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PEABODY COAL CO. V. SOL (MSHA) & UMWA
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Federal Mine Safety and Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

PEABODY COAL COMPANY, APPLICANT	Application for Review
v.	Docket No. KENT 79-107-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Order No. 795972 May 21, 1979 Ken No. 4 North Underground Mine
UNITED MINE WORKERS OF AMERICA, RESPONDENT	

DECISION

Appearances: Thomas R. Gallagher, Esq., St. Louis, Missouri, for Applicant
Joseph M. Walsh, Esq., Office of the Solicitor, Department of Labor, for Respondent Secretary of Labor
Joyce A. Hanula, Attorney, Washington, D.C., for Respondent United Mine Workers of America

Before: Administrative Law Judge Steffey

Pursuant to an order issued June 5, 1979, a hearing in the above-entitled proceeding was held in Evansville, Indiana, on June 13 and 14, 1979, under section 105(d) of the Federal Mine Safety and Health Act of 1977. Although evidence was submitted to support findings pertaining to the civil penalty issues which will be raised if MSHA files a Petition for Assessment of Civil Penalty with respect to the violation which was alleged in Order No. 795972 which is under review in this proceeding, this decision will dispose only of the issues raised by the Application for Review filed by applicant. The civil-penalty issues will be decided only if the parties are unable to settle those issues at a conference with the Assessment Office and counsel for MSHA subsequently files a Petition for Assessment of Civil Penalty.

Completion of the Record

During the hearing, MSHA's counsel introduced Exhibits 5 through 8 for the purpose of indicating that frequent unintentional roof

falls have occurred in applicant's Ken No. 4 North Mine. Although it had been assumed when Exhibits 5 through 8 were received in evidence, that those exhibits covered unintentional roof falls only for the years 1975 through 1978, when I examined the reports after the hearing, I found that one of the reports of unintentional roof falls pertained to one roof fall which occurred in January 1979. That is the same roof fall about which one of applicant's witnesses testified at the hearing (Tr. 443). In such circumstances, it appears appropriate to make a separate exhibit for the report of the 1979 roof fall. Consequently, there is marked for identification as Exhibit 9 a one-page report of an unintentional roof fall which occurred in January 1979. Exhibit 9 is received in evidence.

At the hearing, MSHA's counsel stated that he would submit at a subsequent time a computer printout pertaining to applicant's history of previous violations and also a copy of an order of modification which was issued by the inspector who wrote Order No. 795972 (Tr. 6-7). MSHA's counsel filed a copy of the computer printout and a copy of the modification order with me on August 22, 1979. The letter of transmittal stated that a copy of the computer printout and modification order had been sent to applicant's counsel. I have received no reply from applicant's counsel in opposition to receiving those proposed exhibits into evidence.

Consequently, there is marked for identification as Exhibit 10 a three-page computer printout showing a history of previous violations for applicant's Ken No. 4 North Mine. There is marked for identification as Exhibit 11, a one-page Modification Order No. 795972-1 dated June 15, 1979. Exhibits 10 and 11 are received in evidence.

Issue

The issue raised by the Application for Review filed in this proceeding is whether an imminent danger existed on May 21, 1979, when Order of Withdrawal No. 795972 was issued pursuant to section 107(a) of the Act. At the conclusion of the hearing, counsel for all parties waived the opportunity of filing posthearing briefs (Tr. 448).

Findings of Fact

I shall hereinafter make the findings of fact upon which my decision in this proceeding will be based. Following the findings of fact, my decision will consider the arguments which are inherent in the parties' evidentiary presentations.

1. Mr. Franklin D. Dupree, an MSHA inspector, arrived at Peabody's Ken No. 4 North Mine about 2:30 p.m. on May 21, 1979, for the purpose of making a routine spot inspection. When the inspector went to the bathhouse, he heard UMWA's representative at the mine and two roof bolters discussing what they believed to be separations in

the roof in the No. 1 Unit - ID - 004 (hereinafter referred to as the No. 1 Unit). The roof bolters had concluded that there were separations in the roof strata because the drilling bit on the root-bolting machine would jump about 2 inches almost every time a hole was drilled for the purpose of installing roof bolts. The inspector told the miners that he would check the roof conditions in the No. 1 Unit when he went underground (Tr. 9-15).

2. The inspector was accompanied on his examination of the mine by Mr. Inman, one of Peabody's roof bolters (Tr. 14). As the inspector and Mr. Inman were about to go underground in the mantrip, Peabody's mine manager, Mr. Alton Fulton, called Mr. Ernie Brock, the second-shift foreman on the No. 1 Unit, to the mine office for a short discussion. When Mr. Brock returned to the mantrip, he remarked that he had been given instructions to pull out of the No. 1 Unit and drive some rooms off to the left of that unit, but no explanation was given for the announced intention of withdrawing from the No. 1 Unit (Tr. 16; 18; 47).

3. When the inspector arrived in the No. 1 Unit, all of the men stopped at the dinner hole for a while, except for Mr. Brock, the unit foreman, who made an inspection of the face area. The inspector and his companion, Mr. Inman, began examining conditions in the unit shortly thereafter by proceeding up the No. 4 entry toward the face. When they reached the second crosscut outby the face, the inspector noticed a broken place in the mine roof near the outby rib and water was coming through the roof in steady drops. The broken place extended the entire length of the crosscut between the Nos. 4 and 5 entries. The crack was about an inch or less in width, but it extended along the bottom of a V-shaped ridge which projected downward from the roof for a distance of about 3 inches. The legs of the V-shaped ridge were about 10 or 12 inches apart at the roof, or point of origin (Tr. 20-24; 56; 93). The inspector considered water dripping from the roof at the site of the cracked roof to be a further sign of a weakened roof because water displaces material comprising roof strata and creates voids in the roof (Tr. 39).

4. The inspector believed that the V-shaped broken place in the roof of the crosscut constituted an imminent danger which he defined as a condition which might cause injury or death before it could be corrected (Tr. 31; 57; 107). The inspector thereafter orally issued an imminent danger order under section 107(a) of the 1977 Act and advised Mr. Brock, the unit foreman, that he would determine the extent of the area covered by his order as soon as he could complete his examination of the unit (Tr. 23-24; 108).

5. The inspector then found another V-shaped crack in the roof of the second crosscut from the face between the Nos. 5 and 6 entries and still other cracks in the same crosscut between the Nos. 6 and 7 entries (Tr. 31; Exh. 2). The inspector could not divorce the cracks

in the roof from the separations he had heard described by the miners before he began his underground examination (Tr. 32). Mr. Brock granted the inspector's request that the operator of the roof-bolting machine be permitted to drill test holes to determine whether separations still existed in the roof strata in the No. 1 Unit (Tr. 24-25). The inspector had the operator of the roof-bolting machine to drill about 35 test holes. The inspector concluded that actual separations in the roof strata existed because, when the test holes were drilled, the roof-bolting machine would suddenly jump about 2 inches after the drill had penetrated the roof for a distance of from 36 to 38 inches (Tr. 25-26; 74; 90-91). Resin-grouted roof bolts were being used and the inspector believed that the roof bolts were pushing the resin into the separations which existed near the ends of the bolts. The passage of the resin into the separations was seriously eroding the effectiveness of the resin bolts by preventing the resin from hardening along the full length of the bolts so as to pin the roof strata together and provide a secure beam (Tr. 73; 76; 85-86; 98; 105).

6. The inspector found that the drill stem did not jump when test holes were drilled in the No. 4 entry at the No. 1 crosscut, nor at the crosscut between the Nos. 3 and 4 entries, nor in the No. 3 entry at the last open crosscut (Tr. 27). The inspector ultimately determined that the left side of the No. 1 Unit was the place where the roof was unsafe and Order No. 795972 specifically delineated the territory covered, namely, an area extending 175 feet outby the face in No. 7 entry, an area extending 130 feet outby the face in the No. 6 entry, an area extending 110 feet outby the face in the No. 5 entry, an area extending 80 feet outby the face in the No. 4 entry, and an area in the No. 3 entry at the second open crosscut (Tr. 141-142; Exh. 1).

7. After the inspector had orally advised Mr. Brock that an imminent-danger order had been issued, Mr. Brock responded by having the miners bring crossbars and legs into the mine (Tr. 37). The miners then completely crossbarred the crosscut between the Nos. 4 and 5 entries where the inspector had first observed a crack in the roof (Tr. 38; 103).

8. The Ken No. 4 North Mine has a history of unintentional roof falls (Tr. 33). Although the inspector did not see any roof falls in the No. 1 Unit on May 21, 1979, at the time he issued his imminent-danger order (Tr. 65), Peabody reported 10 unintentional roof falls in 1975, 16 unintentional roof falls in 1976, 20 unintentional roof falls in 1977, 14 unintentional roof falls in 1978, and 1 unintentional roof fall in 1979 up to the date of the hearing which was held on June 13 and 14, 1979 (Exhs. 5, 6, 7, and 8; Tr. 443). Additionally, Peabody has encountered places in its Ken No. 4 North Mine where the roof conditions were so adverse that it was not economically feasible to support the roof and Peabody was forced to discontinue mining in such areas (Tr. 41-44; Exh. 2).

9. Peabody's mine manager at the Ken No. 4 North Mine, Mr. Alton Fulton, refused to believe that roof conditions in the No. 1 Unit were serious enough to justify issuance of an imminent-danger order (Tr. 35). Although the miners were withdrawn from the unit in compliance with the inspector's order, the adverse roof conditions cited in the inspector's order were never abated and the coal remaining in the unit was never extracted (Tr. 255).

10. The inspector stated that Mr. Shemwell, the roof bolter who drilled the test holes, drilled the holes while exerting a steady pressure on the upthrust lever and the inspector said that he would have detected it if Mr. Shemwell had tried to manipulate the lever so as to fabricate the appearance of jumping. The inspector firmly believed that authentic jumping was occurring and that the jumping was caused by actual separations in the roof strata (Tr. 61; 64). The inspector also stated that hitting extremely hard rocks with the drill stem would have slowed the drill stem and that the speed of the drill would be restored to normal after the drill had passed through such rocks, but the inspector said that operators of roof-bolting machines are familiar with variations in types of roof strata and would not interpret reactions of the machine when rocks are encountered to be separations in roof strata (Tr. 62-64; 68-69; 81).

11. The inspector believed that if crossbars had been installed in the areas cited in his order as having separations, the No. 1 Unit would have been made safe for resumption of mining activity (Tr. 96; 109).

12. About a week before the imminent-danger order was issued, Mr. Inman told Mr. Brock about the jumping of the drill on the roof-bolting machine, but Mr. Brock did not think it was bad enough to need extra support--that is, support in addition to the 42-inch resin bolts which were being installed at the time the order was issued (Tr. 34; 149-150). Mr. Brock took his hammer and pulled down some pieces of shale and decided that he would take no further precautions until such time as the roof appeared to become more adverse than it was when Mr. Inman warned him about it (Tr. 162).

13. Mr. Charles Ford, the unit foreman in the No. 1 Unit on the day shift, stated that he had worked the day shift immediately preceding the issuance of the imminent-danger order (Tr. 167). Mr. Ford had also known about the jumps of 1 to 2 inches in the drill for about a week before the imminent-danger order was issued, but he had concluded that the drill was hitting soft places in the roof strata because the jumps occurred to within 10 inches of the working face and he felt that there would have had to have been a visible break in the roof in order for separations to have occurred that close to the face (Tr. 168).

14. Order No. 795972 was orally issued at about 3:30 p.m. on the evening shift of May 21, 1979 (Tr. 59-60). Toward the end of

Mr. Ford's day shift of May 21, 1979, an operator of a roof-bolting machine, Mr. Charles Howard, called Mr. Ford's attention to some bad roof at a breakthrough near the face of the No. 5 entry. Mr. Ford thought that the roof was too hazardous for bolts to be installed until such time as crossbars could first be erected. Since it was then close to the end of Mr. Ford's day shift, Mr. Ford told Mr. Howard that he would report the bad top to the mine manager. Mr. Ford also made an entry in the preshift book stating "All left side of unit--bad top and water" (Tr. 164; 175). When Mr. Ford reported to work on the following day, May 22, 1979, he was surprised to hear that the imminent-danger order had been issued on the evening shift because the mine superintendent, Mr. Clyde Miller, had given instructions for the men to withdraw from the No. 1 Unit and work in some rooms to the left of the No. 1 Unit. Mr. Ford said that he had expected to move back into the No. 1 Unit after the miners had "* * * made it safe to go back in there" (Tr. 171). Mr. Miller's decision to withdraw from the No. 1 Unit had been made after Mr. Ford had reported the jumping of the roof-bolting machine and the bad top in the No. 5 entry. Mr. Ford expected to go back into the No. 1 Unit after about three shifts because Mr. Ford estimated that two shifts would be required to move a pump into the No. 1 Unit and that one shift would be required to install supporting timbers. Mr. Ford would not have objected to reentering the No. 1 Unit to work after the dangerous places had been timbered (Tr. 177).

15. Mr. Alton Fulton, the mine manager, worked the day shift on May 21, 1979, and he received the aforementioned call from Mr. Ford about 2:15 p.m. The call had been made by Mr. Ford to advise Mr. Fulton that crossbars were needed at two crosscuts. Mr. Fulton advised Mr. Ford that he would check into the matter and discuss the problem with Mr. Brock before Mr. Brock began working on the evening shift. Mr. Fulton made an inspection of the No. 1 Unit. He did not see any cracks. Mr. Fulton did not observe the roof-bolting machine in operation, but he had been told that jumps were occurring (Tr. 190-191).

16. Mr. Fulton had gone home on May 21, 1979, before it was reported to him by telephone that the imminent-danger order had been issued. Mr. Fulton called Mr. Conrad Bowen, the assistant mine superintendent, and Mr. Ford and Mr. Bowen went to the mine and tried to convince the inspector that the roof in the No. 1 Unit was not bad enough to warrant the issuance of an imminent-danger order, but the inspector adhered to his original position that the top constituted an imminent danger (Tr. 193-194). On May 22, 1979, Mr. Fulton, Mr. Bowen, Mr. Miller, and Mr. French, the mine safety director, went into the No. 1 Unit and made an inspection (Tr. 195). All of them concluded that the roof was safe. Mr. Fulton said he would work under the roof if he were a union employee (Tr. 202). Mr. Miller said he would spend his vacation under the roof (Tr. 247).

17. Mr. Miller tried to get the supervisor of the inspector who wrote the imminent-danger order to make a personal examination of the roof in the No. 1 Unit, but the supervisor declined to do so, explaining that he did not want to become involved in the controversy (Tr. 252). Mr. Miller said that MSHA could force them to do almost anything, but in this instance he was in a position to make a test of MSHA's action. Therefore, he decided that he would not take any steps to abate the order because he believed that any work he might do to abate the conditions alleged in the inspector's order would be interpreted as a concession by applicant that an imminent danger actually existed (Tr. 222; 255).

18. Mr. French checked the top in the No. 1 Unit on May 23, 25, 29, and June 11 to determine if the roof was taking weight, cracking along the ribs, or breaking up. Mr. French found at the time all inspections were made that the roof was unchanged and had not as of June 11 fallen, although a period of 22 days had by then elapsed since the order was written (Tr. 221). Mr. Bowen also made additional checks of the roof in the No. 1 Unit after the order was written and Mr. Bowen authorized other personnel to make such follow-up examinations (Tr. 236). Mr. Bowen found that from 1 to 2 feet of water had accumulated in the Nos. 1 and 2 entries, but that water had stopped dripping from the roof of the No. 7 entry (Tr. 242).

19. Mr. Miller doubted that it would be ecomically feasible to move equipment back into the No. 4 Unit in order to extract the coal which was abandoned when Mr. Miller decided not to abate the order. Mr. Miller stated that it would take 4 days or 12 shifts for the equipment to be moved back and for the necessary timbering to be done (Tr. 257). Applicant presented testimony through an engineer and an accountant who estimated that applicant's decision not to continue mining in the No. 1 Unit resulted in a failure to produce 22,280.5 tons of coal (Tr. 332) at an estimated loss to applicant of about $103,379 (Tr. 341).

20. Mr. Guy McDowell, respondent's roof-control specialist, presented testimony and several exhibits which show that he has considerable expertise in designing roof bolts and resin-anchoring systems for trusses. Mr. McDowell has been given credit for technical assistance rendered to persons performing research and writing scientific treatises pertaining to roof control (Tr. 271-283). Mr. McDowell examined the roof in the No. 1 Unit at the request of management and made an inspection of the roof while accompanied by Messrs. French, Miller, and Bowen. Mr. McDowell saw no signs of roof failure during his examination which was made by testing the roof with the sound and vibration method and by visual observation (Tr. 284-285). Mr. McDowell also checked 100 of the 2,800 roof bolts in the area covered by the order and found that 50 bolts had resin on them at the bottom plate. Mr. McDowell concluded that the resin roof bolts were anchoring satisfactorily and he believed that the operators of the

roof-bolting machines were inexperienced in using resin bolts and therefore did not have as much faith in the effectiveness of such bolts as the past performance of such bolts merited (Tr. 300-302).

21. Mr. McDowell was of the opinion that it would not now be possible to return to the No. 1 Unit to produce the coal left when the miners withdrew from the No. 1 Unit on May 21, 1979. The reason given by Mr. McDowell in support of that opinion was that the water dropping from the roof had caused the pillars to sink into the fireclay with a resultant weakening of the roof which would make it unsafe to resume the mining of coal in the No. 1 Unit (Tr. 308).

22. Mr. McDowell made no checks of the roof in the No. 1 Unit by any methods which were not also used by the operators of the roof-bolting machines and by the inspector, that is, he checked the roof by the sound and vibration method and by visual observation just as the inspector and operators of the roof-bolting machines did. Mr. McDowell stated that if there really were separations in the roof at or near the extreme end of the 42-inch bolts, the resin would go into the separations and not produce a proper bond for supporting the roof. He also said that one of the signs of roof failure would be cracks in the roof. Moreover, he agreed that if the V-shaped cracks described by the inspector really existed, such cracks would be a preliminary sign of roof failure even when resin bolts are being used (Tr. 321; 324).

23. Mr. Inman, who accompanied the inspector during his examination of the No. 1 Unit, was the safety committeeman at the Ken No. 4 North Mine and he corroborated the inspector's testimony as to the fact that the drill on the roof-bolting machine was jumping about 2 inches in the Nos. 4, 5, 6, and 7 entries when the drill stem had penetrated the roof for a distance of about 36 inches (Tr. 350; 356). Mr. Inman also agreed with the inspector's description of the V-shaped crack in the second crosscut from the face (Tr. 352-354).

24. Mr. Inman was normally the operator of the cutting machine, but he had been operating a roof-bolting machine prior to the issuance of the imminent-danger order because Mr. Shemwell, who drilled the test holes for the inspector, had temporarily stopped operating the roof-bolting machine because the resin used for anchoring the bolts had adversely affected his eyes (Tr. 359). Mr. Inman did not object to installing resin bolts because he recognized that resin bolts are more effective than conventional bolts (Tr. 360)

25. Mr. Inman was afraid to work under the roof in the No. 1 Unit as it existed just prior to issuance of the imminent-danger order (Tr. 358). Mr. Inman said that resin will exude at the bottom or heads of resin bolts when no jumps or separations occur near the tops of the bolt holes, but the last night that Mr. Inman bolted before the imminent-danger order was issued, the drill stem was jumping in seven

out of eight holes drilled and resin was coming out at the bottom of only one or two bolts out of eight (Tr. 376-378). Mr. Inman did not cause the jumps by deliberately manipulating the roof-bolting machine to produce that sort of manifestation and Mr. Inman did not believe that it would be possible for anyone to operate a roof-bolting machine so as to create an artificial appearance of jumping (Tr. 366-367). Mr. Inman did not think the jumps could have been caused by the drill stem's encountering alternate soft and hard places in the roof strata (Tr. 379-380).

26. Mr. Shemwell, who operated the roof-bolting machine for drilling test holes for the inspector, agreed with Mr. Inman's and the inspector's description of the jumps occurring when holes were drilled. Mr. Shemwell was still at the dinner hole on May 21, 1979, when he heard someone say that one of the working places had been designated as an imminent danger by the inspector (Tr. 388-389). Mr. Shemwell believed that the roof in the No. 1 Unit was definitely bad and he would have been afraid to have continued working in the unit without installation of support in addition to the resin bolts they were installing at the time the imminent-danger order was issued (Tr. 390). Mr. Shemwell said that every operator of a roof-bolting machine has experienced hitting hard rocks and soft places in the roof strata and knows the difference between the slowing down of the drill and speeding up of the drill at such times, as compared with the jumps which occur when the drill hits separations between the strata as was occurring in the No. 1 Unit prior to the issuance of the imminent-danger order (Tr. 394-395). Mr. Shemwell agreed with Mr. Inman that it was very dangerous to work in the No. 1 Unit and he said he would have joined with any other miners who might have been willing to decline to work under the roof. They had the right under the union contract to refuse work in a dangerous place (Tr. 396).

27. Management had used conventional bolts in the No. 1 Unit up to May 15, 1979, but management had changed to use of resin bolts because water had been encountered and tests showed that torque was being lost on the bolts after they had been installed (Tr. 266). Mr. Shemwell did not think the resin bolts were performing their intended function with respect to water leaking through the roof because he could install resin bolts and thereafter find water dripping off the bottom of them when he came by the same bolts again during the next mining cycle. In Mr. Shemwell's opinion, if the resin bolts had been anchoring as was intended, water would not have been running off the bolt heads (Tr. 401).

28. Mr. Charles W. Howard preferred the position of a laborer even though he had been working in coal mines for 13 years (Tr. 402; 422). Among other things, he operated the roof-bolting machine and he had shortly before the imminent-danger order was issued declined to install resin bolts in the No. 5 entry because he considered the

roof unsafe. He reported the unsafe roof to Mr. Ford, the unit foreman, and Mr. Ford reported the hazardous condition to the mine manager (Tr. 407). Mr. Howard agreed with the other operators of roof-bolting machines that the drills cannot be made to jump by manipulating the upthrust lever to create such an impression (Tr. 418).

29. Mr. Jerry D. Fulton has been a coal miner for about 11 years and has been an operator of a roof-bolting machine for approximately 10 years (Tr. 424). He agreed with the other operators of roof-bolting machines that the roof was in fair to good condition in the Nos. 1, 2 and 3 entries, but he believed that the roof in the Nos. 4, 5, 6, and 7 entries was in poor condition because the drilling stem would jump in those entries. He had had to back up his roof-bolting machine in the No. 7 entry and install longer roof bolts when the conventional bolts then being used lost their torque (Tr. 425). Thereafter, management converted to using resin bolts (Tr. 426). Mr. Fulton tested the roof by using sound and vibration and visual observation and the roof appeared to be fair in the Nos. 1, 2 and 3 entries and substandard in the Nos. 4, 5, 6, and 7 entries. Mr. Fulton said that on previous occasions when the operators of the roof-bolting machines believed that they had encountered adverse conditions which warranted use of roof support in addition to roof bolts, management had provided the extra support, but for some reason, when the roof bolters encountered the jumps and the miners observed cracks in the roof in the No. 1 Unit shortly before the imminent-danger order was issued, management refused to provide the extra support the miners thought was needed (Tr. 428-429).

30. Mr. Jerry Fulton doubted that the resin bolts were anchoring firmly because he found water dripping off of them on the left side of the unit after they had been installed for one mining cycle (Tr. 432).

A. Evidentiary Support for Inspector's Finding that Imminent Danger Existed

1. Reasons Given by Inspector for Finding of Imminent Danger

Inspector Dupree issued his imminent danger order (a) because he found V-shaped cracks extending along the roof in the second crosscut outby the face (Finding No. 3, supra), (b) because the roof bolters had found separations in the roof strata (Finding No. 5, supra), (c) because water was leaking through the roof in steady drops (Finding No. 3, supra), and (d) because resin was showing at the bottom of only about one-eighth of the bolts (Finding Nos. 5 and 25, supra).

The inspector could not divorce the danger associated with the cracked roof from the fact that separations were being encountered when holes were drilled for installation of roof bolts. The inspector believed that the entire roof on the left side of the No. 1

Unit was unsafe. The water coming through the roof was eroding the stability of the roof and the lack of resin on the great majority of the bolt heads was an indication that the resin was being pushed into the separations or cavities between roof strata instead of hardening along the bolts so as to provide effective holding power.

2. UMWA's Witnesses Supported the Inspector's Finding

The inspector's views about the hazardous nature of the roof were supported by the testimony of four roof bolters who had been working in the Ken No. 4 North Mine for many years and who had been working in the No. 1 Unit for more than a week during which the separations continued to occur. The miners could not understand why management had installed crossbars on other occasions when hazardous roof conditions were encountered, but declined to do so shortly before the imminent-danger order was written on May 21, 1979 (Finding Nos. 23-30, supra) All four roof bolters believed that separations in roof strata existed and that the roof needed support in addition to the resin bolts which were then being used (Findings Nos. 23-24; 26; 28-30, supra).

B. Applicant's Counterarguments

1. Applicant's Contention that Actual Separations of Roof Strata Did Not Exist

Applicant's witnesses attempted to explain the jumps in the drill stem by claiming that the operators of the roof-bolting machines were feigning the jumping of the drill stem by applying sudden pressure on the upthrust lever (Finding No. 10, supra). The operators of the roof-bolting machines denied that the jumps were artificially created and disputed applicant's claim that the jumps could be fabricated even if the operators of the roof-bolting machines had been inclined to do so (Finding Nos. 25-26 and 28, supra). No one ever explained on the record what motive the operators of the roof-bolting machines could have had for creating a false impression that the roof was unsound. I think that the preponderance of the evidence clearly supports a rejection of applicant's contention that the operators of the roof-bolting machines were feigning the occurrence of jumps when holes were drilled for installation of roof bolts.

2. Applicant's Claim that the "Jumps" Were Caused by Drilling Through Alternate Hard and Soft Roof Strata

Applicant's supervisory witnesses agreed that the occurrence of jumping by the roof-bolting machines had been reported to them, but they claimed that the jumps had occurred when the drill stem alternately encountered very hard rocks or strata followed by very soft strata (Finding Nos. 13 and 15, supra). Applicant's witnesses believed that the high pressure under which the drill operates would cause the drill stem to jump suddenly after it had passed through

hard rocks. The inspector and the operators of the roof-bolting machines all agreed that the rate of penetration of the drill stem would be decreased when very hard materials were encountered and that the normal penetration rate would be resumed after the drill had passed through hard materials, but the operators of the roof-bolting machines were all experienced miners and knew the difference in the reaction of the roof-bolting machines when actual separations are encountered as opposed to the slowing and speeding up of the drill when alternate hard and soft materials are encountered (Finding No. 10, supra). Applicant's supervisory witnesses did not actually operate the roof-bolting machines and some of applicant's supervisors did not actually see the roof-bolting machines operating (Finding No. 15, supra; Tr. 310). Therefore, I find that the testimony of the miners who operated the roof-bolting machines is more credible than that of applicant's witnesses with respect to the question of the existence of actual separations in the roof.

3. Mr. Brock's Response

The imminent-danger order was written on May 21, 1979, on the evening shift which was supervised by Mr. Brock. The operator of the roof-bolting machine had reported the separations in the roof strata to Mr. Brock and had asked for erection of additional supports, but Mr. Brock had concluded that the roof did not need additional support. He had simply reported the matter to the mine manager without taking any action other than pulling down a few pieces of roof which he thought were loose. Although Mr. Brock testified that he was having crossbars installed at the time the imminent-danger order was verbally issued, that is inconsistent with his own testimony and that of other witnesses on his shift because they stated that Mr. Brock had gone to the face area to make an onshift examination and that the inspector had verbally issued his order to Mr. Brock at the time Mr. Brock returned from checking the face area (Finding No. 12, supra; Tr. 149-150; 159).

4. Mr. Ford's Conclusion that the Roof Was Unsafe

Mr. Ford was the supervisor of the No. 1 Unit on the day shift and his testimony shows that the operator of the roof-bolting machine on his shift on May 21, 1979, encountered such a hazardous place in the roof that Mr. Ford believed that crossbars should be erected before resin bolts could be safely installed. Mr. Ford advised the mine manager that crossbars were needed and Mr. Ford made the following entry in the preshift book: "All left side of unit--bad top and water." Moreover, Mr. Ford said that he was surprised to hear of the issuance of the imminent-danger order because the mine superintendent had given instructions for the miners to withdraw from the No. 1 Unit and Mr. Ford did not expect any more work to be done in the No. 1 Unit until enough crossbars had been installed to make it "* * * safe to go back in there" (Finding No. 14, supra).

Mr. Ford's testimony fully supports the issuance of the imminent-danger order because Mr. Ford's description of the No. 1 Unit was based on his evaluation of conditions in that unit just a few hours prior to the issuance of the inspector's withdrawal order.

5. Mr. McDowell's Testimony Was Too General in Nature To Offset the Miners' and Inspector's Opinion that Imminent Danger Existed

Mr. McDowell was an impressive witness who obviously possessed considerable expertise in designing and working with resin roof bolts and trusses. Mr. McDowell inspected the roof in the No. 1 Unit after the imminent-danger order had been issued. He only checked the condition of 100 resin bolts out of a total of 2,800 in the area covered by the order. Although the inspector was criticized by applicant for failure to examine the interior of the holes drilled by the roof-bolting machine with a borescope for the purpose of determining whether separations in the roof strata existed, Mr. McDowell was not called in by management to make an evaluation by means of a borescope when the separations were first encountered and reported to the unit foremen and other supervisory personnel. Therefore, when Mr. McDowell examined the roof in the No. 1 Unit, he checked the roof by means of sound and vibration and visual observation. Since the inspector and the operators of the roof-bolting machines had used the same methods in examining the roof, Mr. McDowell's conclusions to the effect that the roof was safe does not rise to a higher level of proof than the opinions of the inspector and operators of the roof-bolting machines because the inspector and roof bolters had not only checked the roof with sound and vibration and visual observation, but had also either operated the roof-bolting machine or had watched the roof-bolting machine in operation, whereas Mr. McDowell had not observed the roof-bolting machine in operation (Finding Nos. 20-23; 29, supra).

6. The Cracks and Water Seepage Were Serious

Respondent's supervisory witnesses avoided making statements to the effect that no cracks existed in the roof. They either stated that they did not see cracks, or minimized the cracks they saw, or said that they did not examine the entries in which the cracks may have existed. Additionally, Mr. McDowell stated that if the cracks did exist, their existence would be a sign of roof failure. Inasmuch as the inspector, Mr. Inman, and Mr. Brock all agreed that the cracks existed, the inspector's conclusion that an imminent danger existed is supported by Mr. McDowell's testimony because Mr. McDowell believed that occurrence of cracks would be a preliminary sign of roof failure in a unit where resin bolts were being used (Finding Nos. 22-23, supra; Tr. 157).

The significance to be attached to the fact that water was seeping through the roof is considerable. Although some of applicant's

supervisory witnesses claimed that water had stopped dripping from the roof by June 11, Mr. Inman said that water was continuing to drip from the roof when he last made an examination just outby the area covered by the imminent-danger order (Finding No. 18, supra; Tr. 371). Regardless of whether the water had stopped dripping by June 11, 1979, it is a fact that more than a foot of water had accumulated in some places in the area covered by the order and it was Mr. McDowell's opinion that the water had allowed the pillars to sink and had weakened the roof sufficiently to make it unsafe for miners to return to the No. 1 Unit to work even if it had been economically feasible to do so (Finding No. 21, supra).

C. Legal Support for Inspector's Finding of Imminent Danger

The concept of imminent danger is fully discussed by the courts in the following decisions: Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, 491 F.2d 277 (4th Cir. 1974); Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741 (7th Cir. 1974); and Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975). In the Old Ben opinion, supra, the court reaffirmed the holding in its prior Freeman opinion to the effect that imminent danger may be said to exist if it can be reasonably expected that injury or death would occur before the hazardous condition can be corrected if normal mining procedures are continued. The court agreed with the former Board that an imminent danger exists if a reasonable man would conclude that the feared accident is just as likely as not to occur before the condition can be corrected.

In light of the court's discussions of the definition of imminent danger, I conclude that the inspector reasonably found on May 21, 1979, that an imminent danger existed in the No. 1 Unit of the Ken No. 4 North Mine. The testimony of the inspector and of four roof bolters, who had been working for many years in the Ken No. 4 North Mine, unequivocally supports findings that the resin bolts were not anchoring thoroughly, that water was seeping through the roof strata, that resin was not appearing at the bottom of the bolts to show thorough adhesion along the full length of the bolts, and that ominous cracks had appeared in the roof of the second crosscut from the face in several locations. The aforesaid hazardous conditions, when coupled with the fact that the roof outby the area covered in the imminent-danger order had previouisly required rebolting with longer bolts than were normally used, support the inspector's belief that the roof could have fallen at any time. The large number of unintentional roof falls which have historically occurred in the Ken No. 4 North Mine show that the roof is generally hazardous and should be supported with the crossbars requested by the operators of the roof-bolting machines when separations, cracks, water seepage, and other signs of roof failure are encountered and reported to management by both the operators of the roof-bolting machines and by the unit foremen, especialy Mr. Ford

who had made an entry in the preshift book just a few hours before the order was issued indicating that the roof was hazardous in the area covered by the order.

The Seventh Circuit also noted in its Old Ben opinion that an inspector has a very difficult job because he is primarily concerned about the safety of men, while the operator is concerned about production and profit. The court indicated that an inspector should be supported unless he has clearly abused his discretion (523 F.2d at 31). The court said that an inspector cannot wait until the danger is so immediate that no one can remain in the mine to correct the condition, nor can the inspector wait until an explosion or fire has occurred before issuing a withdrawal order (523 F.2d at 34). Following the court's reasoning, the MSHA inspector in this proceeding could not wait until he saw pieces of roof falling on the miners before determining that miners should be withdrawn from the No. 1 Unit until crossbars could be installed.

Applicant seemed to believe that if an imminent danger had really existed, the inspector would not have remained in the No. 1 Unit long enough for 35 test holes to be drilled for the purpose of determining the areal extent of the imminent danger (Tr. 60). The inspector hardly had any choice but to remain in the No. 1 Unit until the test holes had been drilled because section 107(a) of the Act provides that if an imminent danger is found to exist, the inspector "* * * shall determine the extent of the area of such mine throughout which the danger exists." Since neither the inspector nor anyone else could see up into the roof to determine the extent of the separations in the roof strata, the inspector could not have determined the area "throughout which the danger exists" if he had not had the test holes drilled for the purpose of determining the areal extent of the imminent danger. Cf. Old Ben, supra at 32-33.

Ultimate Findings and Conclusions

(1) Pursuant to the parties' stipulations, Applicant Peabody Coal Company is subject to the provisions of the Act and to the regulations promulgated thereunder (Tr. 6; 8-9).

(2) The preponderance of the evidence introduced in this proceeding shows that an imminent danger existed on May 21, 1979, in the No. 1 Unit of the Ken No. 4 North Mine and, consequently, Withdrawal Order No. 795972 issued May 21, 1979, should be affirmed and Peabody Coal Company's Application for Review should be denied.

(3) For the purpose of issuing this decision, all civil penalty questions are severed from the issues raised by the Application for Review; if MSHA files a Petition for Assessment of Civil Penalty with respect to the violation of section 75.200 cited in Order No. 795972, as modified June 15, 1979, that civil penalty case should be forwarded

to me for decision on the basis of the record already made in this proceeding.

WHEREFORE, it is ordered:

(A) The Application for Review filed May 29, 1979, by Peabody Coal Company in Docket No. KENT 79-107-R is denied and Withdrawal Order No. 795972 dated May 21, 1979, is affirmed.

(B) The civil penalty questions consolidated for hearing in this proceeding are severed from the issues raised by the Application for Review; if MSHA files a Petition for Assessment of Civil Penalty with respect to the alleged violation of 30 CFR 75.200 cited in Order No. 795972, as modified on June 15, 1979, that civil penalty case should be forwarded to me for decision on the basis of the record already made in this proceeding.

Richard C. Steffey
Administrative Law Judge