believed that the cable bolts and cribs helped to disburse the weight of the roof and were added to stop draw-rock from falling. Tr. 61.

⁴ The term "draw-rock," while not defined in commonly used mining dictionaries, is understood to refer to shale or slate pieces in the outer roof that tend to fall easily when under pressure.

⁵ Meddings described a "swag" as a dip in the mine floor. Tr. 37.

⁶ Banks testified that the entry was between the Number One and Number Two crosscuts. Tr. 99. Banks traveled through the entry at least one time each week as part of examination duties he undertook for the company. *Id.*

⁷ Meddings described a "cutter" as "where the roof is actually separated." Tr. 35.

Meddings speculated that when the company was driving the entry there “were some signs of the top getting bad or they wouldn’t have bolted the whole entry . . . full of cable bolts.” 44. He believed that the 10 foot cable bolts were installed first, and when draw-rock continued to fall, the cribs were installed. Tr. 45. However, according to Meddings even with the supplemental support, the roof in the entry continued to deteriorate and draw-rock continued to fall. *Id.* Draw-rock in the roof was so extensive Meddings thought that the only ways to eliminate its danger were to install chain link netting across the entry roof, install steel crossbars every four feet along the roof, or close the entry and have the mine examiner take a new route around the area. Tr. 45-47.

In Meddings’s opinion the cutter in the roof had existed for a couple of months. Tr. 48. Because the situation was worsening and because Banks passed through the entry at least every seven days when examining the airways, Meddings thought that it was reasonably likely Banks would be seriously injured by falling draw-rock. Tr. 48-49. Meddings speculated that the vibration from the buggy could cause the draw-rock to fall on Banks.⁸ Tr. 50. Meddings also suggested that Banks might pile things on the back of the buggy, and the material would strike draw-rock in the roof and cause the rock to fall. The height of the entry was five feet. Tr. 51.

Meddings told Banks that he, Meddings, had “no choice but to cite” a violation. Tr. 38, 90. Meddings stated that the entry was “too dangerous to be traveling through even if it’s just once a week.” Tr. 39. Meddings remembered Banks saying he knew that the condition “was getting worse,” a statement that Banks denied making.⁹ Tr. 38. 63. Tr. 106, *see also* Tr. 91. Meddings described his reaction to the roof in the entry. He testified that “the hair on my neck stood up.” Tr. 38.

After Meddings and Banks passed through the entry, Meddings asked Banks to stop and park the buggy in the adjacent crosscut, which Banks did. Meddings and Banks got out of the buggy and walked back to the entry. Tr. 58. Before entering the affected area Meddings noticed a “dog-eared” plate on a roof bolt.¹⁰ Tr. 39; Gov’t Ex. 2 at 9. As the men continued into the entry and walked between the cribs, Meddings noticed several more dog-eared plates as well as fallen draw-rock in the entry.¹¹ Tr. 40, 55, *see also* Tr. 90. In addition, Meddings noticed several squeezed crib wedges. Tr. 40, 56; Gov’t Ex. 2 at 9. Banks too saw the squeezed wedges. Tr. 102. The dog-eared plates and squeezed wedges indicated to Meddings that the roof was bearing

⁸ Banks was skeptical. He testified that he never heard of vibration from a buggy causing draw-rock to fall. Tr. 97.

⁹ Meddings wrote in his contemporaneous notes, “[Banks] said he realized that the top was getting worse, but didn’t think he needed to do anything about it yet.” Gov’t Ex. 2 at 10.

¹⁰ The plate was also seen by Banks. Tr. 102.

¹¹ Meddings did not know when the draw-rock fell. Tr. 67.

additional weight, and Banks agreed. Tr. 41; 102.

Meddings found that Excel's negligence in allowing the condition to exist was "moderate." Gov't Ex. 2. He thought the cable bolts in the entry and the cribs on each side of the entry indicated Excel had tried to do something about the condition. Tr. 52.

The condition was abated when Excel placed timbers and "do not enter" signs at the ends to the entry blocking access to it. Tr. 52-53; *see* Gov't Ex. 2 at 12. Banks now had to take a new route around the area when he conducted his weekly examination. Tr. 53.

Meddings agreed that during the summer when the humidity increased the mine experienced a "sweat season" and draw-rock conditions generally worse.¹² Tr. 64. He conceded that the loose and scaling draw-rock in the roof could have developed since Banks last conducted an examination of the area. He agreed he did not know for sure if the roof conditions that existed on August 27, were there the week before. Tr. 64-65, 69. Banks speculated that perhaps the fallen draw-rock in the entry was due to the "sweat season." *Id.* Banks also testified that in his experience intake airways were more affected by the increased humidity than return airways, and he noted that the cited area was ventilated by return air. Tr. 112-113.

Meddings found that falling draw-rock could cause Banks to suffer lost work days or restricted duty. Tr. 48; Gov't Ex. 1. There was even a chance that Banks could be fatally injured. Tr. 48. However, Meddings agreed that a large majority of draw-rock injuries were not reportable because they did not cause lost work days or restricted duty. Tr. 70-71.

Banks testified that he examined all of the Van Lear Mine's airways at least once every seven days. Tr. 77-78. On any given day, he traveled six to ten miles in the mine. Tr. 78. Banks estimated that he had traveled through the cited area 30 times before August 27, 2008. Tr. 80. As far as he knew, he was the only company miner who passed through the entry. *Id.* He further stated that it took him between 30 seconds and a minute to pass under the cited roof. Tr. 80-81. During air way examinations he mainly looked for "loose rock on the top." Tr. 81. When he saw loose rock, he stopped and took it down with a slate bar. Tr. 81.

Banks agreed that on August 27, 2008 roof support in the area consisted of resin bolts, 10 foot cable bolts and cribs and that the combined support extended for approximately 70 feet. Tr. 83. Banks speculated that the 10 foot bolts were installed because miners "probably encountered" adverse roof conditions as they drove the entry. Tr. 85. As far as Banks knew, the 10 foot bolts and the cribs were not required under the mine's approved roof control plan. Tr. 101. They were purposefully added to address roof hazards particular to the entry. Tr. 102.

¹² According to Banks, the "sweat season" occurred when temperatures outside the mine were significantly hotter than temperatures inside the mine. The temperature differential caused condensation on the roof, ribs and bottom, which in turn could cause the roof to scale. Tr. 91-92.

Banks testified that when he first examined the area in December, 2007 the three types of roof support were already in place. Tr. 87-88. At that time some of the cribs and some of the 10 foot bolts showed signs of taking weight. Tr. 88. For the next eight months the roof conditions remained the same except for some “draw-rock scaling out here and there.” *Id.* Banks insisted that when Meddings issued the citation on August 27, 2008 conditions were as they had been except for “two or three pieces of [draw-rock] that [had] fallen in the middle of the entry,” and “a few pieces [of draw-rock that had fallen] . . . toward the left cribs.” Tr. 89.

Banks was asked about the cutter. He defined a cutter as “where the main roof is weighing maybe above the . . . [resin] bolts and maybe not above the 10 foot [cable] bolts, and it’s breaking like in the middle or down the sides . . . and you see pieces of rock separating from one another.” Tr. 92. Banks was asked if he saw a cutter in the affected area. He responded that he saw a place four feet from the right rib where draw-rock had fallen out of the roof. Tr. 93-94. He would not call what he saw a cutter. Rather, he saw “cracks and where the draw-rock and stuff was separating.”¹³ Tr. 95, *see also* Tr. 102-103. Banks explained that “Cracks in the mine roof will cause the draw-rock to break apart from itself and scale out and try to fall.” Tr. 109. He agreed that on August 27 cracks in the roof caused draw-rock to develop above the entry. *Id.* In addition, he noted that when, as at the Van Lear Mine, the mine roof is laminated shale, cracks are “[r]eal common” and the roof is “just not very stable.” Tr. 110.

VIOLATION

Citation No. 8218342 states in part:

The roof and ribs of areas where persons work or travel [are] not being supported or otherwise controlled to protect persons from the hazards related to [the] fall of the roof or ribs. Approximately 70 [feet] between [the] No. 1 and No. 2 entry at the mouth of Room-1 off the 1st Southeast Submains the room has visible cutters running parallel and across the entry. The roof in this area has sagged down in the center and loose draw-rock measuring approximately two to 8 inches thick. [*sic*] This condition exposes the mine examiner who travels this area once per week to crushing hazards associated with the fall of the roof and ribs. The areas has been cribbed and cable bolts [have been] installed in the past.

¹³ It is clear from the testimony that although Meddings and Banks saw the same physical deformity in the roof, they referred to it differently. Meddings called the crack in the roof a “cutter.” Tr. 38. Meddings though the same feature was a crack where draw-rock had fallen causing a separation in the roof. Tr. 103-104.

Gov't Ex. 1.

Section 75.202(a) pertains to specified components of a mine's underground workings. To prove a violation the Secretary must establish a number of things. First, she must show that the challenged citation relates to an area specified in the standard, in this case, to the mine's roof. Here the witnesses consistently testified that the area cited encompassed approximately 70 feet of roof between two crosscuts, and I so find. Tr. 37, 99.

The standard also contains a specific location requirement. It is only applicable to "areas where persons work or travel." 30 C.F.R. § 75.202(a). The inspector understood that Banks, as Excel's mine examiner, traveled under all 70 feet of the cited area one time a week when he conducted his examination, and Banks agreed. Tr. 48-49, 99. Therefore, the Secretary established the location requirement of the standard.

Finally, the standard contains a protective component. It requires that the roof "be supported or otherwise controlled" to protect miners from hazards as they work or travel beneath it. The requirement is generally worded so as to be adaptable to mining's myriad roof conditions. Liability is determined by deciding whether a "reasonably prudent person familiar with the mining industry and the protective purposes of the standard, would recognize the hazardous condition the standard seeks to prevent and would properly support or otherwise control the roof. *Cannon Coal Company*, 9 FMSHRC 677, 668 (April 1987). I conclude the company did not meet this requirement. While Meddings and Banks disagreed as to whether or not a "cutter" existed in the roof, their disagreement was one of semantics rather than substance. Tr. 32, 103. The testimony of both established that in the cited entry, draw-rock had loosened and fallen. On August 27 some of the draw-rock was on the floor and more was hanging in the roof. Tr. 40, 42-43. In addition, both Meddings and Bank agreed that along a crack in the roof, fallen draw-rock left the roof at different levels, one level being two to eight inches below the other (Gov't Exh. 2 at 10, Tr. 36, 103) and that there were physical indications – dog-eared roof bolt plates and squeezed crib wedges – which signaled that the roof was continuing to take weight. Tr. 39, 41, 67, 102; Gov't Exh. 2 at 9. Further, Banks testified cracks would cause draw-rock to scale and fall and that there were cracks in the roof. Tr. 109. Banks added that the kind of roof that existed at the mine was "just not very stable." Tr. 110. The fallen draw-rock and the indications of weight on the roof meant that the roof was subject to ongoing stresses and confirmed the instability to which Banks referred.

I accept Meddings common sense testimony that hanging draw-rock posed a hazard to Banks when he traveled under it. Tr. 39. Meddings's estimate that the pieces of draw-rock weighed between five and 500 pounds was not disputed by Banks. Tr. 38. Meddings's fears that vibrations from Bank's passing buggy could cause draw-rock to fall (Tr. 50) or items protruding from the buggy could strike the roof and bring down draw-rock (Tr. 51) were unsupported, and I give them no credence. However, I find the presence of fallen draw-rock on the floor of the entry establishes that the force of gravity and the stresses on the roof made it likely draw-rock would fall at any time, including the 30 seconds to one minute that Banks spent beneath the roof on a

weekly basis. Tr. 80-81. In addition, the fact that it was the “sweat season” increased to some extent the likelihood that pieces of draw-rock would fall even in an entry ventilated by return air. Tr. 91-92. Although, as Meddings agreed, a great majority of draw-rock caused injuries did not result in lost workdays or restricted duty (Tr. 70-71), with draw-rock weighing up to 500 pounds in the roof (Tr. 38), I conclude that a hazard existed that was capable of causing grave injury to Banks. For these reasons I find that the condition of the roof in the cited area posed a roof fall hazard to Banks, a hazard a reasonably prudent operator would have noted and eliminated, and I conclude the violation existed as charged.¹⁴

S&S AND GRAVITY

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S, “if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.* 52 F. 3rd 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec’y of Labor*, 861 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). 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 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

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

The Secretary established the first of the S&S criteria. There was a violation of section

¹⁴ Meddings persuasively testified that the danger could have been obviated either by placing steel netting or steel bars across the roof or by closing the entry and rerouting the examiner’s path. Tr. 45-47. As noted, the company chose the latter course to abate the violation.

75.202(a). The violation created a discrete safety hazard in that it subjected Banks to the possibility of being hit by falling draw-rock as he traveled under the cited roof during the course of his weekly examination. I find as well that in the context of continued normal mining it was reasonably likely Banks would be hit and injured by falling rock. The draw-rock on the floor of the entry and the signs of stress on the roof bolt plates and crib wedges (Tr. 39, 41, 67, 102) evidenced that the roof in the entry was under stress and that forces were at work causing draw-rock to loosen and fall. Further, the “sweat season” meant that condensation made falling draw-rock at least somewhat more likely as mining continued.¹⁵ There was no indication that Excel planned to support the roof with steel mesh or beams, close the entry, or take other remedial measures. This means that in the context of continued mining Banks would have traveled once a week under a portion of the roof where forces were at work causing draw-rock to fall, and I conclude it was reasonable likely that as mining continued Banks would have been hit. Excel did not challenge Meddings’s testimony that the draw-rock weighed between five and 500 pounds (Tr. 73). Although Meddings agreed that a large majority of draw-rock falls did not cause lost workdays or restricted duty, there obviously were pieces of draw-rock in the roof, which if they fell and struck Banks, would have caused him to suffer broken bones and/or contusions or worse. I therefore find that it was reasonably likely an injury caused by the violation would have been of a reasonably serious nature. The violation was S&S.

The violation also was serious. As noted, if an injury occurred broken bones and/or cuts or even a fatality were not out of the question.

NEGLIGENCE

Negligence is the failure to exercise the care required by the circumstances. Meddings found that Excel, through Banks, was moderately negligent, and I agree. Gov’t Ex. 1. The violation was visually obvious. Banks traveled under the cited roof on a weekly basis. The conditions deteriorated over time. By August 27 they reached the point where draw-rock on the floor, dog-eared roof bolt plates, pinched crib wedges and the uneven roof indicated the inadequacy of roof support measures.

Banks first examined the entry in December 2007. Tr. 87-88. Banks estimated he made 30 trips through the area between his first examination and August 27, 2008. Tr. 80. He testified that true to his once-a-week schedule, he traveled through the entry on August 20. Tr. 108. Banks maintained that in general the roof conditions on August 20 were the same as on August 27 and that except for some fallen draw-rock the conditions were as they always had been. Tr. 89. However, I infer from the testimony that the fallen draw-rock indicated changes in the roof were ongoing and that its condition was in fact deteriorating. The dog-eared plates, squeezed wedges and uneven level of the roof were signs that Banks should have heeded. It may be as Medding speculated that Banks became used to the roof’s condition and failed to appreciate

¹⁵ I take judicial notice of the fact that summer temperatures are likely to continue well into September in eastern Kentucky.

the hazard it posed. Tr. 69. Or, it may be that he misjudged the roof's condition because he honestly believed it did not pose a hazard. In either event, Banks was wrong and his failure to exercise the care that was required establishes the company's negligence. Since there is no suggestion that Banks purposefully looked the other way or that he was highly indifferent to his own safety, I agree with Meddings that the company's negligence was moderate.

HISTORY OF PREVIOUS VIOLATIONS

The Van Lear Mine's history of previous violations is reflected in a computer printout that shows in the two years prior to August 27, 2008 the company paid civil penalties for 408 violations. Gov't Ex. 3 at 37-46. Of the paid violations, 23 were violations of section 75.202(a). This is a large history of prior violations.

SIZE AND ABILITY TO CONTINUE IN BUSINESS

The parties agreed that Excel is a large operator and that the proposed penalties will not adversely affect the company's business. Stips. 4, 8 *infra*.

GOOD FAITH ABATEMENT

Within a few minutes after he was notified of the violation of section 75.202(a), Banks dangered off the area with tape. Tr. 96. That evening or the following morning, Banks returned and set timbers to block both ends of the entry to travel. *Id.* He spray painted a danger sign to warn unsuspecting miners about the area. *Id.* Closure of the area to travel meant that Banks had to take a new and different route, one under a safe roof, when conducting future examinations. Tr. 96-97. Banks's timely and effective efforts constituted good faith abatement of the violation. *See* Gov't Ex. 1 at 2.

CIVIL PENALTY ASSESSMENT

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
8218342	8/27/08	75.202(a)	\$687.00

I have found that the violation existed, that it was serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria, I assess the Secretary's proposed penalty of \$687.00.

ORDER

Within 40 days of the date of this decision, Excel should pay a civil penalty of \$687.00.

Payment should be sent to the: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. The payment should reference Docket No. KENT 2009-200 and A.C. No. 15-18839-164793.

This case **IS DISMISSED**.

David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail)

Matthew S. Shepherd, Esq., Christian Barber, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

Gary D. McCollum, Esq., Corporate Counsel, Excel Mining, LLC, 771 Corporate Drive, Suite 500, Lexington, KY 40503