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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

Civil Penalty Proceeding

Docket No. BARB 78-606-P
A.O. No. 15-07166-02023V

v.

Sinclair No. 2 Mine

PEABODY COAL COMPANY,
RESPONDENT

DECISION

Appearances: John H. O'Donnell, Trial Attorney, Office of the
Solicitor, U.S. Department of Labor, Arlington,
Virginia, for the petitioner;
Thomas F. Linn, Esquire, St. Louis, Missouri, for
the respondent.

Before: Judge Koutras

Statement of the Proceeding

This is a civil penalty proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, initiated by the petitioner against the respondent on August 7, 1978, by the filing of a petition for assessment of civil penalty, seeking a civil penalty assessment for two alleged violations of mandatory safety standards 30 CFR 75.200, and 75.1400, set forth in section 104(c)(2) orders, issued by Federal mine inspectors Arthur J. Parks and Thomas M. Lyle in October and December 1977. Respondent filed an answer and notice of contest on September 7, 1978, denying the allegations and requesting a hearing. A hearing was held in Evansville, Indiana, on December 12, 1978, and the parties submitted posthearing proposed findings, conclusions, and briefs, and the arguments set forth therein have been considered by me in the course of this decision.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing

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regulations as alleged in the petition for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation, based upon the criteria set forth in section 109(a)(1) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq., now the Federal Mine Safety and Health Act of 1977.

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

3. Interim Commission Rules, 29 CFR 2700.1 et seq. 43 Fed. Reg. 10320-10327, March 10, 1978.

Stipulations

The parties stipulated to the following:

1. At all times relevant, the mine was owned and operated by Peabody Coal Company, a large coal mine operator. The mine employed 219 persons underground, 25 persons on the surface, and has a daily production of 3,000 tons of marketable coal (Tr. 5).

2. Any penalty assessed for the alleged violations will not adversely affect the respondent's ability to remain in business (Tr. 5).

Discussion

104(c)(2) Order No. 7-0127, 1 AJP, issued on October 18, 1977, by Federal coal mine inspector Arthur J. Parks, citing a violation of 30 CFR 75.200, states as follows:

The approved roof control plan (September 2, 1977) was not being followed on the No. 2 Unit (I.D. 004) Northwest Mains in that entries and crosscuts were being driven in

excessive widths (Last crosscut between No. 1 & No. 2 entries- 23 ft. 5 inches; No. 4 entry at the feeder- 22 ft. 8 inches; No. 4 entry 2 crosscuts inby the feeder- 24 ft. No. 5 entry 30 feet inby spad no. 915-21 feet). Responsibility of Albert Knight, mine manager; Byron Bailey and Charles Chumley, Asst. Mine Managers; and Roy Stills and James Griggs, Section Foremen.

30 CFR 75.200 provides as follows:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

Testimony and Evidence Adduced by Petitioner

MSHA inspector Arthur J. Parks testified that he is familiar with the Sinclair No. 2 Mine which is located near Drakesboro, Kentucky, near Muhlenberg County and is in the Kentucky No. 9 seam. A conventional method of mining is used there, i. e., the coal is cut, reeled and then shot and loaded out with a loading machine. Continuous mining machines are not presently utilized (Tr. 9-10). On October 18, 1977, he issued to assistant mine manager Byron Bailey, section 104(c)(2) Order of Withdrawal No. 1 AJP, citing 30 CFR 75.200, because he observed places that were wider than the 20-foot width that the roof control plan called for. The first place that he noticed in excess of 20 feet was the last open crosscut on the return side of the unit. The crosscut between Nos. 1 and 2 entries, which is the last open crosscut on the return, was 23 feet 5 inches. He made this determination by using a 50-foot tape line. In addition, he found three

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other places where the roof control plan had not been followed. Two places were in front of the feeder, which is in the No. 4 entry, and another place was in front of the power center, which is in the No. 4 entry. The fourth place listed on the face of the order is No. 5 entry, 30 feet in by spad No. 915; the width at that point was 21 feet. Under the roof control plan, the maximum width that each of these entries could be was 20 feet (Tr. 16). He was at the mine to investigate a roof fall, which, in turn, prompted him to check for wide places or other violations. The roof-bolting pattern seemed to be satisfactory.

Inspector Parks indicated that cutting wide places weakens the top, which, in turn, may result in a roof fall since the top weakens when the entry is too wide. Coal at the Sinclair No. 2 Mine averages 58 inches in height. In some places, one can stand up, but in other places it is difficult to even walk, and it has been determined that a 20-foot height in this coal seam works best. With the exception of shift changes, as a rule, there is someone in the area 24 hours a day. The cracks in the roof presented a danger of a potential roof fall. He sounded the roof and, in his opinion, it sounded drummy. From his visual examination of the roof, he determined that some timbers needed to be set in quickly to compensate for the wide entries in the crosscuts (Tr. 17-20).

Inspector Parks found the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety and health hazard because a roof fall could be fatal or permanently injuring. Such a roof fall previously occurred in the fourth crosscut from the face of the No. 3 entry, where the entry and crosscut widths were approximately 18 feet. From this incident, he arrived at the conclusion that if the roof fell in an area with that width, it would be likely in areas where the width is even wider, e. g., the face. Mr. Parks believed the operator should have known of the condition, and that with reasonable effort, should have known that certain areas were too wide. The last open crosscut between No. 1 and No. 2 entries, which is 23 feet 5 inches, is the place where an air measurement is customarily taken by the face boss or preshift examiner. Since the air measurement is determined by measuring across the crosscut and then multiplying the height to get the area and then multiplying that by the linear reading on the anemometer to find out what the quantity of air is passing through the crosscut, in measuring the width, respondent would have determined that the crosscut was 3 feet 8 inches too wide and could have set some timbers in it. In addition, the face boss marks the width of the face for the cutter and driller to follow, and by so marking the area, the width is determined (Tr. 22-24).

While the excessive widths were visually observable, Mr. Parks also measured the places that were cited on the face of the order, and these were from the narrowest points of the entry and/or crosscuts and were not from duck nests (i. e., a V-shaped cut in the back

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of the rib that occurs as a result of a cutterman sumping too far to the right, thereby pulling his bar too far to the left). If he had found that an effort had been made to hold the width of the ribs to 18 feet and the general rib line was 18 feet, he doubts that he would have cited any violations because the average rib line would probably have been 20 feet or no more than 20 feet. The ribs were not straight; they were full of duck nests, and there were duck nests on the entries. With regard to the probability of injury or death occurring to a miner due to the condition, Mr. Parks indicated the area in front of the feeder would be the most dangerous, and his reason for this opinion is that when men are traveling through this area, due to the car and feeder noise, the men might not hear the top working (Tr. 25-29).

Inspector Parks terminated the order on October 20, 1977, 2 days after it issued, and he believed the operator did not demonstrate good faith in abating the condition because the 100 timbers which had to be set in order to terminate the order, could have been set on the second and third shifts on October 18. However, the foremen at the mine had gone on strike and, as a result, there was no one to set the timbers earlier, and when he returned to the mine on the 19th, he saw only three men underground (Tr. 34).

On cross-examination, Mr. Parks stated that the term "excessive widths," as used in his order, means in excess of 20 feet. When he issued the order, he was aware of the provision on page R-5 of the MESA Manual that defines an "excessive width" as 12 inches or more than the planned opening width; however, he later testified he was not aware of it. According to the MESA Manual, the widths cited in the order would not have been excessive (Tr. 36-40).

Mr. Parks testified that he made the measurements with a cloth tape measure, and assistant mine manager Byron Bailey held the other end of the tape measure for him. He doubted that the tape could have stretched enough through use to make a difference in measuring. He did not know when the last crosscut between Nos. 1 and 2 entries (23 feet 5 inches wide) was mined (Tr. 41-45). With regard to the first area that he noted which was 23 feet 5 inches and located in the last open crosscut, Mr. Parks indicated the men were still working in the general vicinity. He did not determine upon first seeing the area, that it was an unwarrantable failure when he found out that it was excessively wide, since he thought that it was a mistake. However, after he saw three more places that were too wide, he determined that it was a practice throughout the mine and that some timbers should be put up. Although he observed seven places that were in violation due to excessive widths, he documented only four on his order. When he went back to terminate the order and to check over the rib, he found, in total, approximately 16 places that were too wide. Once he issued the order, he would not terminate it until all the wide places on the run were timbered, thereby making the area

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safe. After he came back to terminate, he found that there were other places that were wider than the ones that he cited (Tr. 54-57).

Inspector Parks testified that he cited only four places because he was satisfied in his mind that if he started writing up one citation after another, that those working at the mine could continue working and endangering themselves if there were more wide places. His intent was to get the units shut down and make the people aware of the bad top or bad conditions from the excessive widths and get the condition corrected (Tr. 59-63). When he inspected the top and areas where the excessive widths existed, he sounded the top, however, he prefers to rely upon the examination of the roof, since he cannot tell a great deal on the basis of sound. He was, nonetheless, satisfied with it. Although he did not like the looks of the roof, he understands that the pinning pattern in roof control can hold the roof in place even if it has cracks in it. The areas were pinned and he did not observe a pin pattern violation. Timbers are frequently knocked out by equipment running through, especially on the corners where the shuttle cars are running through since they are wide machines (Tr. 69-70). Although he found no areas in the entries cited to be less than 20 feet wide, the entry and the crosscut at the roof fall were 18 feet wide and on previous occasions he did measure other areas on the unit and some were less than 20 feet and some crosscuts were 17-1/2 feet wide (Tr. 74-76).

Mr. Parks believed the wide places are caused by the creation of duck nests, i.e., the cutterman getting off his mark and then trying to get back on, but not really knowing where he is. It is a multiplying effect and the area could keep getting wider and wider, and while the rib line could be perfectly straight, there could still be an excessive width. He described where his measurements were made from the rib line, and he indicated there were no straight rib lines throughout the unit (Tr. 77-81).

Inspector Parks indicated that when he returned to the mine the next day, there were few people there because of a strike. He referred to a memorandum from his superiors who advised the inspector to consider issuing section 104(c) unwarrantable failure orders rather than 104(b) notices.

When he returned to the mine, he did not see very many men there and he assumes that there was not a sufficient number of men working to terminate the order. He found four more places that needed to be timbered before he could terminate the order, but he did not issue a notice or order on those other areas because the mine was still under a closure order and no work was being performed. Had it not been for the strike, he does not know whether good faith would have been shown, but he can reasonably expect it to be shown (Tr. 84-87).

In response to bench questions, Mr. Parks stated that in order to abate the order, 100 posts were set all over the unit, but at the four locations with excessive widths, approximately 30 posts were set. The posts that were set in the other locations were set in connection with other wide places and entries not cited in his order. The ultimate effect of his withdrawal order, therefore, went to other wide places which he did not cite and which the operator was required to abate anyway. Aside from the wide places that he found, these locations were in compliance with the other provisions of the roof control plan, and he did not notice a violation of the roof-control pattern according to the pin pattern (Tr. 97-98).

Respondent's Testimony

Albert Knight, general mine manager, testified he was at the mine surface on October 18, 1977, and became aware of the subject order when the face foreman called him and told him that an order had been issued on the section. When he arrived at the cited area, he saw that the rib had broken and they began timbering it out so that it could be abated on the second shift. He was not present when the order was abated, but subsequently learned that 18 to 25 timbers had to be installed to take care of the four areas cited in the order. A work stoppage had been called by the face foremen and mine management personnel based on the (c) orders and notices that had been issued to the Sinclair No. 2 Mine and to other mines during that period of time (Tr. 104-105).

Mr. Knight did not consider the alleged violation to be caused by an unwarrantable failure, and he did not believe that it was noticeable enough for anyone to pay much attention to it (Tr. 110-111). The roof control plan (Exh. P-2) calls for the width of openings on the entries to be 20 feet and rooms to be 26 feet. For entries, that plan calls for roof support to consist of crossbars plus supplementary timbers and crossbars, if needed. With respect to rooms, they are not timbered unless they have an abnormal condition. The roof support plan requires that they timber out any entries. The belt entry was timbered up to the tailpiece and the other entries were timbered up (Tr. 114-116).

Mr. Knight described "duck nests," and stated it is possible to avoid creating them by having a conscientious machine operator. Cutting machine operators are shown where to cut by the face boss marking the ribs and the center line with florescent paint. Even though mine management shows the areas to be cut, it is still possible for duck nests to be created through error or inexperience on the part of the machine operator (Tr. 117-120).

He observed each of the areas cited by Inspector Parks in his order, and in his view, each of the wide areas were caused or created by cutting duck nests, and the roof above the duck nests was roof-bolted (Tr. 121-122).

Mr. Knight alluded to a meeting held by mine management with local MSHA officials in Madisonville to discuss the issuance of unwarrantable failure notices at the mine. The work stoppage by the mine foremen was caused by the issuance of these orders and the foremen were concerned because they took them personally and viewed them as a reflection on their job performance. Since that meeting, he received no more unwarrantable failure orders (Tr. 123).

On cross-examination, Mr. Knight stated that the meeting with MSHA was not intended to intimidate anyone. He clarified his previous statement that no subsequent 104(c)(2) orders were issued, and indicated that one was issued on October 27, 1977, for a section 75.1704 hoist violation, and indicated that another general inspection has not been completed at the mine (Tr. 130). Mr. Knight was not present on the section when Mr. Parks issued his order or made his measurements (Tr. 139).

104(c)(2) Order No. 7-0166, 1 TML, issued on December 30, 1977, by Federal coal mine inspector Thomas M. Lyle, citing a violation of 30 CFR 75.1400, states as follows:

A qualified hoisting engineer was not provided on the surface at or near the hoist facility of the Sinclair underground No. 2 Mine on the third shift while persons were underground in the event of an emergency should arise to withdraw such persons from the underground workings. Responsibility of Ruben Thorpe, supt. and Bill Hampton, mine foreman third shift.

30 CFR 75.1400 provides as follows:

Every hoist used to transport persons at a coal mine shall be equipped with overspeed, overwind, and automatic stop controls. Every hoist-handling platforms, cages, or other devices used to transport persons shall be equipped with brakes capable of stopping the fully loaded platform, cage, or other device; with hoisting cable adequately strong to sustain the fully loaded platform, cage, or other device; and have a proper margin of safety. Cages, platforms, or other devices which are used to transport persons in shafts and slopes shall be equipped with safety catches or other no less effective devices approved by the Secretary that act quickly and effectively in an emergency, and such catches shall be tested at least every 2 months. Hoisting equipment, including automatic elevators, that is used to transport persons shall be examined daily. Where persons are transported into, or out of, a coal mine by hoists, a qualified hoisting engineer shall be on duty while any person is underground, except that no such engineer shall be required for automatically operated cages, platforms, or elevators. [Emphasis added.]

Petitioner's Testimony and Evidence

MSHA inspector Thomas M. Lyle confirmed that he issued the order in question and served it on Bill Hampton, the third shift foreman. Mr. Lyle testified that he arrived at the mine at 4 a.m. on December 30, 1977, and encountered no one in the area of the foreman's office nor in the hoist room, where normally a man would be on duty. After walking through the bath house and the supply room which he originally had passed through, he encountered a supply clerk of who he asked the whereabouts of the foreman and hoistman. The supply clerk told him that Mr. Hampton was the foreman and to the best of his knowledge was also the hoistman and that he and the other men were underground (Tr. 142-145).

He then went to the shop and asked foreman Randy Plunkett as to where Mr. Hampton might be located and was told that Mr. Hampton was in the mine with two other foremen. He was also told by Mr. Plunkett that Mr. Hampton was the hoisting engineer. He asked Mr. Plunkett whether he was certified to run the hoist and was told that he was not and that he did not know anything about running one. He then asked Mr. Plunkett if he was aware that section 75.1400 of the Code of Federal Regulations requires that a hoisting engineer be on duty at all times. Mr. Plunkett responded that he was aware of the provision, but that he was not the mine foreman, but would try to get in touch with Mr. Hampton. However, Mr. Plunkett was unsuccessful in doing so. In the meantime, Mr. Lyle called his supervisor, Clyde Turner, and told him what he had found at the mine and that he was going to issue a 104(c)(2) order. At 5:45 that morning, Byron Bailey, the assistant foreman on the day shift, came in and Mr. Lyle told Mr. Bailey that he was going to issue an order. Mr. Bailey replied that he did not know exactly why Bill Hampton was underground, but that both he and Mr. Hampton were aware that they were supposed to keep a qualified hoisting engineer on duty and said that there is no excuse. Mr. Bailey finally got in touch with Mr. Hampton by telephone and told Mr. Hampton that an order was in the process of being issued and that he should withdraw the men from the mine and bring them outside (Tr. 146-155).

Mr. Lyle described the hoisting device in question and its operation. He indicated that it was possible for men to walk out of the mine without using a hoist unless they were injured. However, at the time the order issued, the slope was icy and, in his opinion, two men could not carry an injured man out of the mine on a stretcher and up the slope. If they should be successful in doing so, it would take an extremely long time.

He spoke with Mr. Hampton after he came out of the mine and Mr. Hampton told him that he knew that there was supposed to be a hoist man on top, but that there were only two men besides himself who were working and he just could not sit around while they were

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in the mine rock dusting, so he went in the mine to help them. Mr. Hampton then told him that he promised that it would not happen again (Tr. 155-162).

Mr. Lyle testified that he believed the violation could have contributed to a "significant and substantial" safety hazard because if someone underground other than Mr. Hampton had been injured, it would have taken Mr. Hampton probably 10 or 15 minutes to walk up to the hoist room and drop the car. In addition, someone would have to have been ready to help load the car and bring them out. It would have probably taken 30 minutes to do all this. Had there been a hoist man on the surface, if someone were to be injured, all that would have been necessary would be to call him and tell him to drop the car and then load the injured man and bring him straight out. In a matter of approximately 3 minutes, the injured man would have been brought to the surface and would be on his way to a hospital (Tr. 163-165).

Mr. Lyle testified that he made a finding that the violation was an unwarrantable failure because Mr. Hampton is a mine foreman, he had been trained in operating a hoist and had certification papers as to his ability and, he was aware of the requirement that someone be on duty to operate the hoist. In addition, on other occasions complaints had been made that men were going into the mine on Sundays without a hoisting engineer and he and other inspectors had talked to the company personnel at the mine. He had talked with Ruben Thorpe, the superintendent of the mine, and the last of these conversations was right after the miners went on strike, sometime around December 5 or 6, 1977 (Tr. 165-167).

Although 30 CFR 75.1400 contains the caveat that a hoisting man need not be present if there are automatically operated cages, platforms or elevators, Mr. Lyle did not believe that it would be applicable to the situation at hand because Sinclair No. 2 Mine does not have an automatic cage. Even the emergency escapeway requires a person to raise it. He served the notice of abatement (Exh. P-5) on Mr. Hampton 1 hour and 15 minutes after he issued the order. With regard to whether or not good faith was exercised, upon arriving at the mine, he did not receive much cooperation on the surface since the mine foreman was underground with two other foremen, except that he was called for. After Mr. Bailey arrived, however, he cooperated with him. He abated the violation after going down to the hoisting room with the day shift hoistman, Larry Cleveland. He checked the hoist as Mr. Cleveland operated it. Since Mr. Cleveland was a qualified hoisting engineer and was on duty at the time, he abated the violation. Mr. Cleveland was not present at the time he issued the order of withdrawal, and, in his opinion, Mr. Cleveland showed a good degree of proficiency with respect to operating a hoist (Tr. 167-170).

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On cross-examination, Mr. Lyle confirmed that the mine was not in operation on the day he issued his order, except for nonunion personnel, and this was due to the nationwide miners' strike. The three people that were underground did not use the slope car, and apparently walked into the mine. He did see Mr. Hampton walking near the iron core of the portal. From his reports, it was a practice on Sunday for supervisory personnel to walk into the mine and inspect it for hazardous conditions and then walk back out. The slope was 732 feet long from the portal to the bottom and was at a 16-degree angle. He has walked down the slope and to the best of his recollection, there is a handrail. The slope, however, was severely frozen (Tr. 172-176).

Mr. Lyle testified that in addition to the hoist telephone, there was also a mine telephone underground that connects with the office on the surface and could be used if one was unable to reach anyone in the hoist house. If someone was in the shop and it would take him approximately 3 minutes to get over to the hoist house, he would consider that as being in close proximity to the hoist house. Had there been a qualified hoisting engineer in the bathhouse, office, or in the shop, he would not have issued the order regardless of whether the hoisting engineer was dressed, because in an emergency situation, he could have summoned someone out of the mine. In addition to the regular slope hoist, there is an emergency slope hoist. On the basis of Mr. Plunkett's earlier statement, he does not know whether or not Mr. Plunkett could operate the emergency hoist (Tr. 180-183).

Since it is likely that none of the three men were transported into the mine by a hoist, Mr. Lyle still believed that a qualified hoisting engineer has to be on the surface. He does not recall anyone ever commenting to him that when people walked into a mine and contemplated walking out of the mine, that in that case no hoisting engineer had to be in the hoisthouse. He does not know how long it takes for the hoist car or the hoist to get down to the bottom since he has never timed it (Tr. 186-187).

During a strike such as the one that was underway on December 30, 1977, Mr. Lyle agreed that it is a prudent and good mining practice to go in and inspect the mine on a regular basis and make sure that the integrity of the mine is maintained. He does not know if that is what Mr. Hampton and his two associates were doing that day, since they told him that they were rock dusting. Although Mr. Hampton, a qualified hoisting engineer, was on the surface at 6 a.m., as evidenced by the fact that he gave Mr. Hampton the order at that time, he did not abate the order until 7:15 a.m., because he was never asked to abate until Mr. Cleveland arrived, since he was told that they were going to discuss it (Tr. 188-189).

In response to questions from the bench, Mr. Lyle indicated that there is no question in his mind that the system of taking

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people underground constitutes hoisting, and he does not consider it haulage. However, he did not know why it is not haulage, and neither he nor his fellow inspectors, to the best of his recollection, have questioned whether this particular device is a hoisting device. The slope in question is a designated escapeway (Tr. 195-205).

Respondent's Testimony

General mine manager Albert Knight testified he was at the mine the day the order issued and he confirmed that the mine was not working because of a nationwide miners' strike. The first shift was timbering, and the shift in question was fire-bossing and dusting. He did not know whether the hoisting device was used by the third shift on the day the order was issued. Normally, they had not been using it as the men had been walking in the mine and then walking out. He was told by Mr. Hampton that on the day the order issued, he walked in the mine and they walked out. In his opinion, it is not necessary to use the hoisting device to get underground since it is possible to walk in and to walk out of the mine. The slope is approximately 750 feet in length and is at a 16-degree angle. There are handrails which go all the way to the bottom. The hoisting device is used to transport men, but most of the time it is used for supplying the mine (Tr. 214-218).

Mr. Knight testified that it takes approximately the same time to walk from the bottom area up the full 700 feet to the portal as it would to use the hoisting device to bring a group of people out of the mine--approximately 7 minutes. Whether or not section 75.1400 requires a hoisting engineer to be on duty if the hoisting device is not used to take persons underground, has been an argument with the union people for about 3 years. Up until this particular order was written, he has consistently maintained that a hoisting engineer is not necessary when the device is not being used to get underground. Since the order issued, they have had a hoistman on duty on the surface and he described the operation of the hoist (Tr. 218-220).

Mr. Knight testified that during the strike, it was customary on the third shift to walk in and out of the mine and not use the device. Prior to the time the order was issued, the only time that the necessity of having a hoist was brought up was when the hoistman, a union employee, brought up the fact of going in and out of the mine and that it was against the law. When the mine is not on strike, the hoistman is on duty 24 hours per day. He is a qualified hoisting engineer and is on call 24 hours per day; thus, if he had been needed on the morning of December 30, 1977, he could have arrived at the mine in about 6 minutes, even though he lives about 5 or 6 miles from the mine (Tr. 221-223).

On cross-examination, Mr. Knight testified that while he could not recall the temperature on the day in question, he confirmed there could have been ice on the slope, even though it had been cleaned. The mine met the requirements of section 75.1402 and there are two telephones in the hoisthouse equipped with speakers and a page system which can be heard over the entire surface of the mine. He was not on the mine property at the time the order was issued, and has no idea why it took so long for the inspector to inform Mr. Hampton that the order of withdrawal had been issued. Normally, during a production shift, men are hauled in and out of the mine (Tr. 223-226).

Findings and Conclusions

Fact of Violation--30 CFR 75.200

In its posthearing brief, petitioner argues that it has established by a preponderance of the evidence that the areas cited were in fact wider than the 20 feet allowed by the mine-approved roof-control plan. Although conceding that the inspector cited only four places that had excessive widths, when, in fact, he observed 16 additional such places, petitioner asserts that the respondent understood that mining excessive widths would not be tolerated and the listing of the additional places would simply have been an exercise in futility. Further, although there were "duck nests" in the places cited, petitioner maintains that the inspector made actual measurements of the wide places, but did not include any part of a duck nest in his measurements. Regarding the Inspector's Manual provision defining "excessive" widths, petitioner argues that the roof-control plan is controlling and the Inspector's Manual reference is only relevant when weighing the gravity of the violation.

Petitioner points out that the excessive widths were not caused by rib sloughing and the inspector believed they resulted from a practice in the unit in question to mine areas at excessive widths, and considering the fact that the inspector observed some 16 places with excessive widths, and it took 18 to 25 timbers to abate the four places described in the order, petitioner maintains there was a practice of being indifferent about the excessive width problem on the part of the respondent, and the face boss told the inspector that the problem resulted because the cutting machine operator on the second shift was prone to cut too wide.

Respondent's Arguments

In its posthearing brief, respondent argues that petitioner failed to establish a violation of section 75.200. While conceding that its roof-control plan restricts the widths of entries and crosscuts to 20 feet, respondent argues that its plan does not indicate that widths greater than 20 feet are excessive. Citing section 75.201, which provides that the method of mining followed in a mine

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shall not expose miners to unusual dangers from roof falls caused by excessive widths of rooms and entries, respondent asserts that the record is devoid of any "unusual dangers from roof falls" attributable to openings or widths beyond those specified in its plan. Further, respondent cites petitioner's 1974 Inspector's Guidelines, which define the term "excessive" as "12 inches or more" than the planned opening width and argues that the facts adduced, when applied to the section 75.201 definition of "excessive" and the Inspector's Guidelines, cannot support a finding that excessive widths existed at the mine as charged in the citation. Respondent also argues that the wide areas cited resulted from "duck nests," which in respondent's opinion, are normal conditions caused by the cutting machine.

I find that the preponderance of the evidence adduced in this proceeding supports a finding of a violation of section 75.200. It is clear from the evidence presented, that the widths of the entries and crosscuts cited by the inspector were driven in widths in excess of the approved roof-control plan. It is also clear that the failure to comply with the roof-control plan constitutes a violation of section 75.200. Peabody Coal Company, 8 IBMA 121 (1977). Respondent's suggestion that the inspector's measurements are suspect is rejected. I fail to understand how one can calibrate a tape measure, as suggested by respondent, and respondent was free to take its own measurements, but did not do so. Respondent's personnel assisted the inspector in taking his measurements and I find the inspector's testimony regarding those measurements to be credible. Respondent's assertion that the wide places measured by the inspector resulted from "duck nests" caused by the cutting machine bar is likewise rejected. Respondent concedes that the measurements were made in the general vicinity of the duck's nests and the inspector's testimony that he was careful to avoid the duck nests while making his measurements, stands un rebutted. Under the circumstances, I find that the inspector's measurements as stated in his order, were accurate and that petitioner has established that the wide places did, in fact, exist as stated on the face of the order.

Respondent's reliance on the cited Inspector's Manual instructions and guidelines regarding the interpretation of the term "excessive widths" as a defense to the citation, is rejected. The Inspector's Manual does not have the force and effect of law or a mandatory standard and is not controlling. Here, the roof-control plan and provision with regard to the widths of the areas cited is controlling and any deviation from that provision is a violation not only of the plan, but also of section 75.200. Even if the Inspector's Manual reference at 75.201-1 (Exh. R-5) were deemed to be controlling, it seems clear to me that the inspector followed the exception noted which states: "[I]f it is evident that excessive widths are prevalent and are caused by poor mining practices, a violation shall be cited." In this case, it is clear from the inspector's testimony that he believed the excessive widths resulted from poor mining practices in that the cutting machine operator consistently failed to

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cut straight entries and crosscuts and that mine management failed to insure that the marked-out areas were, in fact, cut straight. Respondent's own witness conceded that wide entries were, in part, due to poor mining practices. Further, although not detailed in his order, the inspector cited numerous other locations where the entries and crosscuts were driven too wide and it is obvious to me from his testimony that he believed the excessive widths which he found on the day of his inspection were prevalent, were caused by bad mining practices on that day, and that the area cited was not adequately supported. While it may have been better for the inspector to have included these other areas in his order, the fact that he did not, does not detract from his unrebutted testimony and findings made at the time the order issued.

Size of Business and Effect of Penalty Assessment on the Respondent's Ability to Remain in Business

The parties have stipulated that the respondent is a large coal mine operator and that any civil penalty assessed by me in this matter will not adversely affect its ability to remain in business, and I adopt these stipulations as my findings in this regard.

Good Faith Compliance

The inspector's conclusion that the respondent demonstrated lack of good faith in abating the conditions cited is rejected. In support of his conclusion in this regard, the inspector testified that 100 roof-support timbers had to be set to abate the conditions cited and that due to a mine foremen's "strike" or work stoppage, adequate personnel were not available to do the work. However, it is clear that the 100 timbers were, in fact, required to support not only the areas cited, but the additional areas which concerned the inspector and which the respondent was required to abate before he would terminate the order. Thus, it is clear that substantial work had to be performed before termination of the order occurred. As for the work stoppage by the foremen, while these individuals are part of mine management, there is no evidence that the work stoppage was, in fact, condoned by the mine superintendent or that it took place for the purpose of avoiding compliance. That work stoppage apparently took place because the foremen believed MSHA's enforcement practices with respect to the issuance of unwarrantable failure violations were unjustified and reflected on what they perceived was an attack on their job performance. Aside from the merits of that controversy, I take note of the fact that the work stoppage subsequently resulted in a meeting with local MSHA district enforcement officials for the purpose of discussing the matter further and there is no evidence that the respondent subsequently failed to make a diligent effort to comply. Given the circumstances presented, I cannot conclude that the time taken to abate (2 days) was untimely or an indication of a lack of good faith. The affected area was closed by the order and

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the inspector himself recognized that no men were available to do the work and he did not specifically fix any time for abatement since his order effectively closed down the area where excessive widths were being driven. Further, while the respondent could have taken the position that it was only required to install enough additional roof support to abate the specific areas cited by the order, it did, in fact, install all of the additional roof support as required by the inspector in the other areas which concerned him and it obviously did so to terminate the order so that production could resume. In view of the totality of the circumstances which prevailed at the time in question, I conclude and find that the respondent exercised normal compliance once the order issued and should not be penalized further by adopting petitioner's suggestion that it exhibited a lack of good faith in abating the conditions once the order issued.

Negligence

Respondent's suggestion that the wide areas cited resulted from "duck nests" created by the machine operator and that the respondent cannot be held accountable for this practice, is rejected. As indicated earlier, the inspector took into consideration the existence of duck nests, but he specifically stated that the measurements he made were of the wide entries and crosscuts. Further, he specifically stated that the mining widths are controlled underground by the face boss marking the required widths of the cuts and that in the event the cutting machine operator is wide of those marks, it is the responsibility of the face boss to take corrective action on the scene to insure that the areas are cut as marked and in accordance with the roof-control plan. I agree with these observations by the inspector and I find and conclude that on the day in question, the wide areas cited were caused by the failure of the cutting machine operator to cut within the areas apparently marked out by the face boss and that with a little more attention on his part, the conditions cited could have been prevented. Respondent admitted that the conditions cited were, in part, caused by poor mining practices and resulted from "likely errors" on the part of the machine operator. In the circumstances, I find that the violation cited resulted from the respondent's failure to exercise reasonable care to prevent or correct the conditions which it knew or should have known existed and that this failure on its part constitutes ordinary negligence. I find nothing in the record to support any conclusion that respondent recklessly and deliberately caused the conditions cited.

Gravity

Respondent's proposed finding that the violation cited was nonserious is rejected. The inspector was in the mine on the day his order issued for the purpose of investigating a roof fall which had occurred in an area where the mining width was approximately 18 feet. He was concerned over the fact that the cutting of entries and crosscuts at widths more than that called for by the roof-control plan

would, over a period of time, likely weaken the roof and cause another possible roof fall, unless additional roof support was installed in those areas. Considering all of the wide places which he found during his inspection, I cannot disagree with the inspector's conclusions in this regard. Although it is true that the roof areas in question were bolted in accordance with the roof-control plan, the fact is that the inspector testified the roof sounded drummy and he believed additional support was required to compensate for the wide areas cited. In the circumstances, the failure of the respondent to follow its roof-control plan by cutting wide entries and the failure to install additional roof support was serious and presented a potential for additional roof falls in the cited areas. I find that the violation was serious.

History of Prior Violations

Petitioner introduced a computer printout of the prior history of violations pertaining to the Sinclair No. 2 Mine (Exh. P-6). That history reflects a total of 145 paid violations for that mine during the period January 1, 1970, to April 4, 1977. During that same period of time, the history for the operator/controller (Kennecott Copper Corporation) reflects a total of 857 paid violations.

Respondent contends that at the time the order issued on October 18, 1977, the history of violations attributable to the respondent should be "zero" since on July 1, 1977, the corporate stock of Peabody Coal Company had been sold by Kennecott Copper Corporation, the prior owner, to Peabody Holding Company, the present owner. Respondent points to the fact that the mine was previously owned by the Kennecott Copper Corporation and that the ownership period, as reflected on the face of the printout, ended on June 30, 1977. At the time of the violation in question, respondent argues that the Peabody Holding Company (PHC), and not Kennecott, was the controlling company, and that petitioner has introduced no evidence respecting the prior history of violations attributable to PHC. Since petitioner has listed only those violations attributable to Peabody Coal Company when it was owned by Kennecott, and since MSHA's Office of Assessments recognized the fact when a mine is sold to a new operator, that new operator starts out with a "clean slate" (Tr. 251), respondent asserts that petitioner is now estopped from arguing the contrary. Further, respondent argues that significant management changes were made in Peabody Coal Company after the sale of that company by Kennecott to PHC on July 1, 1977, including most directors, many officers, the president, and the chief executive officer, and that such changes were doubtlessly deemed to be an improvement over the prior management arrangement. In the circumstances, respondent argues that the prior history, as reflected in the printout, should not be considered as part of its prior history of violations, insofar as any assessment of the instant violation is concerned, and any penalty assessed must reflect a "zero" history.

Petitioner points out that since the effective date of the 1969 Act until July 1, 1977, the corporate stock of the Peabody Coal Company was owned by Kennecott Copper Corporation. On July 1, 1977, the corporate stock of the Peabody Coal Company was sold to Peabody Holding Company, which became the new owner of the Peabody Coal Company since the holding company, in fact, became the new owner of the corporate stock of the Peabody Coal Company. Peabody Coal Company is a wholly-owned subsidiary of the holding company and is its only asset. Petitioner argues that while corporate stock changes owners, the liability of the corporation remains constant and intact. Here, petitioner argues that the mine was not, in fact, sold to a new operator, only the corporate stock was sold, and Peabody Coal Company and its assets remained intact.

After full consideration of the arguments presented, I conclude and find that on the basis of the record here presented, petitioner has the better part of the argument, and its proposed finding on this issue is adopted as my finding, and respondent's arguments to the contrary are rejected. I find that the prior history of the Peabody Coal Company, as reflected in the printout, and notwithstanding the transfer of stock, may be considered by me in assessing a civil penalty in this matter. While respondent alluded to certain management changes at the uppermost levels of the holding company, the fact is that there is no evidence that mine management has undergone any changes, that the holding company is, in fact, the present owner of Peabody Coal Company, that the company is, in fact, its sole asset, and that there has been a continuity of operation of the mine in question, and that the only change has been in the sale of stock. While it may be true that MSHA's Assessment Office considered that an actual change in mine ownership had taken place, I am not bound by that fact, and based on previous proceedings involving the manner in which the Assessment Office evaluates any given citation at any given time, I doubt whether that office made other than a cursory evaluation of the question.

On the facts presented in this proceeding, I find that the prior history of violations with respect to the mine in question, when viewed in light of the size of Peabody's total coal mining operations, does not constitute a significant prior history of violations, and that fact is reflected in the penalty assessed by me in this matter. The same can be said for the prior history of Kennecott's overall total history as reflected in the printout. For an operation of its size, I cannot conclude that the 145 paid violations over a period in excess of 6 years for the mine, or the 857 violations over that same period for the size of Kennecott's mining operations can be said to be significant.

Fact of Violation--30 CFR 75.1400

The pertinent part of the mandatory safety standard cited in Order No. 1 PML (7-166) on December 30, 1977, reads: "[W]here persons

are transported into, or out of a coal mine by hoists, a qualified hoisting engineer shall be on duty while any person is underground, * * *."

Petitioner's Arguments

Regarding the hoist violation, petitioner concedes that due to a nationwide mine strike, only management and supervisory personnel were working at the mine. Although there was an emergency drop cage hoist in the intake shaft which requires an engineer on the surface to operate it, petitioner argues that the slope hoist, located in the designated escapeway, is the only other means of entering and exiting the mine, and that persons normally ride into and out of the mine to change shifts by use of that hoist, and it is also used to get miners and supplies underground. The hoist is operated by a cable on a hoist drum; the cable attaches to an automatic brake and other cars, and the cars are dropped down into the slope or pulled up out of the slope to the mine portal. The cars are on a track, and normally two cars, including the brake car, can convey 30 to 40 persons in each car into and out of the mine. The hoist does not have an automatically operated cage, platform or elevator, and normally there is a qualified hoistman in the house 24 hours a day when coal is being produced, or the normal maintenance shift is employed. The cars were on the surface when the inspector made his inspection, and injured persons have been taken out of the mine by being hauled up the slope by the hoist and car.

Although it is true that the men who were underground may have walked down the slope in the mine, the slope was wet, muddy and icy, and an injured person could not be carried out on a stretcher without riding on the cars with the use of the hoist. Regarding the man who was supposedly "on duty," petitioner points out that it took the foreman an hour to get to the surface once he was called from underground, and the other man lived 5 or 6 miles from the mine. As for the definition of the term "hoist," petitioner cites the definitions of that term as used in Webster's Dictionary and Bulletin 95, A Glossary of the Mining and Mineral Industry, and points out that the mechanics of the hoist device in question qualifies it as a hoist as that term has always been considered in the mining industry. Further, the fact that a vertical cage or bucket is not involved is immaterial argues petitioner, since the standard language "other such equipment" includes the hoist device in question.

Finally, petitioner argues that the fact that persons went underground without the use of the hoist, does not matter since persons are transported underground in the mine by the hoist and while anyone is underground, a hoist engineer must be on duty, and the slope must be available as long as anyone is in the mine.

Respondent's Arguments

Respondent argues that on the day the citation issued, due to a strike, no union personnel were in the mine, but three management personnel were underground. These three individuals walked into and out of the mine without using a device usually employed for transporting men and material into and out of the mine, namely, a track-mounted car or set of cars to which is attached a cable with the other end of the cable attached to a drum on the mine surface. Respondent asserts that this device is used principally for the haulage of materials and supplies, although it is also used to transport men during normal production shifts, and the hoisting engineer is usually a union employee. The mine slope entrance descends some 730 feet at a slope of some 16 degrees and has handrails and a walkway to facilitate walking into and out of the mine. Since the legislative history of section 314(a) of the 1969 Act, the statutory counterpart of section 75.1400, intended the standard to apply only where men are regularly transported in and out of the mine by hoist, respondent submits that persons were not being transported into or out of the mine with any degree of regularity because the third shift customarily walked into and out of the mine without the use of the personnel transport device as they did on the day in question. Thus, as to the third shift, particularly during the strike, respondent asserts that the hoist was not customarily or regularly used for the transportation of personnel. Since persons were not being transported into or out of the mine on the third shift with any degree of regularity, respondent maintains that no violation occurred.

Finally, respondent argues that the term "hoist" is not further defined and that Congress intended section 75.1400 to apply to those instances in which a hoist is the sole or principal means of entering and exiting a mine, and that since the standard speaks of "hoist-handling platforms, cages, and elevators," respondent submits that the type of hoist to which Congress was addressing itself is a device designed to lift persons in a more or less vertical fashion from the depths of a coal mine. Also, since the device in question was not in use, the mine was not one "where persons are transported into or out of a coal mine" by a hoist, because the word "where" connotes more than merely location and may be used to indicate the situation or circumstances to which relates the remainder of the clause in which the word "where" is used. And, respondent asserts that it has steadfastly maintained that the last sentence in section 75.1400 refers to situations in which persons are transported into or out of a mine, rather than a location at which persons are sometimes transported into or out of the mine. Further, since the evidence shows that a qualified engineer was on the surface and near the "hoisthouse" and since a qualified hoisting engineer, who is on a 24-hour call, was only 6 minutes from the mine at the time the order issued, respondent maintains that a qualified hoisting engineer was "on duty"

within the meaning of section 75.1400, and respondent cites the testimony of the inspector who considered a man to be "on duty" when he is 5 or 6 minutes from the hoist house.

It is clear from the evidence adduced in this proceeding that the hoisting device in question is, under normal circumstances, used to transport men and materials underground. In such circumstances, it is also clear to me that section 75.1400 requires that a qualified hoisting engineer be on duty while anyone is underground. On the facts presented in the instant case, it is clear that on the day in question, the three management individuals went underground by walking down the slope incline and the hoist was not used because the mine was idle due to a strike. Aside from the requirement in section 75.1704-1(b), which provides that escape shafts include elevators, hoists, cranes, or other such equipment, and that they be manned by an attendant during coal-producing or maintenance shifts, I find nothing in section 75.1400 that requires a mine operator to use any hoisting device to transport men or supplies underground. Nor do I find anything in that standard which requires an operator to install such a hoist or to have it available for the transportation of men to the surface in the event of emergencies.

Except for a drop cage hoist in the intake shaft, which is used in emergencies and requires an engineer on the surface to operate, the slope in question is the only means of entering and exiting the mine. Petitioner's proposed interpretation of section 75.1400, if accepted, would require an operator to maintain the slope hoisting device in question operational at all times when miners are underground. Thus, if an operator decides to close the device or car trips down for maintenance, and the men walk in and out of the mine for any given shift while the device is inoperative, petitioner seemingly would require a qualified hoisting engineer to be on duty. In my view, such a result is not only illogical, but I can find no authority in any mandatory standard for such a requirement. Here, the evidence establishes that the slope in question was an escapeway and was so designated on the mine map. In the circumstances, since petitioner's arguments in support of its interpretation of the standard focus on the fact that the lack of a qualified engineer would not permit the expeditious removal of a miner in the event of an emergency, it seems to me that the inspector should have cited sections 75.1704 or 75.1704-1 which require that escapeway slopes be maintained in safe condition to allow quick escape of miners in the event of emergencies, and that an attendant be on the surface in a position to hear or see a signal for the use of the hoist and who be readily available to operate it.

After careful consideration of the arguments presented, including the facts and evidence adduced in this proceeding, I conclude that respondent's proposed interpretation and application of section 75.1400 is correct and petitioner's arguments and proposed

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interpretation and application are rejected. I find that the critical phrase "where persons are transported into, or out of a coal mine by hoists, a qualified hoisting engineer shall be on duty while any person is underground, * * *" as applied to the facts of this case, refers to the circumstances in which persons are transported into or out of a mine, rather than the location at which such transportation is had. Under the circumstances, since the management personnel in question were not transported underground by means of the hoisting device in question, I conclude that section 75.1400 is inapplicable and that petitioner has failed to establish a violation.

It is clear from the citation issued by Inspector Lyle that he was concerned over the fact that no one was on the surface to attend the hoist while persons were underground in the event an emergency should arise to withdraw such persons from underground, and petitioner's proposed interpretation and application of the cited standard is consistent with the language of the order. However, as concluded above, I believe the standard is inapplicable to the facts presented, and that the inspector should have cited sections 75.1704 or 75.1704-1(b). If petitioner believes those sections are inapplicable, then it should consider promulgating a safety standard to cover circumstances such as those presented in this case.

With respect to the question of whether the device used to transport men in and out of the mine was, in fact, a "hoist" within the meaning of section 75.1400, I conclude that it was, and I adopt petitioner's proposed findings and conclusions as the basis for this conclusion. The fact that the device was not a platform, cage, or elevator, and did not move in a vertical fashion, is immaterial as correctly argued by the petitioner. The mechanics and workings of the transportation device in question, including the definitions cited by the petitioner, including the phrase "or other devices used to transport persons" support petitioner's position on this issue. However, since I have found the cited section to be inapplicable, this issue is moot.

In view of the foregoing, I conclude and find that the cited standard is inapplicable to the conditions cited by the inspector, and that the petitioner has failed to establish a violation of section 75.1400. Accordingly, the petition for assessment of civil penalty, insofar as it seeks a civil penalty assessment for the section 104(c)(2) order, Citation No. 7-0166, December 30, 1977, is dismissed.

Penalty Assessment and Order

In view of my findings and conclusions made with respect to the section 104(c)(2) order issued October 18, 1977, Citation No. 7-0127, I find that a civil penalty in the amount of \$4,000 is appropriate in

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the circumstances presented, and respondent is ordered to pay that amount within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge