CCASE:
SOL (MSHA) V. PARAMONT COAL
DDATE:
19871005
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. VA 86-46 A.C. No. 44-06112-03507
v.	Deep Mine No. 13
PARAMONT COAL CORPORATION, RESPONDENT	

DECISION

Appearances: Page H. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner; Karl K. Kindig, Esq., The Pittston Company, Abingdon, Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment in the amount of $850 for a violation of mandatory safety standard 30 C.F.R. 75.202, as stated in a section 104(d)(1) Citation No. 2752968, issued on February 14, 1986, at the respondent's mine. The respondent filed a timely answer contesting the citation and a hearing was held in Duffield, Virginia. The parties filed posthearing briefs, and the arguments presented therein have been considered by me in the course of my adjudication of this case. I have also considered the oral arguments made by counsel during the course of the hearing.

Issues

The parties have stipulated as to the fact of violation, and they agree that a violation of section 75.202 occurred as stated by the inspector in the citation. The parties agree

that the only issue presented in this case is whether or not the proposed civil penalty assessment based on the inspector's finding of "high negligence" was correct (Tr. 5). The parties also agreed that the validity of the section 104(d)(1) citation insofar as it alleges an "unwarrantable failure" by the respondent is not an issue in this civil penalty proceeding (Tr. 5).

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95Ä164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 20 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 8Ä9):

1. The respondent is the owner and operator of the Deep No. 13 Mine, and is subject to the jurisdiction of the Act.

2. The presiding judge has jurisdiction to hear and decide this matter.

3. The inspector who issued the citation in question was acting in his capacity as an authorized representative of the Secretary of Labor.

4. The citation in question was duly served on the respondent, and all witnesses testifying in the hearing are accepted generally as experts in coal mine health and safety.

5. The imposition of a civil penalty for the violation in question will not adversely affect the respondent's ability to continue in business.

6. The respondent is a wholly owned subsidiary of Pyxis Resources Company, a subsidiary of the Pittston Coal Corporation. In 1985, the respondent was a wholly owned

subsidiary of a partnership controlled by the Hanna Mining Company and W.I. Grace Company.

7. In 1986, the respondent produced approximately 400,000 tons of coal, and it is a medium-size coal company.

8. A violation of mandatory safety standard 30 C.F.R. 75.202, did in fact occur as stated and alleged in the citation which was issued in this case.

9. MSHA's computer print-out concerning the respondent's assessed history of prior violations as reflected in exhibit GÄ1 may be used in determining an appropriate civil penalty assessment.

10. The violation was abated by the respondent within the time fixed by the inspector.

Section 104(d)(1) "S & S" Citation No. 2752968, issued on February 14, 1986, cites a violation of mandatory safety standard 30 C.F.R. 75.202, and the cited conditions or practices are described as follows:

> Loose overhanging coal and rock brows and fractured coal ribs were present in the Nos. 2, 3, 4, and 5 entries on the 001 No. 1 active working section beginning at the section belt feeder and extending inby for approximately 200 feet including the interconnecting crosscuts left and right. The loose overhanging brows and fractured ribs were located in regularly traveled haulways and were readily visible. The mining height is from 9 to 10 feet. The brows were from 3 feet to 8 feet long from 2 feet to 4 ft. thick and overhanging from 10 inches to 3 feet. Also, the belt entry from the 3rd interconnecting crosscut outby the No. 2 drive inby to the belt tailpiece.

The inspector fixed the abatement time as 8:00 a.m., February 18, 1986, and on that day another inspector extended the abatement time to February 29, 1986, because "a roof fall at the mine has stopped all work. Additional time is granted." Thereafter, on March 3, 1986, a third inspector

extended the abatement time to March 10, 1986, for the following reason:

> The operator is in the process of permanently abandoning the mine. However, some of the ribs have been taken down and as the mine is being pulled out the rest of the areas involved will be timbered or taken down. More time is granted to complete the work being done to correct this citation.

The citation was terminated on March 7, 1986, and the termination notice states that "The overhanging coal and rock brows and fractured coal ribs referred to in Citation No. 2752968 were either taken down or supported."

Petitioner's Testimony and Evidence

MSHA Inspector Larry Coeburn confirmed that he issued the citation during the course of a spot inspection conducted on February 14, 1986, with his supervisor Ewing C. Rines. The inspection was in conjunction with a fatal roof fall accident investigation which began that same morning (Tr. 17). Mr. Coeburn stated that he observed overhanging brows in at least 10 locations, and loose ribs at approximately four locations, and that he recorded these in his notes, and later reproduced them on a sketch or map of the area which he prepared for the hearing (exhibit GÄ3; Tr. 20Ä22). He measured the brows by means a carpenter's rule and recorded the results on the sketch, and confirmed that none of them were supported (Tr. 24). Some of the brows were pulled down with very little effort, but he did not record these in his notes or on the sketch. He was not aware of any brows where attempts were made to pull them down, and they did not come down.

With regard to the loose and fractured ribs located on the sketch, Mr. Coeburn stated that he observed visible vertical fractures and separations of coal away from the main coal pillar, and that some of the ribs had been rock dusted at places where the pressure on the pillar "had caused it to sort of break outward, ravel, slough" (Tr. 26).

Mr. Coeburn identified exhibits GÄ4 through GÄ8 as sketches of the areas where he found he cited rib and brow conditions, and he explained the conditions and locations as depicted on the sketches (Tr. 26Ä36). He stated that miners would be working in these areas at different times, and he observed signs of travel by shuttle cars and scoops in the

haulageways and entries (Tr. 39, 42). He confirmed that he observed four loose, overhanging coal and rock brows on the walkway clearance side of the belt haulageway outby the areas depicted on the sketch, exhibit GÄ3, and confirmed that men would normally walk along that walkway. However, he observed no loose ribs in this walkway area (Tr. 45).

Mr. Coeburn confirmed that five people would normally be working in the areas where he observed the loose brows and fractured ribs, and they would be building stoppings and working on the belt. Also, at any given time, one person would be present on a piece of equipment along the travelways (Tr. 42Ä43). Mr. Coeburn believed that it was highly likely that a roof fall would occur, and that due to the mining height and the size of the overhanging brows and the extent of the fractured ribs, if falls occurred, fatal injuries would result. Under all of these circumstances, he concluded that the cited conditions constituted a significant and substantial violation (Tr. 47Ä48).

Mr. Coeburn stated that the coal brows were "man-made" and were created during the mining and removal of coal. They were left by the continuous-mining machine that had mined the entries up to the roof line. On the ribs and corners, the exposed brows were left where the machine had not mined all the way up the entry. The machine bit markings were evident on the brows (Tr. 43Ä44).

In response to a question as to why he made a finding of "high negligence" on part II of the citation form, Mr. Coeburn responded as follows:

> Q. Now, you checkedÄunder negligence, Part II, you checked high. Why do you believe the respondent, Paramont Coal Corporation, demonstrated high negligence in allowing this condition to exist?
>
> A. The brows were man-made, made with the continuous mining machine as mining progressed. The conditionsÄthe overhanging brows and loose ribs were very obvious to anyone who entered that area. They were very obvious. This mining wasÄcoal was being mined on the section at this time or immediately prior to this and had beenÄthese conditions had existed -- in my opinion, the brows had existed for some time prior to this taking

> place, with preshift examiners being required to travel these haulways, on-shift examinations, qualified people making examinations, and these conditions were very obvious.
>
> Not only that, but the workmen, the continuous mining machine operator, the roof bolters were in this area installing roof support. The continuous mining machine created these brows. It was very obvious. Therefore, they should have known; they should have known something about it.
>
> Q. How about the rib conditions?
>
> A. The rib conditions were very visible, obvious, very obvious, very obvious.
>
> Q. Now, on the 14th of February, 1986, when you first observed each of the conditions cited in this citation, did you observe any danger boards or warning signs?
>
> A. No, sir.

On cross-examination, Mr. Coeburn confirmed that his inspection on February 14, 1986, constituted his first visit to the mine. He also confirmed that in issuing the citation, he discussed the conditions with Mr. Rines and with Mr. Gary Sweeney, the respondent's representative who accompanied them during the inspection. Mr. Coeburn stated that he was not familiar with the civil penalty assessment negligence criteria found in 30 C.F.R. 100.3(d). He confirmed that when he made his "high negligence" finding, he did so without specific reference to that regulation (Tr. 53Ä54).

Mr. Coeburn believed that three prior mine inspections were conducted by MSHA in January and February of 1986, and he was not surprised to learn that seven inspections were actually conducted during that time period (Tr. 54). When asked to explain the basis for his testimony that the cited rib and brow conditions had existed "for some time," he replied as follows at (Tr. 55):

> A. The distance that had been mined from the tailpiece to the face, and the brows, in particular, were createdÄthey were made during mining. That is what I base it on, that they had been there.

Q. But you had never been in this mine before.

A. No, sir.

Q. When you say some time, how long is some time?

A. At least six to seven production shifts.

Mr. Coeburn stated that he issued the citation on his own initiative, and that the roof fall accident which was being investigated had no connection with the cited rib and brow conditions (Tr. 56, 58). He confirmed that generally two mine examiners per shift conduct the required preshift and onshift examinations, but that he did not review the examination records covering the prior six or seven shifts for the cited areas in question. He also confirmed that he did not speak with any of the mine examiners or with any of the equipment operators (Tr. 59).

Mr. Coeburn stated that he served the citation on mine foreman Ron Orender, but did not believe that he discussed the matter with him. However, Mr. Sweeney told him that similar brow and rib conditions had existed in the past down the belt entry and that the brows had been supported. However, Mr. Coeburn confirmed that the cited brows were not supported (Tr. 60Ä61).

The parties agreed that the applicable mine roof-control plan does not contain any specific requirements for taking down loose ribs or brows, and petitioner's counsel stated that he was relying on the regulatory requirement found in section 75.202, which has general applicability to all mines, while the roof-control plan provides "specific patterns for this mine" (Tr. 62Ä63).

Ewing C. Rines, MSHA Supervisory Inspector, agreed with Inspector Coeburn's gravity findings, and confirmed that his experience has shown that rib rolls and brows have consistently contributed to fatality incidents year in and year out (Tr. 68).

Referring to exhibit GÄ3, a sketch prepared by Mr. Coeburn with respect to the locations of the cited brows and ribs, specifically the crosscut between the No. 3 and 4 entry just inby the feeder and running to the right towards the No. 4 entry, Mr. Rines stated that he observed the rib conditions for approximately an hour and was "very perturbed

about the situation" (Tr. 69). He stated that the ribs on the top side of the "rock parting" were fractured from the No. 3 entry all the way through to the No. 4 entry and had a very visible separation. He described the separation as "you could see as far as you could see back in there and it was sort of on a slip-like plane. It got deeper as it penetrated into the coal fractures" in the No. 3 entry going toward the No. 4 entry (Tr. 70Ä71).

Mr. Rines explained the circumstances and appearances of the "rock parting" which would give one an indication that the rib was beginning to become loose and fractured, including pressure breaks which would cause "the coal raveling a little bit near the roof line," sloughing of the face of the rib, or visible cracks (Tr. 73Ä74). On the other hand, the rib may just "roll immediately" (Tr. 74).

Mr. Rines was of the opinion that the rib conditions which he observed "had been in the making for awhile," and that "there had been some indicators as far back as a week," and his reason for these conclusions were stated as follows at (Tr. 74Ä75):

> A. I would say that there had been some indicators as far back as a week. The reason I say that is the fact that they didn't have a fractured rib problem or rib problem over the entire section. Normally, if you've got rib problems, it will start either from the left side of the section and go all the way across or the right side, all the way across, or go from the middle, out to.
>
> But that wasn't true in this situation here. This was in this localized area for this particular section here even though he did have a loose, fractured rib up here, but it was nothing to the extent that this was down here (indicating).
>
> **********
>
> A. These ribs did notÄfrom the day we seen them, on the 14thÄthis condition didn't occur just overnight or over the past three or four days. I'm saying there should have been some indicators or signs there as far back as a week. And the reason I say that is if you

had had this kind of relief occurring instantaneously, the ribs would have rolled out and filled the entry up.

****

Q. Now I want to turn your attentionÄwell, let me ask you one more question about this loose rib condition or all the loose rib conditions on the section. What would Paramont have had to do to correct the condition if they had noticed it, say, six days before the 14th?

A. They could have taken down that portion that was fractured. * * * I would like to add, too, some people don't like to cut ribs down because it exposes more roof, which requires additional support. So that is why sometimes they set timbers to support.

Referring again to the sketch, exhibit GÄ3, Mr. Rines described the condition of the brows which existed at the locations shown on the sketch, and he explained the existence of the brows as follows at (Tr. 79Ä80):

A. These brows, since they didn't have any sloughing or undercutting of the bottom portion of the coal seam under the rock parting, these brows were left there during the continuous mining cycle for whatever time the cycle had been. For what reason, I don't know. But the miner, when he was on his mining cycle, during the making of these brows, he failed to cut that portion, which originally was part of the coal face, and he failed to cut that portion of it down.

****

A. Since he didn't get it the first time, he definitelyÄif they can't get it down no other way, you know, they could support it temporarily till he gets back on the second

cycle, and he should definitely take it and cut it down.

****

Q. What would, in your opinion, a reasonably prudent section foreman do when he observed one of these brows after the miner had pulled out of an entry, a particular entry?

A. He would make arrangements to either have the brow taken down or supported.

****

Q. Based upon your experience in the thick tiller seam and your knowledge of the conditions in the Deep Number 13 Mine, of the mining conditions, do you have any idea, let's say, for example, how long the brows that are immediately inby the belt feeder may have been in existence?

A. Looking from where the belt feeder is locatedÄand you have an open crosscut immediately inby. That is one (1), two (2), three (3)Äthere is four (4) crosscuts to your most inby brow ribs.

And considering the height of their coal, they were high producers, but they probably wouldn't have gotten over eight (8) or nine (9), at the most, or ten (10) cuts per shift, which would have probably averaged about eighteen (18) feet per shift).
So you're talking about several days here to mine this distance; that is, from the feeder up to a short distance of those that are up there in the last line of open crosscuts.

Q. When you say several days, are you talkingÄ

A. Well, at leastÄfrom what I'm looking here and knowing, you know, the way they mine, I'm going to say at least ten days, because this is very high coal.

Mr. Rines was of the opinion that the brow conditions in the crosscut immediately inby the belt feeder should have been apparent to a preshift or onshift examiner at least 10Ädays prior to the time the citation was issued, and that the brow that was left during the mining cycle should have been noticed by the next trip of the preshift examiner, as well as by the section foreman on his shift (Tr. 82).

Mr. Rines confirmed that MSHA Inspector Ronald E. Adkins works for him, and that he was at the mine on February 10 and 12, 1986. Mr. Adkins informed him that he had not observed the cited rib and brow conditions (Tr. 93Ä94). The regularly assigned inspector, Teddy Phillips, would not have observed the cited area during his prior inspection visit on January 10, 1986, because mining was going on in another area (Tr. 85, 94). Mr. Rines stated that he has had occasion to visit a mine and found a readily apparent violation that he had missed the day before (Tr. 95).

On cross-examination, Mr. Rines stated that he discussed the cited conditions with Inspector Adkins at length because he was concerned that one could be in the area and miss the conditions. He confirmed that no disciplinary action was taken against Mr. Adkins (Tr. 96).

In response to a question as to whether or not anyone walking from inby the belt feeder toward the face in the No. 3 entry, past the crosscut which he discussed would have occasion to see the cited rib conditions, Mr. Rines responded "not if he didn't go in that particular area" and "if he hadn't went into the crosscut he would not have seen" (Tr. 97Ä98). If one were walking on the right side of the entry, he should have at least observed the brow immediately at the feeder, unless it was hidden by a line curtain. The walkway was on the left side of the entry (Tr. 98Ä99).

Mr. Rines confirmed that he was present on February 14, 1986, during the accident investigation and heard Mr. Ron Hamrick a Virginia State Mine Inspector, make the following statement (Tr. 101):

> I'll add something to that, E.C. I inspect that mine regularly. During an inspection, takes me three or four days, I go out on all shifts to do it, and they really impress me. They watch the ribs.
> But I can go in today and have every rib we find pulled down, cut down, try to knock

> out with scoop or take bar and knock down. I go in tonight and find more ribs that have loosened up just between one shift to the next. I observed this myself.

Mr. Rines confirmed that he was in the mine on one prior occasion several weeks before February 12, 1986, to look at some diesel shuttle cars, and while he was in the section where the rib and brow conditions were cited, that particular area had not been mined. Although he did walk the air intake entry on that occasion, he did not notice any loose ribs or overhanging brows (Tr. 106).

Mr. Rines confirmed that if someone were walking on the left side of the haulway in the No. 3 entry toward the face, they could easily walk by the crosscut at the feeder and not notice the ribs, but if they travelled into the crosscut, it would have been obvious that the ribs were severely fractured (Tr. 107). However, there were a minimum of seven people on this section every day, including the section foreman. Mr. Rines stated that while it was possible for an area where fractured and loose ribs and brows were taken down to have the same problem the next day, such an area would also have serious roof control problems. Shifting roof weight and bottom coal sloughing out would result in coal brows other than those which are left from mining (Tr. 111). However, he saw no such brows on February 14th. Mr. Rines confirmed that the cited brow and rib conditions were prevalent down the belt entry in question (Tr. 116). However, he disagreed that they were prevalent in the working section, but agreed that in the belt entry the respondent had set a lot of timbers and cribs to try to control rib rolls, and that massive ribs rolls existed in that entry (Tr. 117).

Respondent's Testimony and Evidence

Mine Foreman Ronald R. Orender described the system of mining being used in January and February, 1986, and he confirmed that the rib work and setting of cribs was done during the midnight maintenance shift. He stated that the mine had some bad bottom conditions and that the ribs were bad (Tr. 130). Due to a bad and wet uneven mine bottom, the large 12Äfoot wide ram cars would sometimes tear out the rib cribs. The ribs would be barred or cut down. The brows in question which would be left by the miner were difficult to bolt, and sometimes when the miner returned to cut them down it could not reach the top, and some brows would be left (Tr. 131).

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Mr. Orender described the procedures followed for providing protection along the entry as the belt feeder was advanced during the mining cycle. He explained that the belt was usually moved up for two breaks, sometimes once a week, and sometimes it would take 2 weeks to get up far enough to move. They would then go back and do the cribbing work outby, especially in the belt line which seemed to be the worst area. He explained the problems encountered while attempting to timber, crib, or otherwise support some of the rib rolls. Ribs were being pulled inby the belt feeder, and all three shifts were instructed "to try to pull what we could." Some of the brows that could be reached with the miner were pulled, and others would stick to the roof and could not be pulled. Attempts were made to bolt some of the brows, but the bolter could not get close enough to the rib and "some we may have missed." Mr. Orender stated further that ribs were constantly being pulled in the face areas and that "sometimes you would pull and it would leave a brow" (Tr. 132Ä134).

Mr. Orender stated that steps were taken to alert the work force about the bad rib conditions and that morning safety talks were conducted, and the miners were constantly told to watch the ribs and to try to pull down any bad ribs. He stated that "sometimes they would and sometimes they wouldn't" (Tr. 134). He stated further that a lot of the ribs which were pulled down would again develop cracks by the next day, and some would again develop cracks within 24Ähours. However, he could not recall pulling any ribs a day or two prior to the accident, but knew that some were pulled "over that way" (Tr. 135).

Mr. Orender confirmed that the rib conditions inby the belt feed area were particularly bad during January and February of 1986, and more problems were encountered within the last 300 to 400 feet of mining in that area, but steps were taken to protect the miners by installing wire mesh around the shuttle cars which were not designed for an enclosed canopy (Tr. 136).

Mr. Orender confirmed that he accompanied the inspectors at the time the citation was issued, and they called his attention to a rib that had sloughed off in the tailpiece area. The crosscut was dangered off, and the next day two foremen went in with a miner machine and knocked the ribs down and installed crib blocks in the area. No coal was run after the accident and hourly miners were not working the section. Another fall occurred outby the area, and the conditions worsened. Four to 6 days later the decision was made that coal could no longer be mined safely and the mine was

closed because of the rib conditions and the outby top, and out of concern for the safety of the miners (Tr. 138Ä139).

On cross-examination, Mr. Orender stated as follows at (Tr. 139Ä141):

> Q. Now, I believe you testified on direct examination in regard to the working places that existed on February 14, the area inby the tailpiece, that you didn't recall having anybody pull any ribs for a day or two prior to the accident. Isn't that correct? You don't recall any ribs being pulled for two days prior to the accident?
>
> A. Not myself personally, no.
>
> Q. You don't have any knowledge of anybody doing it?
>
> A. I didn't see them.
>
> Q. Nobody told you they pulled any either, did they?
>
> A. Well, it wasn't a practice to do that. I mean, if you seen a bad rib, the worker or the foreman, they would pull a rib, you know, without even, you knowÄ
>
> Q. You also talked about you were always telling them to watch the ribs and men were supposed to pull the ribs if they saw a cracked or fractured rib.
>
> A. We tried to, yes.
>
> Q. You tried to. You said sometimes the men did not do that?
>
> A. I'm sure they did. I'm sure there was times they did not pull ribs when they should have.
>
> Q. What was the company's practice when the men did not pull a rib they should pull?
>
> A. We would usually ask them, "why did you go by there?" Or something. And a lot of times

> they would answer, "well, we didn't see it." You know, everybody was aware those ribs were bad. And we had safety meetings and it was put in the preshift books where we did have talks with the men about these ribs, that they were to be pulled and so forth.
>
> Q. Mr. Orender, isn't it true that if the men themselves didn't pull the ribs, that management didn't insist those ribs be pulled?
>
> A. No, sir. You're wrong. No. No, that is not true.
>
> Q. Then why in my prior question didn't you tell me that management went and pulled the ribs themselves?
>
> A. Management did pull. We pulled ribs ourself. Everybody worked together in that mines to try to pull what we could when we saw them. I'm sure we didn't see all of them, you know.

Mr. Orender stated that the respondent's efforts to address the rib and brow problems were not confined totally to the maintenance shifts, and that attempts were made to take them down during the day and evening production shifts (Tr. 152Ä153). Mr. Orender agreed that the entries and crosscuts labeled "hw" on the sketch, exhibit GÄ3, were the haulageways down the belt entry, and that they were used for that purpose some of the time but not necessarily all of the time. He also agreed that the battery charging station is properly located on the sketch and that it would be used to charge equipment from one shift to the next. Access to these areas by walking was through several possible routes which he described (Tr. 155Ä156). He agreed that none of the brows which he observed on February 14, 1986, as marked on the sketch, were supported. Some of the brows were taken down before the mine was abandoned, and others were not (Tr. 157Ä158).

In response to a question as to how long the cited conditions may have existed before they were found by the inspector on February 14, 1986, Mr. Orender responded as follows at (Tr. 158Ä159):

> A. Your Honor, some of the brows could have possibly been there for four or five days, but

the rib conditions, like I say, it's hard to say.

Q. Go ahead.

A. Sometimes you could walk by a corner and there wouldn't be a crack and you go by there two hours after and the pressure had made a crack in it. But some of the brows were probably there, yes.

Q. And you say, the ribs, the conditions could exist from day to day.

A. Yes, sir. They did, definitely, the ribs.

Q. How about loose ribs. I'm not talking about fractured ribs, but what about some of the loose ribs. Is there a distinction between a loose rib and a fractured rib? Is there a difference between those two?

A. In my opinion, a cracked rib maybe is not as dangerous as one that is real loose where it could fall. But then sometimes you could put a bar on one that you wouldn't think was very loose and you take two men and try to pull on it and you couldn't pull it down. And other times you would touch it and it would come down.

Mr. Orender identified exhibit RÄ2, as an inspection report he signed which indicates that Virginia State Mine Inspector Ron Hamrick was in the mine on February 3, 1986, conducting an inspection for 4 hours and that he issued no violations (Tr. 192Ä194).

MSHA Inspector Ronald E. Adkins confirmed that he was familiar with the subject mine, had been in it five or six times, and that the sketch depicting the working face areas (exhibit GÄ3), which existed in February, 1986 appears basically accurate (Tr. 161Ä163). Mr. Adkins confirmed that he was underground in the mine on February 10, 1986, for 2 hours, and spent the majority of his time in the working faces. He reached the working faces by walking up the number three entry inby the belt feeder as shown on the sketch, and while he was there he observed no overhanging brows or cracked ribs that constituted violations of any MSHA regulations. The purpose of his mine visit was a "walk and talk inspection" for the

purpose of alerting miners as to "what was going on in the industry so far as accidents and try to get across to them how critical their own initiative so far as their safety was, how important it was" (Tr. 165Ä167).

On cross-examination, Mr. Adkins stated that the working faces on February 10, 1986, were not as depicted on the sketch in question, and that they were probably advanced a crosscut or more. While he was there, line curtains were hung in all working places (Tr. 168). Referring to his notes of his February 10, visit, he confirmed several notations indicating that he examined each of the six working places as depicted on the sketch, and that the working practices he observed were good. Another notation reflected that 5Äfoot resin roof bolts were being installed in all entries and that the bolting pattern was good. He confirmed that the work habits and procedures of the miners at that time were adequate (Tr. 168Ä169).

When asked to explain his failure to observe the violative rib and brow conditions in question, Mr. Adkins responded as follows at (Tr. 170Ä171):

> * * * Eighty percent (80%) of the fatalities occur within fifty (50) feet of the face, of the working faces and, basically, I would say I spend ninety percent (90%) of my time there.
>
> In this situation on the walk and talk inspections, we are assigned a group of mines. We're given, more or lessÄwe need to finish these in a certain length of time to get back to our regular work. I'm sure by looking at my time sheets, I was pushed for time on this.
>
> But it is my personal policy and MSHA's District 5 policy, too, when we enter a mine, we will make the working faces and check for imminent dangers. I'm sure I did that. As far as seeing these things outby, I just didn't see them. I wasn't in the area.
>
> Q. You say you weren't in the area.
>
> A. It's possible I could have walked by one. It could have been behind a curtain. I could have been talking to someone or something like that and not noticed it.

Q. Okay. Are you telling me on that day you didn't go in specifically to check roof conditions or ribs and brows or fractured ribs, that sort of thing?

Q. No, sir. That is always our number one priority, but the inspection, the walk and talk inspection, is more to make contact with the people, to get on a one-to-one basis with them, talk to them. We talk to them in a group, watch them work and discuss their work habits. That is basically what I was there for that day.

Ronald Hamrick, State of Virginia Coal Mine Inspector, stated that he has inspected the subject mine since it began operating and that he has been in it five or six times. He confirmed that he participated in the fatality investigation on February 14, 1986, and he identified exhibit RÄ1 as a partial transcript of a statement that he made during the course of a conference held on that day with several MSHA inspectors in connection with the investigation, and read parts of the statement into the record (Tr. 175Ä177).

A. I'll add something to that, E.C. I inspect that mine regularly. During an inspection, which takes me three or four days, I go out on all shifts to do it, and they really impress me. They watch the ribs.
But I can go in today and have every rib we find pulled down, cut down, try to knock it out with a scoop or take a bar and knock them down. I go back in tonight and find more ribs have loosened up just between one shift and the next.

I observed this myself. And while I'm running my big mouth, I would like to add something to find a way of preventing this accident, but let's not jump off the deep end and come up with some rig that would cause these miners to be exposed to more danger than what the conditions we already have.

Ron and I have talked about trying to design a protection for rib rolls, but we agree, as you said, E.C., rib rolls are not a problem right at the immediate face, but

> actually past them but in behind them, two crosscuts back is where the ribs start loosening up and moves and so on.
>
> But let's not come up with some half-cocked idea that would expose people to more hazards.

Mr. Hamrick confirmed that he was familiar with the mine layout as depicted in the sketch, exhibit GÄ3, and he confirmed that the rib and brow conditions marked on the sketch "probably" existed generally in the area two crosscuts back from the face. Other than the rib conditions in the mine, he described the general mine conditions as "as average type mining" (Tr. 180). He stated that from his experience in the mine, everyone, including employees and management, were aware of hazardous rib conditions, which he believed were inherent in the Clintwood seam, and that all personnel were constantly on the alert for these conditions, pulling them down when they were discovered. He confirmed that he constantly gave advice to management as to how to guard against the rib conditions, and stated that he never previously discussed these conditions with MSHA inspectors Rines, Coeburn, or Phillips. Mr. Hamrick also stated as follows at (Tr. 181):

> A. Well, as I say, this is an inherent condition with the Clintwood seam. There isn't much you can do to these ribs and brows other than watch them, take them down as they're discovered and as they loosen up. In past experience, I've tried bolting ribs. I've tried putting steel bands around ribs to hold them together. I've tried numerous things. In some thirty-seven (37) years' experience, I never did find anything that was actually a way of handling unsafe ribs other than watching them, stay away from them as much as possible.

Mr. Hamrick stated that he went over the entire section of the mine on February 14, 1986, and with respect to the brow conditions noted on the sketch, exhibit GÄ3, he confirmed that he observed unsupported brows, but could not recollect how many he observed and could not remember counting them (Tr. 184). He confirmed that he did observe the ribs between the number 3 and 4 entries shown on the sketch, and that he issued a citation for those conditions (Tr. 185). He also confirmed that the cited rib conditions were also in the area between

the belt feeder and the battery charger (Tr. 188). However, he could not state how long the conditions had existed, and stated that such rib conditions "occurred unexpectedly, and often, quite frequently" (Tr. 188). He also stated that the brow conditions which are outby the face areas were probably caused by the coal rolling out from under them, and he doubted that they were caused by a continuous miner leaving them on a prior shift because "the men at the mine were so particular and so self-conscious of the fact that these were hazardous they would not leave one" (Tr. 190). However, he could not explain why the cited brow conditions were not taken care of prior to February 14th when the MSHA inspectors found them (Tr. 190). He also stated that it was entirely possible that the brow conditions came about over a short period and possibly a day, but confirmed that he was not with the inspectors when they viewed the cited brow conditions and issued the citation (Tr. 191). He confirmed that his citation may have been for the same or similar conditions cited by the MSHA inspectors and that he required the ribs or brows to be removed or supported (Tr. 191).

Mr. Hamrick stated that under state regulations, he does not make any negligence findings as part of any citations he issues. He confirmed that while he had no idea how long the conditions cited by the MSHA inspectors may have existed, they may have been there "for hours or days." He further explained that "I have observed by going in on one shift and following immediately, the next shift, brows have loosened up between shifts" (Tr. 192).

Petitioner's Negligence Arguments

During oral argument at the close of its case in response to the respondent's motion for a summary dismissal of this case (which was denied), petitioner's counsel asserted that the testimony of the inspectors makes it clear that the cited rib and brow conditions were readily observable for as much as a week prior to the February 14, 1986 inspection, and that the conditions existed in areas which were regularly travelled and required to be examined by onshift and preshift examiners. Given these facts, counsel concluded that there is a clear inference that the respondent's personnel knew or should have known of the conditions for a week or 10Ädays prior to the inspection. Under the circumstances, counsel took the position that the respondent was "very negligent-if not grossly negligent" (Tr. 121Ä122).

Petitioner's counsel asserted that in addition to the testimony of the inspectors, Mine Foreman Orender confirmed

that he was aware of brows which were not taken down or supported because it was impractical to do so due to the use of oversized ram cars which were knocking down the cribs. Counsel further asserted that the evidence establishes that the brows had been in existence since they were created by the continuous-mining machine during the normal mining cycle, and that Mr. Orender specifically admitted that no ribs had been taken down on the section for at least 2Ädays prior to the inspection. Counsel concluded from this that no brows were created by rib rolls for at least 2Ädays prior to the inspection, and that they were in fact created by the mining machine (Tr. 196Ä198).

Petitioner's counsel took the position that mine management had knowledge of the cited conditions, knew what should have been done to correct the conditions, but did not take the appropriate action mandated by the Act. Counsel asserted that "the standard is not what is reasonably practical in the operator's mind, but whether the operator's conduct is reasonable in view of the standard mandated by the Act" (Tr. 196). Counsel suggested that section 75.202, mandates that loose ribs and overhanging brows be immediately taken down or supported. He cited Westmoreland Coal Company, 7 FMSHRC 1338 (September 1985), as an example of a case where a mine operator's negligence was lowered because of evidence that he had immediately tried to support or take down overhanging ribs. In the instant case, however, counsel asserts that the respondent did not give immediate attention to the cited conditions, and that the brows, at least, had been in existence since they were created by the continuous miner (Tr. 98). Conceding that the respondent may have taken appropriate action in other mine areas, counsel concluded that this was not done in the areas which were cited by the inspector (Tr. 210).

Responding to the respondent's suggestion that the cited brow conditions were left after the rib had rolled, counsel stated that if this were the case, the respondent should have put on some direct evidence to support such a conclusion. Counsel took the position that any inferences that the brows were left by rib rolls is directly contradicted by the inspectors' observations of teeth marks made by the continuous-mining machine at each of the brow locations, and that "those teeth marks obviously would not be there if the brow was created by a rib roll" (Tr. 208).

Petitioner's counsel filed a written posthearing brief, and the arguments advanced are essentially the same as those made during the course of the hearing. With regard to the

cited conditions, counsel relies on the testimony of Inspectors Coeburn and Rines that all of the brows they observed were created by the continuous miner, and Mine Foreman Orender's testimony that many of the brows were created by the miner. Counsel also relies on the inspectors' testimony that the brows may have existed for 6 to 10Ädays prior to the inspection, and Mr. Orender's admission that they may have been present for 4 or 5 days.

With regard to the cited rib conditions, counsel points out that Inspector Rines observed a visible separation between the loose ribs and the remaining block of coal, and was of the opinion that the separation had been apparent for about a week, and Mr. Orender's statement that it was hard to say how long the ribs had been in that condition. Counsel concludes that the violation resulted from the respondent's unwarrantable failure to comply with the cited standard.

Respondent's Negligence Arguments

Respondent's negligence argument is based on mitigating circumstances, and counsel points out that the petitioner had people at its disposal who could have testified as to the respondent's past practices and mine history, but chose only to call people who had no real experience with the mine (Tr. 124). Counsel states that the respondent was well aware of the existing mine conditions, but instructed its employees to watch out for the conditions and that it was doing everything that was reasonably practical to control the conditions. When the respondent concluded that the worsened conditions could not be safely controlled, the mine was shut down (Tr. 195).

Taking issue with the petitioner's characterization of Mine Foreman Orender's testimony, respondent's counsel asserts that Mr. Orender simply stated that he was personally unaware of any ribs being taken down for 2Ädays prior to the inspection. Counsel points out that Mr. Orender also testified that because of the instructions given to the miners, they would, on their own initiative, routinely take down any loose ribs they encountered. Since it was such a common occurrence, they would not necessarily report it to the mine foreman (Tr. 205). Counsel also points out that in addition to the testimony of Mr. Orender, a man with long experience in the mine, the respondent also presented the testimony of state mine inspector Hamrick, the only disinterested witness in this case, and the testimony of an MSHA inspector who was in the mine 2 to 4Ädays prior to the inspection on February 14, 1986, whereas

the petitioner has presented testimony from two inspectors who were in the mine for a total of 1 or 2 days (Tr. 205Ä206).

Referring to the negligence criteria found in Part 100 of MSHA's civil penalty assessment regulations, 30 C.F.R. 100.3(d), counsel points out that three of the negligence categories, "low," "moderate," and "high," are all based on one common factor, namely whether the operator "knew or should have known of the violative condition or practice." What distinguishes the three levels is the existence of "considerable mitigating circumstances," "mitigating circumstances," and "no mitigating circumstances" (Tr. 206).

Counsel asserts that the circumstances relied on by the respondent to mitigate its negligence consists of its history in dealing with adverse rib and brow conditions, the testimony of state mine inspector Hamrick, who inspected the mine on a regular basis and believed that the cited conditions could have existed for less than a few hours, and the particular circumstances with the particular coal seam where rib rolls occurred either instantaneously or over a very short period of time, leaving loose ribs and brows (Tr. 207). Counsel maintains that the respondent took significant steps to protect its employees from the roof and rib conditions present in the mine, including the designing and installation of personnel protective devices beyond those mandated by MSHA, and the constant reminding of its employees to watch the rib conditions (Tr. 134, 136).

Counsel states that Inspector Coeburn, by his own admission, had no knowledge of the history of the mine, that the petitioner did not produce Inspector Phillips, the regular MSHA inspector, and that the petitioner's perception of this mine is on a very narrow time frame. On the other hand, counsel points out that the respondent has relied on the testimony of its experienced mine foreman, an MSHA roof control specialist (Adkins) who was in the mine 2 to 4Ädays prior to the inspection and who did not observe the cited conditions, and the state inspector who knew the history of the mine and who testified that the respondent was actively concerned about the cited conditions and was taking all appropriate steps to deal with them (Tr. 207).

Respondent's counsel filed a written posthearing brief and essentially advanced the same arguments made orally during the course of the hearing. Counsel cites a decision by Commission Judge Melick in MSHA v. Rushton Mining Company, 5 FMSHRC 2081 (December 1983), in support of his argument

that the failure of MSHA Inspector Adkins to observe the conditions when he was in the mine, coupled with the testimony of State Inspector Hamrick, belies the petitioner's assertion that the cited rib and brow conditions had existed for at least 4Ädays prior to the date of the citation. Counsel cites Judge Melick's observation at 5 FMSHRC 2083Ä2084:

> It is not disputed that Klemick was indeed present in the same mine section two days before, as alleged, but he claims not to have noticed the rib conditions because he was concentrating on another violation. I find it difficult to believe, however, that an experienced miner and mine safety inspector would be so oblivious to conditions he characterized as "an imminent danger" if they were as obvious and dangerous as he alleges. Thus while there is no doubt that overhanging rib conditions did exist with detectable fractures, I do not find that the conditions were as obvious as now alleged by MSHA. Accordingly, while I find the operator to have been negligent in allowing the cited conditions to exist, I do not find it to have been grossly negligent.

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 75.202, which requires in pertinent part that "Loose roof and overhanging or loose faces and ribs shall be taken down or supported." Although the standard does not specifically refer to "brows," the parties are in agreement that a "brow" is akin to an overhanging rib and is located in area where the rib ends and the roof starts (Tr. 197). In any event, the respondent has conceded that the cited rib and brow conditions were present, that they were not taken down or supported, and that the cited conditions constituted a violation of section 75.202. Accordingly, the violation IS AFFIRMED.

History of Prior Violations

Exhibit GÄ1 is an MSHA computer print-out summarizing the respondent's compliance record for the period August 1, 1984 through August 13, 1986. That record reflects that the respondent was issued nine section 104(a) citations, and one combination section 104(a) Ä 107(a) citation-order, for which

it paid civil penalty assessments totalling $386. Two prior section 75.202 roof control violations issued in 1984 were assessed a total of $161, and two section 75.200 violations issued in 1985 were assessed at a total of $70. For an operation of its size, I conclude and find that the respondent has a good compliance record, and I find no basis for otherwise increasing the civil penalty assessment for the violation which has been affirmed in this case.

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

The parties have stipulated that the respondent is a medium-size coal operator and that a civil penalty assessment for the violation in question will not affect its ability to continue in business. I adopt this stipulation as my finding and conclusion on this issue.

Good Faith Compliance

The parties have stipulated that the violation was timely abated by the respondent. Inspector Coeburn confirmed that after the citation was issued, the respondent dangered off the cited area by placing boards and a sign across the entry and marked off the affected areas with spray paint (Tr. 46Ä47). Under these circumstances, I conclude and find that the respondent exercised good faith compliance in timely correcting the violative conditions.

Gravity

The record in this case establishes that at the time the citation issued, the mine was idle due to a fatality which had occurred, and that it was subsequently closed when the roof conditions worsened. There is no evidence that any normal mining activities, other than abatement work, took place subsequent to the issuance of the citation. However, the fact remains that the existing loose ribs and overhanging brows, which were unsupported, and present on the working section, did present a potential hazard to those miners expected to travel and work in the affected areas immediately prior to the inspection. As a matter of fact, the unrebutted testimony of Inspector Coeburn reflects that some of the brow conditions were present along a belt walkway normally used for travel by miners and that the loose ribs which he cited were readily barred down with little or no effort. Inspector Coeburn also confirmed that the cited rib and brow conditions were present along haulageways and entries where miners and equipment would be present during normal mining activities, and that given the

conditions of the ribs, a scoop or anything coming in contact with the ribs could have easily caused them to roll. Further, the testimony of Mine Foreman Orender confirms that the rib and brow conditions were bad in the affected area in question and that oversized mining machines often tore down the cribs used to support the ribs. Mr. Orender also confirmed that brows which were difficult to bolt or which were inaccessible because of their high locations were sometimes left in place. Given all of these circumstances, I conclude and find that the cited violative rib and brow conditions were serious.

Significant and Substantial Violation

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

In Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazardÄthat is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

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

> an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574Ä75 (July 1984).

Incorporating by reference my gravity findings, and applying the principles of a "significant and substantial" violation as articulated by the Commission in the aforementioned decisions, I conclude and find that the cited rib and brow conditions constituted a significant and substantial violation of section 75.202. Although it may be true that no coal was being mined at the time the violative conditions were observed and cited, and the mine was later closed because of adverse roof conditions, in terms of continued normal mining operations, the adverse rib and brow conditions which were present on the working section presented a real hazard and potential for rib rolls and falling brows, and I conclude and find that there was a reasonable likelihood that the loose overhanging coal and rock brows and fractured ribs could contribute to the hazards resulting from the violative conditions in question. I further conclude and find that had the unsupported ribs or brows rolled or fallen, and struck miners on foot or in equipment passing by the areas where they were located, injuries of a reasonably serious nature would have resulted. Accordingly, the inspector's "significant and substantial" finding IS AFFIRMED.

Negligence

In support of Inspector Coeburn's "high negligence" finding, petitioner relies on his testimony, as well as the testimony of Inspector Rines, who was with Mr. Coeburn. Both inspectors personally viewed and examined the cited rib and brow conditions, and Mr. Coeburn took measurements and counted the overhanging brows. Both inspectors were of the opinion that the unsupported brows had been created by the continuous miner during prior mining cycles. Based on their observations of the miner cutting bit marks left in the coal ribs, and the advanced mining cuts which had been taken, they believed that the brows had existed for at least six to seven production shifts, and possibly as long as 10 days. As for the loose and fractured rib conditions, both inspectors testified that they were readily visible, and that visible separations were

readily observable between the loose rib areas and the block of coal. Inspector Rines was of the opinion that the separation had been apparent for at least a week, and he discounted any notion that the separation had occurred quickly. In his view, had the separation occurred quickly, there would have been a massive rib roll into the entry.

Petitioner also relies on the testimony of Mine Foreman Orender, and points out that Mr. Orender conceded that many of the brows were created by the continuous miner and were possibly present for 4 to 5Ädays prior to the issuance of the citation. Petitioner also points out that Mr. Orender admitted that sometimes brows were left by the miners, that he had no knowledge of any rib rolls, or any ribs being pulled, for a day or two prior to the day the citation issued, and his admission that it was difficult to say how long the ribs had been in a loose and fractured condition. Finally, petitioner points out that while respondent's representative Gary Sweeney accompanied the inspectors and viewed the cited conditions, the respondent did not call him to testify in this case.

In support of its argument for a finding of "low negligence with considerable mitigating circumstances," respondent maintains that the violative conditions were constantly being created because of the inherrent nature of the mine strata, and that it had effective procedures to deal with such conditions as they occurred. Respondent maintains that it took a number of steps to protect its work force and that this should be considered as mitigating circumstances in determining the appropriate negligence level.

With regard to the issue of the length of time that the cited conditions actually existed, respondent relies on the testimony of State Inspector Hamrick who testified that the nature of the mine was such that the cited brow and rib conditions could occur overnight or even between shifts. Respondent also relies on the testimony of MSHA Inspector Adkins, who was in the mine on two occasions, within 4 days of the issuance of the citation, and confirmed that he did not see the cited conditions and issued no citations.

Inspector Hamrick could not recall the date of his last visit to the mine prior to the date of the issuance of the citation on February 14, 1986. Although a copy of one of his inspection reports, exhibit RÄ2, reflects that he was in the mine on February 3, 1986, Mr. Hamrick had no independent recollection of that visit. With regard to the rib and brow conditions cited by Inspector Coeburn, and detailed in the sketch made by Mr. Coeburn from his notes, Mr. Hamrick agreed

that the conditions probably existed generally one or two crosscuts outby the face area. Mr. Hamrick confirmed that he issued a citation on February 14, 1986, for a violation of state law for brows and ribs which were not removed or supported. However, he was not sure whether his citation covered the same rib and brow conditions cited by Mr. Coeburn, and he explained that he was not with the Federal inspectors when Mr. Coeburn issued his citation and did not discuss the conditions with them.

Respondent relies on Mr. Hamrick's testimony concerning its practices and efforts at controlling and addressing its inherrent adverse rib and brow conditions to mitigate its negligence. Mr. Hamrick's unrebutted testimony is that respondent's management and employees are constantly on the alert for hazardous rib conditions "pulling them down when they are discovered." Mr. Hamrick indicated that anytime he was in the mine, overhanging brows at the face area were always taken down. When asked about the cited areas outby the face, Mr. Hamrick surmised that the overhanging brows could have been caused by rib rolls. Conceding that the brows could have been left by a continuous miner during a prior mining cycle, Mr. Hamrick nonetheless believed that respondent's responsible miners would not leave them in that condition. However, he had no explanation as to why the brow and rib conditions which he and the MSHA inspector cited were undetected and left unattended other than his speculation that they were possibly caused by unexpected rib rolls over a short period of time.

With regard to the question as to how long the particular cited brow and rib conditions may have existed prior to the date of the issuance of the citation, Mr. Hamrick testified that it was entirely possible that they came about over a short period of time, even one day. However, he was not sure if he observed all of the cited conditions, and he conceded that he was not with the MSHA inspectors when they viewed the conditions and confirmed that he did not discuss them with the inspectors. He also conceded that while he observed unsupported brows on the section, he had no recollection as to how many he may have observed and confirmed that he did not count them. With regard to the rib and brow conditions which he cited, Mr. Hamrick had no knowledge as to how long they may have existed prior to the issuance of the citation and indicated that they may have been there "hours or days."

Although I find Mr. Hamrick's testimony with respect to the respondent's general efforts at addressing and controlling

adverse rib and brow conditions to be credible, and have considered this as a general mitigating factor, I find it of little value in determining respondent's negligence level with respect to the specific cited rib and brow conditions which formed the basis for the citation issued by Inspector Coeburn on February 14, 1986. I take note of the fact that while Mr. Hamrick also issued a citation for possibly the same or similar rib and brow conditions cited by Mr. Coeburn, Mr. Hamrick made no negligence findings with respect to his citation, and he apparently is not required to do so under state law.

With regard to the failure by Inspector Adkins to cite any violations during his prior mine visits, although petitioner finds his failure to do so to be inexplicable, it points out that the issue here is whether the respondent was negligent, not MSHA. Petitioner takes the position that any failure by Mr. Adkins to act may not excuse or mitigate the respondent's negligence (Tr. 12). Respondent's counsel took the position that while Mr. Adkins' prior visits may mitigate its negligence, his prior presence in the mine, as a factual matter, simply indicates that had the cited conditions existed when he was there, he would have issued a citation. Counsel concluded that the reason Mr. Adkins did not issue a violation during his mine visits is that he did not observe the conditions, and that his failure to observe them reflects that they did not exist at that time (Tr. 14).

It is clear that the fact that Inspector Adkins did not cite any violative conditions during his prior visit to the mine did not preclude Inspector Coeburn from citing violative conditions which he personally observed. Midwest Minerals, Inc., 3 FMSHRC 251 (January 1981); Missouri Gravel Co., 3 FMSHRC 1465 (June 1981); Servtex Materials Company, 5 FMSHRC 1359 (July 1983); BrubakerÄMann Incorporated, 8 FMSHRC 1487 (September 1986). In other words, the failure by one inspector to issue a citation for mine conditions which may be later viewed as a violation by another inspector may not serve as a per se defense to the violation. However, the failure by Mr. Adkins to issue a violation when he was in the same section several days earlier may be considered as an evidentiary factor in any determination as to whether or not the conditions cited by Mr. Coeburn may have existed or were left unattended prior to the time Mr. Coeburn issued his citation on February 14, 1986.

Inspector Adkins testified that he was in the section on February 10 and 12, 1986, pursuant to an MSHA roof evaluation and accident prevention program, and he characterized his

visit as a "walk and talk inspection" with mine personnel for the purpose discussing safety and accident prevention. His duties included the observation of miner work habits and work procedures. He confirmed that he was on the section for approximately 2 hours on February 10, and that ventilation curtains were hung throughout the section. He confirmed that he walked up the No. 3 belt entry, past the belt feeder, went directly to the working faces by walking up the belt entry, and spent the majority of his time at the faces. He was sure that on February 10, the working faces were not as depicted on the map, exhibit GÄ3, because mining had advanced one or more crosscuts by February 14th. Although he was certain that he checked the faces for imminent dangers, he did not observe any of the cited rib or brow conditions outby the faces because he was not in that area. However, he conceded that it was possible that he may have walked by some of the ribs or brows that could have been behind a curtain, and may not have noticed them while talking to someone.

Mr. Adkins testified further that during his prior visits on February 10 and 12, 1986, he conducted "safety talks" at the dinner hole by the power center in the No. 4 entry as shown on exhibit GÄ3. He was not certain how he would have travelled to that location, and indicated that it was possible that he walked up the No. 3 entry and across the crosscut beyond the feeder in the No. 3 entry and then over to the No. 4 entry. From that point, he would have proceeded directly to the face area by walking directly up the No. 4 entry. I take note of the fact that Inspector Coeburn found no violative rib or brow conditions in the No. 4 entry near the power center, or in the connecting crosscut between the No. 3 and No. 4 entries.

After careful review of the testimony of Inspector Adkins, I am not convinced that he actually travelled all of the areas where the cited brow and rib conditions were observed by Inspectors Coeburn and Rines. Mr. Adkins' travels apparently took him directly to the faces along the No. 3 entry, and along the No. 4 entry and a crosscut where no brow or rib conditions were cited. Further, his testimony that line curtains were hung throughout the section, thereby possibly obstructing his view, and that he was preoccupied with safety talks and his "walk and talk" inspection, and the fact that the mining cycle when he was there did not appear as advanced as it was on the day the citation was issued, raise doubts in my mind that the then prevailing mining conditions were the same when Mr. Adkins was in the section several days prior to the issuance of the citation. I also doubt that he actually travelled all of the same areas where the cited rib

and brow conditions existed. Under the circumstances, I reject any notion that the testimony by Mr. Adkins reasonably supports any conclusion that the cited rib and brow conditions did not exist during his prior visits to the mine.

With regard to the Rushton decision cited by the respondent, I take note of the fact that the inspector who Judge Melick referred to actually issued the violation which was affirmed. Judge Melick simply found that the failure by the inspector to previously observe conditions which he characterized as an "imminent danger" did not support MSHA's proposed finding of "gross negligence." However, Judge Melick did find that the operator was negligent for allowing the cited conditions to exist.

I conclude and find that the cited rib and brow conditions did not occur overnight, as suggested by the respondent, or immediately before the issuance of the citation on February 14, 1986. To the contrary, I believe that the testimony of Inspectors Coeburn and Rines, and Mine Foreman Orender, which I find credible, supports a conclusion that the cited conditions had been created by the continuous-mining machine during prior mining shifts and had existed for at least 2 days, and possibly longer. I further find and conclude that the failure by the respondent to observe the loose ribs and overhanging brows and to take appropriate action to either take them down or support them resulted from its negligent failure to exercise reasonable care.

I have taken into consideration as general mitigating circumstances the respondent's past 2Äyear good compliance record, which includes only four prior violations of the roof control requirements of section 75.200, and no prior violations of section 75.202. I have also favorably considered the respondent's generally good attitude towards safety, and the steps taken to control the apparent inherent adverse roof conditions in the mine. However, the fact remains that while the respondent may have generally given timely attention to hazardous brow and rib conditions in the mine, I find no credible evidence to suggest that it did so with respect to the particular brow and rib conditions observed and cited by the MSHA inspectors. As a matter of fact, the record here shows that State Inspector Hamrick issued a citation the same day in the same section for hazardous rib and brow conditions, and Mine Foreman Orender admitted that brows were sometimes left unattended in high locations, that management sometimes would not see all of the brows, and that at times miners would not pull down loose ribs. Under all of these circumstances, I find no mitigating circumstances warranting a finding that the

cited conditions resulted from a low or moderate degree of negligence.

I believe that a reasonable interpretation of section 75.202 would require mine management to insure that loose ribs and overhanging brows be taken down or supported during the same working shift if miners are expected to work in those areas, or at least during the next working or maintenance shift when miners may be expected to work and may be exposed to the hazardous conditions. Since I have found that the cited conditions existed during prior mining cycles in areas where miners would be working and travelling, it follows that the respondent's failure to timely address and correct the conditions before they were found by the inspectors supports Inspector Coeburn's finding of "high negligence." Accordingly, that finding IS AFFIRMED.

Petitioner's posthearing assertion that the violation resulted from the respondent's "unwarrantable failure" to comply with the requirements of the cited standard IS REJECTED. This is not a viable issue in a civil penalty proceeding. See MSHA v. Black Diamond Coal Mining Company, 7 FMSHRC 1117 (August 1985); MSHA v. Brown Brothers Sand Company, 9 FMSHRC 636 (March 1987). In any event, I find no credible testimony or evidence to support a finding of willful intent or reckless disregard for the requirements of the cited safety standard.

Civil Penalty Assessment

During his opening remarks at the hearing, with respect to his suggested $2,000 civil penalty assessment in this case, petitioner's counsel asserted that MSHA's Office of Assessments was not aware "of the significance and the dangers and the number of violations that actually were written up in the one violation. I believe the violations were more serious and more negligent than the assessment office apparently believed" (Tr. 13). During closing arguments, and in further support of his request for a $2,000 civil penalty assessment, counsel cited three decisions concerning rib and brow violations in which substantial penalties were levied by Commission judges, Westmoreland Coal Company, 7 FMSHRC 1338 (September 1985); Valley Camp Coal Company, 7 FMSHRC 138 (January 1985), Jim Walter Resources, Inc., 7 FMSHRC 263 (February 1985) (Tr. 208Ä210).

Westmoreland Coal involved an overhanging rib condition which resulted in fatal injuries to a scoop operator. The presiding judge found that the violation was the result of an

"unwarrantable failure" to comply with section 75.202, because of a section foreman's knowledge of the violative condition and his failure to take corrective action through indifference or lack of reasonable care. The Commission reversed, and found that the overwhelming weight of the evidence established that repeated efforts to remove the overhanging rib, coupled with the good faith belief on the part of miners and others during their attempts to bar down the rib and that no hazard existed, could not support a finding that the foreman's action in allowing work to proceed represented the degree of aggravated conduct intended to constitute an unwarrantable failure under the Act.

Valley Camp involved an overhanging rock brow that fell and killed a roof bolter. The judge found a violation of section 75.202, and affirmed a section 104(d)(2) unwarrantable failure withdrawal order, and he did so on the basis of evidence which established that a section foreman was aware that the roof had fallen in the accident area immediately prior to the brow fall which killed the bolter, but did not take the time to thoroughly evaluate the residual roof conditions, and allowed production to resume without first examining the work place to determine whether any hazards remained. Further, mine management had a policy which allowed overhanging brows to remain in work areas as long as they were no more than 2 feet thick. Given these circumstances, the judge found that the violation resulted from "gross negligence," an "unwarrantable failure" constituting indifference, willful intent, or a serious lack of reasonable care.

Jim Walter Resources involved a violation of section 75.202, because of loose hanging roof conditions, broken roof bolt plates which allowed loose roof to fall out between the broken roof bolts, roof stress requiring additional roof bolting which was not done, and cracks between roof bolts in various places. The judge found that the conditions had existed for a "substantial period" before the inspection, but his decision contains no discussion of the fact used to support that conclusion. The judge found that the violation was "unwarrantable" because the operator "knew, or with the exercise of reasonable care should have known, of the hazardous roof conditions."

Aside from the fact that I am not bound by the prior judge's decisions cited by counsel, I take particular note of the fact that those decisions were based on the facts there presented. In each instance, the judge made his factual findings on the basis of credible evidence indicating egregious situations where the mine operator's failure to act was the

result of either gross negligence, indifference, or willful intent which directly resulted in fatalities in two of the cases. I find no such circumstances present in the case at hand.

With regard to counsel's conclusions concerning MSHA's assessment office evaluation of the negligence and gravity connected with the violation, my review of the "Narrative Findings" supporting the "special" civil penalty assessment of $850, which is a part of the pleadings, reflects a detailed analysis as to the cited conditions, their locations, the particular hazards presented by the conditions, and the respondent's negligence. Under the circumstances, I disagree with counsel's unsupported conclusions, and find that the assessment office adequately evaluated the facts and circumstances presented by the violation. Under the circumstances, I conclude and find that the proposed civil penalty assessment of $850 is reasonable and appropriate for the violation which has been affirmed.

ORDER

Respondent IS ORDERED to pay a civil penalty assessment in the amount of $850 for the violation in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision. Upon receipt of payment, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge