

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

July 12, 2000

EAGLE ENERGY, INCORPORATED, : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. WEVA 98-72-R
: Order No. 7166391; 3/11/98
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. WEVA 98-73-R
ADMINISTRATION (MSHA), : Order No. 7166392; 3/11/98
Respondent :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 98-123
Petitioner : A.C. No. 46-07711-03674
v. :
: Mine No. 1
EAGLE ENERGY, INCORPORATED, :
Respondent :

DECISION

Appearances: Howard N. Berliner, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia; James Bowman, Conference and Litigation Representative, Mine Safety and Health Administration, Mount Hope, West Virginia, for the Petitioner;
David J. Hardy, Esq., Julia K. Shreve, Esq., Jackson & Kelly, Charleston, West Virginia, for the Respondents.

Before: Judge Feldman

These contest and civil penalty matters concern a petition for assessment of civil penalty filed by the Secretary of Labor (the Secretary) against the respondent, Eagle Energy, Incorporated (Eagle Energy), pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). The petition seeks to impose a civil penalty of \$3,000 for each of two 104(d)(2) orders issued as a result of a February 26, 1998, inspection of the 2 North section of Eagle Energy's Mine No. 1. Specifically, the orders cite alleged violations of the Secretary's mandatory safety standards in 30 C.F.R. §§ 75.360(b) and 75.362(a)(1) that require adequate

preshift and onshift examinations for the purpose of detecting and remedying hazardous conditions.

The hearing in these proceedings was conducted in Charleston, West Virginia, over ten days, in three sessions, from September 14 to September 17, 1999, December 7 to December 9, 1999, and February 15 to February 17, 2000.¹ Eagle Energy has stipulated that it is a large mine operator that is subject to the jurisdiction of the Act.

I. Statement of the Case

These proceedings concern 104(d)(2) Order Nos. 7166391 and 7166392 issued by Mine Safety and Health Administration (MSHA) Inspector Thurman L. Workman as a consequence of his February 26, 1998, inspection of Eagle Energy's No. 2 North section located in its Mine No. 1. During the course of his February 26, 1998, inspection, Workman observed ten roof conditions that he determined to be unsupported kettlebottoms at various locations in the 2 North section's mine roof.² Three of the kettlebottoms were spray painted in orange paint. As discussed below, kettlebottoms are fossilized remains of trees, often circular or oval in shape, that are present in the mine roof, and that require supplemental support because they are capable of falling without warning.

Upon completing his inspection, Workman reviewed the preshift and onshift examination reports for the 2 North section beginning with the preshift examination on the hoot owl shift (11:00 p.m to 7:00 a.m.) on February 24, 1998, through the preshift examination for the February 26, 1998, night shift, that was conducted during the day shift at 1:30 p.m. on February 26, 1998. During this period from February 24 through February 26, 1998, 17 preshift and onshift examinations were conducted. However, Workman noted that no entries, notations or comments concerning the ten hazardous roof conditions that he had observed in the 2 North section had been made by any of the three section foreman performing the preshift and onshift examinations during those days.

In its defense, Eagle Energy asserts the cited conditions were not hazardous kettlebottoms. Although it maintains the conditions were not hazardous, Eagle Energy contends the conditions did not become visible until immediately prior to Workman's inspection because of roof sloughage that had occurred as a result of mountain bumping. For the reasons discussed below, Eagle Energy's defense is not supported by the record and must be rejected.

¹ References to the hearing transcript for the September, December and February sessions will be designated as volumes "I, II and III", respectively, followed by the transcript page number.

² Although Workman observed ten alleged kettlebottoms, Workman only cited nine kettlebottoms in 104(d)(2) Order Nos. 7166391 and 7166392. Eagle Energy concedes one of the cited conditions was a kettlebottom. (*Eagle Energy Br.* at p. 8). It was the condition supported by a roofbolt through the center. The Secretary alleges it was supported inadequately.

II. Preliminary Findings of Fact

On February 26, 1998, at approximately 2:50 p.m., James Kerns, a maintenance foreman, was fatally injured as a result of a rib roll accident in the 2 North section of Eagle Energy's Mine No. 1. The fatal accident occurred in the 27th crosscut between the first and second entries, inby survey spad 2669. (Gov. Ex. 19). Shortly thereafter, Eagle Energy alerted MSHA's Mount Hope District Office that a fatality had occurred, and an MSHA investigative team was dispatched to the mine. MSHA personnel, as well as State of West Virginia Office of Miners' Health, Safety and Training personnel, arrived at the Mine No. 1 at approximately 5:00 p.m. Among the MSHA investigative personnel that went underground to the No. 2 North section were inspectors Thurman L. Workman, Vaughan Gartin and supervisory inspector Terry D. Price. The federal and state investigators were accompanied by Eagle Energy Vice-President Larry Ward, superintendent Terry Walker and night shift foreman Roger Lovejoy.

MSHA personnel, West Virginia personnel and Eagle Energy officials went underground in several groups and met at the No. 2 North section dumping point/feeder location, located outby survey spad 2665 in the No. 2 entry at the 26th crosscut. The investigators were divided into inspection teams, each team being comprised of at least one federal investigator, one state investigator, and one management official. While one team traveled to the accident site, the other individuals waited at the dumping point.

At approximately 6:50 p.m., while the first investigating team was at the accident site, Price walked from the dumping point area in the No. 2 entry through the 26th crosscut towards the No. 3 entry. At that time Price heard sounds he attributed to mountain bumping. Mountain bumping is common in the mining industry. It occurs as a result of movement or slippage in the earth's strata above caused by weight shifts as a consequence of coal removal, particularly from longwall mining below. (Tr. I, 1264-66). Miner's representative Keith Casto, who was underground with Price during the evening of February 26, 1998, opined the mountain bumping at that time was "super light" and that he "didn't see nothing falling off the roof, or nothing." (Tr. II, 232-33).

While Price was walking towards the No. 3 entry, Workman traveled from the dumping point through the 26th crosscut towards the No. 1 and No. 2 entries. Workman then doubled back along the 26th crosscut towards the No. 3 entry whereupon Workman observed a kettlebottom, with a roof bolt through the center, located in the 26th crosscut between the No. 2 and No. 3 entries. (2(c) in Gov. Exs. 1, 2; Gov. Ex 19; Joint Ex. 1, photos 11, 12; Tr. I, 284-87). This kettlebottom was also observed by Price. (Tr. I, 1267).

Kettlebottoms are fossilized remains of tree trunks that are cylindrical or oblong in shape and sometimes protrude from the mine roof. Although most often cylindrical or oblong, Kettlebottoms have various shapes and do not all look alike. Kettlebottoms may be surrounded by a ring of coal, or, they maybe surrounded by slickensided material that consists of smooth and highly polished planes of weakness that are primarily found in mines containing shale roof rock. Some kettlebottoms may be partially surrounded by coal and partially slickensided. Price explained the nature and dangers of kettlebottoms, and their need of supplemental support :

Kettlebottoms are an indication of a roof abnormality. A well supported mine roof consists of being supported with roof bolts. And generally what happens is you get a consolidated beam that each individual layer by itself is weak. But if you put all these layers together, you build a stronger beam. That, in turn, supports the roof above so it doesn't fall in on the mine entry where the mine entry has been taken out. What a kettlebottom does is it interrupts that beam structuring process and it weakens the roof. Now, the problem with kettlebottoms is that it's tied into nothing. It's slicksided or [slick and sides] and the coal reams together and they have no strength. It's just there and they have no strength. Now, when the weight of a kettlebottom overcomes its ability of the tension to hold it in from the slickenside, it falls out. Or it can fall without warning if it is not supported.

(Tr. I, 1110-1111). Virtually all of the witnesses agreed that kettlebottoms are a common occurrence in Eagle Energy's Mine No. 1. (*See e.g.*, Tr. II, 204, III, 1067). Kettlebottoms are sometimes identified with spray paint or chalk to alert the roof bolter that additional support is required. (Tr. II, 215, 272).

Given the above explanation by Price, it is clear that a roof bolt and plate in the center of a kettlebottom is ineffective because such support will not prevent the kettlebottom from dropping out of the roof. Rather, Workman and miners' representative Casto explained the proper method of supporting a kettlebottom is to secure headers or straps to the outer perimeter of a kettlebottom to make certain the kettlebottom will not separate from the surrounding roof structure. (Tr. I, 124-27, II, 204-06). Thus, Workman and Price concluded the kettlebottom with the roof bolt and plate through the center, located in the 26th crosscut between the No. 2 and No. 3 entries, was a hazardous condition.

After observing the roof bolted kettlebottom, Workman returned to the dumping point where he saw Pete Hendricks, President of Massey Coal Services, Eagle Energy's parent company. Workman and Price, accompanied by Casto, next walked approximately 27 feet in by the dumping point where they observed three oblong or round kettlebottoms at survey spad 2665 that were each painted in their entirety with orange spray paint and had the letters "CUZ" spray painted next to them. (2(d) in Gov. Exs. 1, 2; Gov. Exs. 11(A) - (E); Tr. I, 292, 296, 308). One of the kettlebottoms appeared to have an orange painted centerline drawn through it. (Gov. Ex. 11(A)). A centerline is drawn on the mine roof of an entry, before the next cut in the entry is taken, to ensure that the continuous miner proceeds in a straight direction.

Workman walked back to Hendricks at the dumping point. Workman pointed to the painted kettlebottoms he and Casto had just observed, and Hendricks, using his cap lamp, looked up at the roof from the dumping point and acknowledged that he saw them. (Tr. I, 297-300). Workman specifically asked Hendricks, who then was sitting on the end of the feeder tailpiece, if he had seen the three unsupported, painted kettlebottoms. Workman testified Hendricks replied, "T. L. [Workman], I pay my people to support them (sic) kettlebottoms." (Tr. I, 224-25, 293-94, 298).

Ward testified that, after the conditions in the No. 2 entry inby the feeder had been pointed out by Workman, he looked at the painted roof conditions and instructed safety manager Jeffrey Bennett to danger-off the area. Ward stated that he had the area dangered-off until he would have the opportunity to get a better look at the area. (Tr. III, 1052-53, 1096-97).

Workman asked MSHA's lead investigator, Vaughn Gartin, to photograph the painted kettlebottoms. Gartin had used all of his film at the accident site. However, Gartin borrowed some film from a state investigator and photographed the painted cluster of kettlebottoms. (Gov. Exs. 11(A)-(E); Tr. I, 310, 314). Although Gartin did not have enough film to photograph the other kettlebottoms observed by Workman, photographs of the cited conditions were taken by Bennett on November 21, 1998. The photographs were taken to illustrate the cited conditions shortly before the No. 2 section of the mine was scheduled to be abandoned. Bennett's photographs, and accompanying photo log, were admitted in evidence as a joint exhibit. (Joint Ex. 1; Tr. I, 442-43, 444, 1329).

After his conversation with Hendricks, Workman traveled back in the 26th crosscut toward the No. 1 entry. Workman observed an unsupported egg-shaped kettlebottom in the 26th crosscut approximately half way between the No. 1 and No. 2 entries. (1(b) in Gov. Exs. 1, 2; Gov. Ex. 19; Tr. I, 294, 301, 354).

Workman then traveled inby with the second investigative team. The team traveled up the No. 2 entry to the accident site in the 27th crosscut between the No. 1 and No. 2 entries. Workman took contemporaneous notes as he was walking around the No. 2 section. (Gov. Ex. 5; Tr. I, 358). Workman returned to the dumping point to confer with Gartin and other investigators about their preliminary accident investigation findings. At that time, Workman was instructed to conduct a Triple A inspection to determine the conditions in the No. 2 section inby from the dumping point to the working faces. (Tr. I, 364).

Workman, accompanied by Denver Gunnoe, a State of West Virginia inspector, walked up the No. 1 entry and noted a roundish-oblong kettlebottom approximately six to nine inches in diameter, inby survey spad 2669. (1(a) in Gov. Exs. 1, 2; Gov. Ex. 19; Tr. I, 370). Workman continued to walk through the 27th crosscut from the No. 1 entry into the No. 2 entry. There, at the intersection of the 27th crosscut and the No. 2 entry, just inby survey spad 2668, Workman observed an unsupported "sunflower-shaped" kettlebottom "with jageddy (sic) edges" that was approximately six to nine inches in diameter. (2(a) in Gov. Exs. 1, 2; Gov. Ex. 19; Tr. I, 385-86).

Workman next traveled inby survey spad 2668 in the No. 2 entry towards the face. Workman noted another unsupported kettlebottom located approximately 25 feet inby spad 2668 that was similar in size and shape to the other kettlebottoms. (2(b) in Gov. Exs. 1, 2; Gov. Ex. 19, Joint Ex. 1, photos 7, 8; Tr. I, 392-93). Workman did not observe additional kettlebottoms inby the last open crosscut (the 27th crosscut) toward the faces in the No. 2 and No. 3 entries. However, in returning outby in the No. 3 entry, Workman saw another unsupported kettlebottom just outby spad 2666 that was round in shape and approximately six to ten inches in diameter.

(Gov. Ex. 19; Tr. I, 406-07). However, this kettlebottom was not cited by Workman in the subject 104(d)(2) orders.

Workman traveled down the 27th crosscut and turned in an outby direction in the No. 1 entry. There, in the No. 1 entry, outby the 26th crosscut near spad 2664, Workman spotted another unsupported kettlebottom, similar in size and shape to the kettlebottom found outby spad 2666. (1(c) in Gov. Exs. 1, 2; Gov. Ex 19; I, 410). Thus, Workman observed a total of ten kettlebottoms, nine of which were cited in 104(d)(2) Order Nos. 7166391 and 7166392. Price testified that he also traveled the 2 North section and personally observed all of the kettlebottoms listed in Workman's 104(d)(2) orders. (Tr. I, 1144, 1175, 1216, 1268-86).

Having completed his inspection, Workman traveled with Gunnoe up the No. 2 belt entry to the mine elevator, arriving on the surface at approximately 10:30 p.m. (Tr. I, 410, 412). At approximately 11:00 p.m., a meeting was held to discuss the investigative findings. The participants at the meeting were MSHA inspectors Workman, Price and Gartin, state inspector Gunnoe, and Eagle Energy/ Massey Coal officials President Pete Hendricks, Vice-President Larry Ward, superintendent Terry Walker and night shift foreman Roger Lovejoy.

At the meeting, Workman issued 104(a) Citation No. 4400559 to Walker for a violation of the mandatory safety standard in 30 C.F.R. § 75.202(a) as a result of inadequate roof and rib support in the 2 North section.³ (Gov. Ex. 14; Tr. I, 537). Workman based Citation No. 4400559 on his observations of numerous unsupported kettlebottoms inby the dumping point as well as his observations of loose, unsupported coal ribs, and entry widths exceeding the 20 feet wide entries in Eagle Energy's approved roof control plan. (Tr. I, 546).

To abate Citation No. 4400559, the next day, on February 27, 1998, Ward instructed safety director Jeffrey Bennett to paint any area of the roof that "looked slickensided." (Tr. III, 1195-97). Bennett painted numerous areas of the 2 North section roof in orange spray paint similar to the paint that had been used on the three conditions inby the feeder. The areas painted were then supported by installing roof bolts and headers around the outer perimeter of the painted areas. (Joint Ex. 1). Ward considered these conditions to be non-hazardous irregularities that were identified by Bennett and supported solely for the purpose of abatement. Citation No. 4400559 was terminated on March 2, 1998, by MSHA Inspector Andrew J. Nunnery after the cited unsupported kettlebottoms were fortified with roof bolts and headers. (Tr. I, 538-39).⁴

³ Section 75.202(a) provides:

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.

⁴ To support its claim that the cited conditions were not hazardous, Eagle Energy asserts MSHA permitted "the cited area to be traveled without impediment on February 27, 1998, up until the issuance of [104(d)(2) Order Nos. 7166391 and 7166393] on March 11, 1998 . . .," despite MSHA's assertion that the kettlebottoms could fall at any moment. (*Eagle Energy Br.* at p. 14). Eagle Energy is mistaken. Mine operations were suspended after the February 26 fatality. The cited kettlebottoms were supported as early as February 28, 1998, when Ward instructed his management staff "to clear up the violations [cited in 104(a) Citation No.

Ward testified that Citation No. 4400559 was not contested, and that the civil penalty for this citation was paid “just purely for economic reasons.” (Tr. III, 1115-16).

The following day, on February 27, 1998, Workman and Price returned to Eagle Energy’s No. 1 Mine and inspected the preshift and onshift examination mine books. (Gov. Ex 5, p.14; Tr. I, 680). Workman and Price inspected the examination reports for the preceding three days from February 24 through February 26, 1998. (Gov. Ex 13(h)-13(w); Tr. I, 684, 1371). The section foremen conducting the preshift and onshift examinations during this period were Larry Saunders, Thomas Fisher and Carter Miles. During this period they conducted 17 examinations. Not one of the ten conditions in the 2 North section that Workman and Price had determined was a kettlebottom, including any of those painted in orange color inby the feeder, was noted by Saunders, Fisher or Miles. These three individuals maintain they did not observe any kettlebottoms during their examinations, and they all testified that they were unaware of any painted roof conditions located inby the feeder in the No. 2 entry.

Upon further investigation, Workman concluded that the areas where the cited kettlebottoms were located were mined as early as the day shift on February 24, 1998. Workman’s conclusion is based on a mine advancement map prepared by Ward that provides the chronology for the advancement of the working faces in the 2 North section from the day shift on February 24, 1998, until the day shift on February 26, 1998. (Gov. Exs. 9(a), 10). Specifically, regarding the painted cluster of kettlebottoms in the No. 2 entry, Ward stated that area was mined sometime during the day shift on February 24, 1998. (Tr. III, 1089-90).

Consequently, Workman concluded Eagle Energy had repeatedly violated the mandatory safety standards in 30 C.F.R. §§ 75.360(b) and 75.362(a)(1) that require hazardous conditions to be noted during preshift and onshift examinations. (Gov Exs. 1, 2). Section 75.360(b) provides, in pertinent part:

(b) The person conducting the preshift examination shall examine for hazardous conditions . . . at the following locations:

(1) Roadways, travelways and track haulageways where persons are scheduled, prior to the beginning of the preshift examination, to work or travel during the oncoming shift.

(2) Belt conveyors that will be used to transport persons during the oncoming shift and the entries in which these belt conveyors are located.

4400559].” (Tr. III, 1059-60). Ward used management personnel because “the workforce [was] off due to the fatality.” (Tr. III, 1060). Citation No. 4400559 was terminated at 4:35 a.m. on March 2, 1998, after the kettlebottoms were supported. (Gov. Ex. 15).

(3) Working sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift. The scope of the examination shall include the working places, approaches to worked-out areas and ventilation controls on these sections and in these areas, and the examination shall include tests of the roof, face and rib conditions on these sections and in these areas.

* * *

(10) Other areas where work or travel during the oncoming shift is scheduled prior to the beginning of the preshift examination.

Section 75.362(a)(1) provides, in pertinent part:

At least once during each shift, or more often if necessary for safety, a certified person designated by the operator shall conduct an on-shift examination of each section where anyone is assigned to work during the shift and any area where mechanized mining equipment is being installed or removed during the shift. The certified person shall check for hazardous conditions

On March 11, 1998, approximately two weeks after the fatality, Workman issued 104(d)(2) Order Nos. 7166391 and 7166392 to Larry Ward for alleged “perfunctionary” (sic) preshift and onshift examinations.⁵ (Gov. Exs. 1, 2). The orders alleged the cited violations were significant and substantial (S&S) in nature and attributable to Eagle Energy’s unwarrantable failure.

As noted below, Eagle Energy asserts the conditions observed by Workman and Price were non-hazardous “roof irregularities” that were obscured by slate until mountain bumping occurred shortly before Workman’s inspection. Eagle Energy contends the mountain bumping caused roof sloughage that exposed the cited conditions. However, Workman and Price noted continuous miner bit marks on, and in the immediate vicinity of, the cited conditions reflecting that the conditions were exposed during the mining cycle. (Tr. I, 346-47, 351, 594, 989, 1001, 1198). Miners’ representatives Casto and James Bias also testified bit marks indicated the kettlebottoms were exposed during mining. (Tr. II 248, 302, 304-05, III, 212, 301-04).

⁵ Although the subject 104(d) orders allege the preshift and onshift examinations were perfunctory in nature, the Secretary need only establish that the examinations were inadequate to prevail on the issue of the fact of the violations.

Moreover, Workman, Price and Casto observed no evidence of loose roof plates, or, roof sloughage on the mine floor, that would indicate the roof conditions were exposed as a result of mountain bumping.

III. Eagle Energy's Defense

a. The cited conditions were not kettlebottoms

Eagle Energy contends that, with the exception of the bolted kettlebottom cited by Workman, the remaining cited conditions were not kettlebottoms. Eagle Energy relies on the expert testimony of Dr. Vincent Scovazzo, an engineer with a doctorate degree in geomechanics. Scovazzo examined the roof of the 2 North section on November 23, 1998, nearly nine months after MSHA's February 1998 accident investigation. Scovazzo's description of a kettlebottom is consistent with the descriptions of Price and Workman. Scovazzo testified that kettlebottoms are "easy to identify." (Tr. III, 515). They are the remains of casts of tree trunks that are circular or cylindrical in shape. This circular or near circular formation is totally or partially rimmed in coal with slickensides on the rim. Although slickensides is a characteristic of a kettlebottom, Scovazzo testified that slickensides also occur when rock is compacted at different rates, and he opined that slickensided rock was strong enough to hold together. (Tr. III, 592-93).

Scovazzo testified that all of the cited roof conditions he observed on November 23, 1998, were not kettlebottoms with the exception of the bolted kettlebottom cited by Workman which is "probably a kettlebottom." (Tr. III, 576). Scovazzo characterized the three painted roof conditions in by the feeder as "some sort of abnormality" or "roof irregularity." (Gov. Ex. 9(B), p. 2; Tr. III, 561). Scovazzo's contemporaneous notes taken during his observations refer to "irregularities" that "could be kettlebottoms." (Gov. Ex. 9(B), p. 3). Although Scovazzo stated he used the term "irregularity" as a "convenience" and that these irregularities were "[t]o me . . . just a normal mine roof," Scovazzo had no explanation for why the three roof conditions in by the dumping point were spray painted, describing the paint as "somebody's doodling." (Tr. III, 572, 878). In this regard, Scovazzo provided the following testimony about the photographs in Government Exhibit 11 depicting the painted roof conditions:

Court . . . I'm talking about the three distinct circles [painted on the roof in by the dumping point]. One [circle] is through the centerline and then there is what we've described as a protrusion and an abnormality, whatever that means.

Scovazzo: That being said, when I see all this paint on the ceiling, to me, somebody's doodling .

Court: You think those are doodles?

Scovazzo: Yes. Because a lot of them - - - a lot of the circles go around things that there's nothing there as we discussed yesterday.

Court: All right. So [if shift foreman] Lovejoy testified that [area] was dangered-off. It was dangered-off because of the doodles?

Scovazzo: I have no idea.

(Tr. III, 427-28, 877-88). Scovazzo's doodling explanation was essentially adopted by Ward who opined, "it all look[s] like graffiti." (Tr. III, 1137-38).

Finally, although Scovazzo testified he used a mason's hammer to determine if the material inside the formations was different from the material outside, the photographs taken by Bennett in Joint Exhibit 1 reveal that Scovazzo's examination of the cited conditions was limited by the paint applied by Bennett, as well as by the headers that were installed over the perimeter of the formations. In addition, observation of the roof was also limited by rock dust.

Day shift section foremen Saunders, evening shift section foreman Fisher, and "hoot-owl" section foreman Miles, who performed the preshift and onshift examinations from February 24 through February 26, 1998, as well as shift foreman Lovejoy, superintendent Walker, and Vice-President Ward, all denied the conditions cited by Workman were kettlebottoms. Saunders, Fisher and Miles also denied having seen the three painted roof conditions inby the dumping point during their examinations. Similarly, all three section foremen denied painting, or even seeing, the centerline that is painted through one of the cited conditions in the No. 2 entry inby the dumping point. (Gov. Ex. 11(A), (B), (C) and (E)). Although Saunders testified continuous miner operators and other miners sometimes paint centerlines, Bias and Casto, and Lovejoy, testified mine foreman are responsible for drawing centerlines. (Tr. II, 248, 386, III, 62, 445). Saunders was the day shift foreman on February 24, 1998, when the area containing the painted roof conditions observed by Workman was mined.

With respect to the nature of the cited conditions, Lovejoy opined the cited conditions were "visual irregularities" as distinguished from "structural irregularities." (Tr. III, 368-69). However, Lovejoy admitted there are roof irregularities that require supplemental support. (Tr. III, 383-84). In fact, Lovejoy conceded that one of the cited painted roof conditions that appears to be protruding from the roof with cracks around it 'could very well be' hazardous. (Tr. III, 428-32). Lovejoy also conceded he could not tell if the painted areas inby the dumping point photographed in Gov. Ex. 11 were kettlebottoms because the conditions were obscured by the paint. (Tr. III, 435-36). Superintendent Walker opined the cited conditions "looked like just slick pieces of rock where the slate had just dropped off them," but they were not kettlebottoms. (Tr. II, 575).

b. The cited conditions were not visible prior to February 26, 1998

Even if the cited conditions were kettlebottoms, Eagle Energy asserts the conditions were not detectable when the pertinent preshift and onshift examinations were conducted from February 24 through February 26, 1998, because they were under the mine roof's surface. In this regard, Eagle Energy argues that, "[s]ince the Secretary has no witnesses to establish that the alleged kettlebottoms were visible during the pertinent time period, the Court must look to the Respondent's witnesses to establish if the roof conditions were visible." (*Eagle Energy Br.* at p. 24). Thus, Eagle Energy heavily relies on the exculpatory testimony of Fisher, Saunders and Miles that adequate examinations were conducted, and, that there were no visible kettlebottoms, including the three painted conditions in by the dumping point. For example, Eagle Energy notes that Saunders testified he "takes his time and occasionally hammers the roof to detect if there is any loose material." (Tr. II, 363-64).

Given the testimony of Eagle Energy management that they were unaware of the cited conditions, Eagle Energy contends that the roof formations cited in Workman's 104(d)(2) orders were not noted on preshift or onshift examinations because they "became more visible on February 26, 1998, because of the geological events of the day." (*Eagle Energy Br.* at p. 25). Specifically, Eagle Energy argues that mountain bumping on February 26, 1998, caused obscured roof conditions to become visible to Price and Workman because of roof sloughage.

It is unclear how Eagle Energy's roof sloughage theory applies to the three painted roof conditions. Moreover, the cited kettlebottom that was bolted in the center obviously existed for several shifts preceding Workman's inspection.

IV. Further Findings and Conclusions

a. Fact of Occurrence of the Violations

The threshold issue is whether the conditions cited by Workman were hazardous kettlebottoms that required supplemental support. In addressing this issue, I note that Eagle Energy has made two damaging admissions. First, I credit Workman's testimony that Pete Hendricks, president of Eagle Energy's parent corporation, acknowledged seeing the kettlebottoms and stated, "that's what I pay my people to do is support these kettlebottoms." (Tr. I, 297-98). Second, Eagle Energy did not contest, and has paid the civil penalty for, 104(a) Citation No. 4400559 issued by Workman on February 26, 1998, for hazardous roof conditions, including kettlebottoms in the 2 North section. I cannot ignore the fact that Eagle Energy has paid a civil penalty for the same roof conditions it now contends did not exist. Ward's explanation, that Citation No. 4400559 was not contested "for economic reasons," does nothing to lessen the evidentiary significance of this admission.

Notwithstanding the above admissions, the evidence amply supports the conclusions of Workman, who has 45 years of experience in the mining industry, and Price, who has 27 years of mining experience, that the cited conditions were kettlebottoms. In reaching this conclusion I note that Scovazzo testified kettlebottoms are easy to identify. Moreover, kettlebottoms are common in West Virginia and, more importantly, they are a common occurrence in Eagle Energy's Mine No. 1. In this regard, Casto testified without contradiction "there is (sic) kettlebottoms throughout Eagle Energy's mines. . . . They are everywhere." (Tr. II, 204). Significantly, Scovazzo's description of a kettlebottom comports with the descriptions provided by Price and Workman. It is noteworthy that Price and Workman had an opportunity to view the cited conditions before they were spray painted for abatement purposes and/or supported with headers that conceal substantial portions of the slickensided outer perimeters of the formations. In this regard, Ward testified:

Your Honor, we put up probably 100 additional bolts to make sure we covered everything. I mean, if it had small slickensided areas we put up bolts because we were trying to cover everything. . . . Anything like (sic) looked slickensided we tried to cover.

(Tr. III, 1196).

Finally, Scovazzo's doodling explanation, and Ward's graffiti conclusion, with respect to the three painted circles in the No. 2 entry, are, to be charitable, unavailing. The conclusions of Scovazzo and Ward are particularly suspect in view of Ward's instructions to Bennett to danger-off the area inby the feeder. Moreover, Ward instructed Bennett to highlight the cited conditions using the identical method of orange spray paint that was used inby the feeder. (Tr. III, 1195-97). Shift foreman Lovejoy also testified that he used orange spray paint to highlight some of the cited conditions. (Tr. III, 363-64, 408-12). Thus, when viewed in context, Scovazzo's doodling theory negatively impacts on his credibility as an expert witness. *United States v. Cutler*, 58 F.3d 825, 836 (2nd Cir. 1995) (bias of an expert witness is a proper matter to be considered in determining the weight to be given to expert testimony). *See also Sartor v. Arkansas Natural Gas*, 321 U.S. 620, 627-28 (1944); *Webster v. Offshore Food Serv.*, 434 F.2d 1191, 1193 (5th Cir. 1970); *Massey v. Gulf Oil*, 508 F.2d 92, 94 n.1 (5th Cir. 1975) *cert. denied*, 423 U.S. 838 (1975). In addition, based on the testimony concerning the characteristics of kettlebottoms, I find the photographs of the cluster of three painted conditions in Gov. Ex. 11, as well the photographs taken by Bennett in Joint Ex. 1, support, rather than detract from, the determinations of Workman and Price that the cited conditions were kettlebottoms.

Since it is undisputed that kettlebottoms are hazardous conditions that require supplemental support, it follows that the failure to note visible kettlebottoms during preshift and onshift examinations constitutes a violation of the cited mandatory safety standards in 30 C.F.R. §§ 75.360(b) and 75.362(a)(1). However, the issue of duration remains. For, if the conditions were obscured by slate and revealed because of mountain bumping that occurred immediately prior to Workman's inspection, the conditions could not have been noted by the preshift and onshift examiners.

In addressing the issue of duration, I note that it is not surprising that Eagle Energy's section foreman and other management personnel have denied knowledge of unsupported kettlebottoms, including those painted in by the dumping point, given the fact that a fatal roof accident had just occurred. Thus, I cannot infer that the kettlebottoms were not observable simply because Eagle Energy's witnesses deny that they were seen. For, in the final analysis, at least three of the cited roof conditions were seen prior to Workman's arrival - - by the person who painted them.

Nevertheless, the burden of proof that the kettlebottoms were visible and should have been noted by the preshift and onshift examiners remains with the Secretary. However, the Secretary does not have to prove, as Eagle Energy suggests, when the cited roof conditions were exposed. Rather, the Secretary must show "that it was more likely than not" that the conditions observed by Workman were visible during the relevant 15 preshift and onshift inspections beginning with the onshift conducted on the day shift of February 24, through the preshift for the night shift conducted on February 26, 1998. *Enlow Fork Mining Company*, 19 FMSHRC 5, 13, n.10 (January 1997).

In this case, the question of the duration of the unsupported kettlebottoms must be resolved by circumstantial evidence. In this regard, the Commission has recognized that the Secretary may establish a violation by inference. *Mid-Continent Resources*, 6 FMSHRC 1132 (May 1984). However, the inference must be inherently reasonable, in that there must be a rational connection between the collateral evidentiary facts and the ultimate fact to be inferred. *Id.* at 1138.

Here, the Secretary relies on several collateral evidentiary facts to infer that the painted cluster of kettlebottoms was exposed during the day shift on February 24, 1998, when that area of the No. 2 entry was mined. Namely, the centerline, normally drawn by the section foreman after an entry is mined, was painted through one of the three painted kettlebottoms. In addition, there were continuous miner bit marks in the kettlebottoms indicating the formations were exposed when the area was mined. Finally, the roof plates in the vicinity of the painted kettlebottoms were tight to the roof, and there was no evidence of roof sloughage on the floor to indicate the conditions had been recently exposed because of mountain bumping.

In sum, the collateral facts relied upon by the Secretary consisting of a centerline, bit marks, tight roof plates, and no roof sloughage, clearly provide a rational basis for inferring the painted cluster of kettlebottoms in the No. 2 entry was exposed during the normal mining cycle on the day shift of February 24, 1998. Similarly, the same evidentiary facts with regard to bit marks, tight roof plates and no evidence of roof sloughage, support the conclusion that the remaining cited unpainted roof conditions were exposed during the normal mining cycles between February 24 and February 26, 1998. Having established, through circumstantial evidence, that it "is more likely than not" that the cited kettlebottoms existed as early as the day shift on February 24, 1998, the Secretary has demonstrated the preshift and onshift examiners' repeated failures to note them from February 24 through February 26, 1998, constitute violations of 30 C.F.R. §§ 75.360(b) and 75.362(a)(1).

It should be noted that Eagle Energy's circumstantial case, that mountain bumping was responsible for revealing each and every kettlebottom cited by Workman immediately prior to Workman's arrival at the mine, stretches credulity and must be rejected. In this regard, Ward conceded, while mountain bumping may affect a particular section of a roof on a case-by-case basis, it was a stretch to conclude that mountain bumping was the sole explanation for all of the kettlebottoms that were observed by Workman. (Tr. III, 1150-1154). Moreover, excluding the painted kettlebottoms for a moment, Eagle Energy's mountain bumping speculation does not address the relevant bit marks and tight roof plates, or, the cited kettlebottom with the roof bolt in the center.

To support its mountain bumping explanation, Eagle Energy relies on a statement made by Workman during an April 21, 1998, health and safety conference that was made in response to Ward's belief that "slate could obscure kettlebottoms." (Tr. III, 1230). At trial, Workman explained, when he was at the safety conference, he agreed with Ward that "slate could obscure kettlebottoms because there's nothing impossible, [although] it might be incredible." (Tr. III, 1230-31). Workman's acknowledgment that slate "could" have obscured all of the cited kettlebottoms, based on his assumption that anything was remotely possible, does not support Eagle Energy's circumstantial case that it was more likely than not that the cited conditions had been obscured.

Returning our attention to the painted cluster of kettlebottoms, Eagle Energy has failed to present evidence concerning when, and by whom, the cluster was painted. Rather, Eagle Energy suggests that these kettlebottoms may have been exposed by mountain bumping, and then painted, only minutes before the fatal accident occurred at approximately 2:50 p.m. on February 26, 1998. This theory is rejected as implausible.

Moreover, under the well settled "missing witness" evidentiary rule, the failure of a party to call a known non-hostile person who has direct knowledge of a fact in issue raises the inference that the testimony would be unfavorable to that party. *Richardson on Evidence*, § 92 at 65-68, 10th (ed. 1973). *York v. American Telephone & Telegraph*, 95 F.3d 948 (10th Cir. 1996); *Wilson v. Merrell Dow Pharmaceuticals, Inc.*, 893 F.2d 1149, 1150 (10th Cir. 1990); *Borror v. Herz*, 666 F.2d 569, 573 (3rd Cir. 1981); *NLRB v. Laredo Coca-Cola Bottling Co.*, 613 F.2d 1338 (5th Cir. 1980); *NLRB v. Dorn's Transportation Co.*, 405 F.2d 706 (2nd Cir. 1969). In *Wilson v. Merrell Dow*, the Court recognized the four factors that must be present to infer that a missing witness's testimony would have been adverse to a party. The four factors are:

- (1) the party must have the power to produce the witness, *see, e.g.*, *Sutton*, 732 F.2d at 1492; 2 J. Wigmore, *Evidence Trials* at Common Law § 286 J. Chadbourn rev. ed. 1979 & Supp. 1989;
- (2) the witness must not be one who would ordinarily be expected to be biased against the party; *see id.* § 287, at 202 & n. 1;

(3) the witness's testimony must not be "comparatively unimportant, or cumulative, or inferior to what is already utilized" in the trial, *see id.* § 287, at 202-03 (emphasis omitted); and

(4) the witness must not be equally available to testify for either side, *see, e.g., Sutton*, 732 F.2d at 1492; *Quad Constr., Inc. v. William A. Smith Contracting Co.*, 534 F. 2d 1391, 1394 (10th Cir. 1976); 2 J. Wigmore, *supra*, at § 288.

893 F.2d at 1151 (footnote omitted).

Here, Eagle Energy had exclusive access and control of the 2 North section from February 24 through February 26, 1998. Eagle Energy must be held accountable for knowing who painted the centerline on the roof that runs through one of the cited painted kettlebottoms. (*See Gov. Ex. 11*). Having failed to call that individual subjects Eagle Energy to the adverse inference that the cited conditions were painted, contemporaneous with the centerline, during the mining cycle on the day shift on February 24, 1998. I am cognizant that the missing witness rule requires that the missing witness must be known. In this case the missing witness is known, or should be known, to Eagle Energy - - he is the employee who was responsible for painting the centerline in the No.2 entry photographed in Gov. Ex. 11. Such knowledge is exclusively available to Eagle Energy because the centerline was painted by its foreman, or at its foreman's direction. *United States v. Caccia*, 122 F.3d 136, 139 (2nd Cir. 1997) quoting *Unites States v. Rollins*, 487 F.2d 409, 412 (2nd Cir. 1973) (availability of missing witness depends on relationship to the parties). Eagle Energy cannot escape the adverse inference simply by denying that it knows the identity of the employee who was responsible for painting the centerline, regardless of whether its ignorance is feigned or real. (Tr. II, 245-46, 254-57). Any other conclusion would eviscerate this important evidentiary rule.

b. Significant and Substantial

A violation is properly designated as S&S in nature 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 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 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 Co. v. Secretary*, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining, Inc.*, 7 FMSHRC 1125, 1129, (August 1985), the Commission explained its *Mathies* criteria as follows:

We have explained further that the third element of the *Mathies* formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984).

The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

Resolution of whether a particular violation of a mandatory safety standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC 1125, 1130 (August 1985). Thus, consideration must be given to, both the time frame that a violative condition existed prior to the issuance of citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (November 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986).

Thus, the fundamental question is whether the repeated failure of Eagle Energy's preshift and onshift examiners to note hazardous roof conditions that required supplemental support during the relevant 15 examinations of the 2 North section substantially contributed to the cause and effect of a roof fall accident. Virtually every one of the Secretary's, as well as Eagle Energy's, witnesses, including Scovazzo, agreed that kettlebottoms are hazardous roof conditions that require supplemental support. For, example, Ward, Eagle Energy's Vice-President, testified, "[i]t's common knowledge in the mining industry that kettlebottoms are a hazard and should be treated as such." (Tr. III, 1106). A 1992 information circular on coal mine groundfall accidents, published by the U.S. Department of the Interior, Bureau of Mines, and proffered by the Secretary, notes there is an abundance of kettlebottoms in southern West Virginia and eastern Kentucky that have "been responsible for numerous injuries and fatalities." (Gov. Ex., p. 8).

An Atlas of Coal Geology introduced in evidence by Eagle Energy states kettlebottoms can fall without warning causing injuries or fatalities and that "identification [of kettlebottoms] and subsequent support during mining is critical." (Resp.'s Ex. 3, p. 2).

Thus, it is undisputed that the slickensided material surrounding kettlebottoms could cause kettlebottoms to fall from the roof at any moment without warning. (Tr. III, 373). Significantly, the three painted kettlebottoms were only approximately 27 feet in by the feeder. The feeder area is not a remote area of a mine. Rather, it is one of the more heavily traveled areas of a mine. (Tr. III, 1124-25). Thus, the location of some of the cited kettlebottoms increased the exposure of miners to a roof fall accident. In addition, the likelihood of an event causing serious injury, *i.e.*, a kettlebottom fall, contributed to by the subject violations, was heightened by the presence of mountain bumping.

Although the mass of a particular kettlebottom cannot be determined because it is concealed by the roof, kettlebottoms can be very heavy and are capable of inflicting serious, if not fatal, injuries. Given the fact that kettlebottoms can unexpectedly fall at any time, the Secretary has demonstrated that there is a reasonable likelihood that the roof hazard contributed to by Eagle Energy's repeated inadequate preshift and onshift examinations will result in injury, and, that that injury will be reasonably serious, if not fatal, in nature. Accordingly, the Secretary's S&S designations for the cited 30 C.F.R. §§ 75.360(b) and 75.362(a)(1) violations shall be affirmed.

c. Unwarrantable Failure

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. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* At 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving the Commission's unwarrantable failure test).

The Commission has identified various factors in determining whether a violation is unwarrantable, including the extent of the violative condition, the length of time that it has existed, whether the violation is obvious, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Windsor Coal Company*, 21 FMSHRC at 1000; *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596 1603 (July 1984). The Commission also considers whether "the violative condition . . . poses a high degree of danger." *Windsor Coal Company*, 21 FMSHRC at 1000; *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (August 1992). The Commission's indicia for determining whether a violation is attributable to an operator's unwarrantable failure will be taken in turn.

i. Extent of the Violative Condition

The degree of negligence associated with the preshift and onshift examiners' failure to note hazardous roof conditions is directly related to the extent of the hazardous conditions. Although the cited conditions were extensive, in that there were nine cited kettlebottoms, I am not unmindful that the cited conditions were relatively small in size, ranging from approximately six to twelve inches in diameter. Conditions that are readily apparent when being observed in a photograph utilizing a flash attachment, may escape scrutiny in the normal mining environment using a cap lamp. Thus, given the relatively small size of the cited conditions, ordinarily, I would be hesitant to attribute their lack of disclosure to high negligence.

However, here, the painted kettlebottoms convinces me that Eagle Energy is entitled to no such benefit of the doubt. The bit marks and centerline reflect the kettlebottoms were revealed and painted during the mining cycle on the day shift of February 24, 1998. Yet, despite being painted to highlight the fact that supplemental support was required, the conditions went repeatedly unnoted during approximately 15 preshift and onshift examinations. Under such circumstances, even the failure to note hazardous conditions that were marked for remedial action during the course of one preshift or onshift examination may constitute unwarrantable conduct. Consequently, the Eagle Energy's inaction in the face of highlighted hazardous roof conditions supports the Secretary's unwarrantable charge.

ii. Duration

As previously discussed, the evidence with respect to the painted cluster of kettlebottoms in the No. 2 entry reflects the cited conditions existed as early as the day shift on February 24, 1998. The purpose of preshift and onshift examinations is to identify hazardous conditions that require remedial action. Eagle Energy's failure to note any of the cited hazardous roof conditions, including the painted conditions, in the 15 preshift and onshift examinations conducted from foreman Larry Saunders' onshift examination between 7:30 a.m. and 3:30 p.m. on February 24, through the last preshift examination conducted by Saunders at 1:30 p.m. during the day shift on February 26, is indicative of an unwarrantable failure.

iii. Whether the Violation was Obvious and its Degree of Danger

Some of the cited roof hazards were spray painted in reflective orange paint. This method of painting is commonly used by Eagle Energy to alert personnel to the fact that there are kettlebottoms that need additional roof support. As previously noted, this method of spray painting was used by Bennett to highlight the cited conditions that needed supplemental support for the purposes of abatement of Workman's 104(a) Citation No. 4400559. In addition, there was an apparent centerline drawn through one of the cited painted roof conditions. Despite the orange paint and centerline, all of the cited conditions were repeatedly overlooked by foremen conducting preshift and onshift exams. Such repeated oversights were extremely dangerous given the unpredictable nature of kettlebottoms.

iv. History of Previous Violations

The evidence reflects Eagle Energy was cited for 14 violations of 30 C.F.R. §§ 75.360(b) and 75.362(a)(1) during the 18 month period prior to the issuance of the March 1998, orders in issue. Absent evidence concerning the nature and extent of these violations, I am unable to determine whether Eagle Energy's compliance history should have placed it on notice that greater efforts were required to ensure the adequacy of its preshift and onshift examinations.

As a final matter, Eagle Energy's purported lack of knowledge about when, why, and by whom, the three circles and two lines photographed in Gov. Ex. 11 were painted on the roof of the No. 2 entry is troubling.⁶ An operator is responsible for the training, supervision and discipline of its employees. Eagle Energy's reported complete lack of knowledge about the painted conditions in the No. 2 entry adversely impacts on the adequacy of its supervision and training, and further evidences an indifference indicative of unwarrantable conduct. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982); *Western Fuels - Utah, Inc.*, 10 FMSHRC 256, 261 (March 1988). Thus, the evidence clearly reflects the requisite unjustifiable conduct to support an unwarrantable failure. Accordingly, 104(d)(2) Order Nos. 7166391 and 7166392 will be affirmed.

V. Civil Penalty

It is well settled that the Commission assesses civil penalties *de novo* and is not bound by the Secretary's proposed assessments. *Topper Coal Co.*, 20 FMSHRC 344, 350 n.8 (April 1998); *Sellersburg Stone Co.*, 5 FMSHRC 287, 291, (March 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). Here, the Secretary urges me to impose a civil penalty greater than the \$3,000 civil penalty initially proposed by the Secretary for each of the 104(d) orders in issue. (*Secretary's Br.* at p. 34).

In determining the appropriate civil penalty to be assessed, Commission Rule 30, 29 C.F.R. § 2700.30, requires the Judge to consider the statutory criteria set forth in 110(i) of the Mine Act, 30 U.S.C. § 820(i). Section 110(i) provides, in pertinent part, in assessing civil penalties:

the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

a. Size of Operator and Ability to Remain in Business

⁶ The photographs in Gov. Ex. 11 depict two painted lines on the roof. The evidence reflects one line was drawn as a centerline, and the other line was drawn as a belt hanger line.

The parties have stipulated that Eagle Energy is a large operator and that the maximum \$55,000 penalty that can be imposed under 30 U.S.C. § 820(a) will not affect Eagle Energy's ability to remain in business.

b. Negligence

With respect to negligence, while the evidence may be insufficient to warrant a finding of a willful disregard, there is ample evidence to suggest a reckless disregard given Eagle Energy's repeated disregard of hazardous roof conditions in a heavily traveled area of the mine that were highlighted for additional roof support.

c. Gravity

The gravity penalty criteria contained in section 110(i) requires an evaluation of the seriousness of the violation. *Hubb Corporation*, 22 FMSHRC 606, 609 (May 2000) citing *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (September 1996); *Sellersburg*, 5 FMSHRC at 294-95. In evaluating the seriousness of a violation, the Commission focuses on "the affect of a hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC at 1550. Here, unsupported portions of roof that could fall at any moment, located in a heavily traveled area of the mine, were permitted to exist even after they had been identified by orange spray paint. If the cited roof abnormalities were to fall from the roof, there is a reasonable likelihood that serious, if not fatal, injuries will occur. Consequently, the cited violations are of extremely serious gravity.

d. History of Previous Violations

During the period September 1, 1996, through February 28, 1998, Eagle Energy was cited for approximately 453 violations, including 14 violations of the mandatory safety standards in 30 C.F.R. §§ 75.360(b) and 75.362(a)(1). (Gov. Ex 3). In applying the history of prior violations penalty criterion, the Commission has noted that it is the operator's general history of violations, not just its history of similar violations, that should be considered. *Cantera Green*, 22 FMSHRC 616, 623 (May 2000) (citations omitted). Eagle Energy's history of 453 violations during the approximate 18 month period preceding the issuance of the subject 104(d) orders constitutes an extensive violative history.

e. Good Faith Efforts at Abatement

There is no evidence to suggest that Eagle Energy did not endeavor to timely abate the cited violations.

When considering the penalty criteria in their entirety, I agree with the Secretary that the evidence in this case warrants a higher penalty than the \$3,000 civil penalties initially proposed. It is one thing to overlook relatively small hazardous roof conditions during preshift and onshift examinations. However, Eagle Energy has offered no plausible evidence to justify, or otherwise mitigate, its failure to note the highlighted hazardous roof conditions in close proximity to the

dumping point. Accordingly, the evidence establishes a compelling case for raising the proposed civil penalty. Consequently civil penalties of \$6,000 shall be imposed for each of the 104(d) orders in issue in these proceedings.

As a final note, I have exercised restraint. Obviously, even a doubling of the proposed civil penalty, given Eagle Energy's large operator size, will not have a significant financial impact. However, hopefully, this relatively small increase in penalties will have a deterrent effect and will encourage future compliance.

ORDER

Accordingly, **IT IS ORDERED** that 104(d)(2) Order Nos. 7166391 and 7166392 **ARE AFFIRMED**.

Consequently, **IT IS FURTHER ORDERED** that Eagle Energy, Inc.'s contests of 104(d)(2) Order Nos. 7166391 and 7166392 **ARE DENIED**.

IT IS FURTHER ORDERED that Eagle Energy, Inc., shall pay a total civil penalty of \$12,000 in satisfaction of 104(d)(2) Order Nos. 7166391 and 7166392. Payment shall be made within 40 days of the date of this decision. Upon timely payment of the \$12,000 civil penalty, **IT IS ORDERED** that the contest proceedings in Docket Nos. WEVA 98-72-R and WEVA 98-73-R, and the civil penalty matter in Docket No. WEVA 98-123, **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

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