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SOL (MSHA) V. LEECO INC.  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

SECRETARY OF LABOR, Civil Penalty Proceeding  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA), Docket No. KENT 79-112  
PETITIONER A.O. No. 15-06823-03007I

v. Mine No. 3

LEECO, INCORPORATED,  
RESPONDENT

DECISION

Appearances: George Drumming, Jr., Attorney, U.S. Department of  
Labor, Nashville, Tennessee, for the petitioner  
Al Douglas Reece, Esquire, Manchester, Kentucky,  
for the respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), on June 22, 1979, charging the respondent with one alleged violation of the provisions of 30 C.F.R. 75.200. Respondent filed a timely answer contesting the proposed civil penalty and requested a hearing. A hearing was held in London, Kentucky, on December 13, 1979, and the parties appeared and were represented by counsel. The parties waived the filing of posthearing proposed findings and conclusions, were afforded an opportunity to present oral arguments in support of their respective positions at the hearing, and pursuant to notice, respondent was afforded an opportunity to take the deposition of a witness in London, Kentucky, on March 13, 1980. The deposition has been filed and is a matter of record in this proceeding.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulation as alleged in the proposal for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) 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 Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

#### Discussion

At the hearing, the parties stipulated to the following (Tr. 5-12):

1. Respondent is subject to the provisions of the Act by virtue of the fact that it is the operator of the mine where the alleged violation took place.

2. The mine in question is a small mining operation, employing approximately 31 people, and at the time the citation issued it employed approximately 40 miners.

3. The administrative law judge has jurisdiction of the proceeding, and the inspector who issued the citation is an authorized mine inspector who validly issued the citation alleging a violation.

4. Respondent's ability to remain in business will not be adversely affected by any civil penalty assessment made in this proceeding.

5. Respondent's history of prior violations before August 29, 1978, consists of 144 citations.

6. Annual coal mine production for the No. 3 Mine in 1978 was 101,720 tons, and in 1979, mine production was 74,825 tons. Annual mine production for Leeco, Incorporated for 1978 was 460,918 tons, and for 1979, the annual production was 489,679 tons.

Section 104(a) Citation No. 127294, issued on August 29, 1978, citing a violation of 30 C.F.R. 75.200, states: "Evidence indicated that the approved roof control plan was not being followed in that two employees were injured while mining coal inby roof supports in the left break of the No. 1 room on the 002 working section."

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The inspector fixed the abatement time as 8 a.m., August 30, 1978, and he terminated the citation on August 29, 1978, at 10:10 a.m., and the termination notice gives the following explanation for this action: "The approved roof control plan was discussed with all the employees by mine management concerning the requirements of the plan."

#### Testimony and Evidence Adduced by the Parties

##### Petitioner

MSHA inspector Lawrence Spurlock testified as to his background and mining experience, and indicated that he is familiar with respondent's mining operations through prior inspections of their mines. He confirmed that he conducted a non-fatal roof fall accident investigation at the mine in question in August 1978, and he identified a copy of the accident report (Exh. P-2) which he wrote. In compiling his report, he spoke to certain people who witnessed the accident and who had information pertaining to it, reduced the interviews to notes, and then compiled his report from this data. Mr. Spurlock stated that he did not visit the actual scene of the accident and began his investigation a day after the accident occurred together with the inspector who issued the citation (Tr. 14-21). MSHA inspector Helton had previously issued the citation in question, and the accident report was in part compiled from information supplied by Mr. Helton (Tr. 27). During the course of the investigation, section foreman Dewey Brock was interviewed and stated that approximately 20 minutes before the roof fall he examined the roof visually and by the sound and vibration method and that the miners were under supported roof when he left the scene. Mr. Brock said nothing about any unsupported roof and indicated that he knew nothing about the roof-control requirement that the roof had to be supported before side-cuts were made (Tr. 28).

In compiling his accident report, Mr. Spurlock stated that company management furnished a sketch of an area identical to the accident scene (Exh. P-11) and it indicates where the roof fell on the two victims (Tr. 29). In addition, the company submitted the required MSHA accident reporting forms, 7000-1, and he identified copies of the reports filed by the company (Exhs. P-12 and P-13; Tr. 30). The accident reporting forms were received before he compiled his accident report (Tr. 34), and he also received information from the two injured miners, as well as the observations of the MSHA inspectors at the scene of the accident.

On cross-examination, Inspector Spurlock testified that he was not in the mine when he conducted his investigation, that Inspector Helton had already issued the citation prior to the start of the accident investigation, and he did not know what evidence was available to Inspector Helton to support his citation (Tr. 38-41). Mr. Spurlock stated that his review of the roof-control plan indicated that persons were not to venture out from under the second row of roof supports, and that when side cuts were turned the roof area had to be supported. He

identified the roof-control plan (Exh. P-3) and

stated that safety precaution No. 13 at page six of the plan is the provision applicable to the area cited, and he conceded that it is more or less a "boiler plate" provision that appears in most mine roof-control plans. Precaution No. 13 provides that "before side cuts are started, the roof in the area from which it is turned, shall be supported with permanent supports according to the plan" (Tr. 42). However, he also alluded to another specific roof-control provision dealing with the belt section in question. He identified this roof-control plan provision as "sketch Number 3, entitled -Cut Sequence for Room Panels" (Tr. 44). That provision provides that "the miner operator shall remain outby the second row of support from the face during mining," but it does not denominate permanent support or the type of support required (Tr. 44). He also testified that there is one main belt entry for the section in question and that it was his understanding that it was bolted all the way up (Tr. 45).

In response to bench questions, Mr. Spurlock stated that he learned of the accident on the day it occurred, that Mr. Helton issued his citation that same day, and that the accident investigation took place after the citation issued (Tr. 47). In further response to questions from respondent's counsel, Mr. Spurlock indicated that the accident occurred off a crosscut of one of the rooms of the belt entry and not in the belt entry itself (Tr. 50).

MSHA inspector Everett R. Helton testified as to his mining experience and background, indicated that he has conducted numerous roof fall accident inspections, and confirmed that he conducted an inspection at the mine in question on August 29, 1978. Prior to going underground that day, he issued a section 103(k) order in order to close the section so that the investigation could be conducted. He went directly to the roof fall area and found the state inspectors, section foreman Dewey Brock, and respondent's safety inspector Steve Adams on the scene. He examined the roof fall area and found an offset in the roof line where the rock had "tailed out over about halfway of the room." The entire area had been bolted, but there were offsets in the bolts where the rock had fallen, and a board covered the area where the rock had fallen. This indicated to him that the roof area which fell had not been bolted and the roof bolts in the fall area were higher up in the roof than the other area where no rock had fallen. He identified Exhibit P-11 as a sketch of the fall area (Tr. 51-57). Respondent's counsel stipulated that the roof area which fell was not roof bolted at the time of the fall (Tr. 57). The area was bolted after the fall (Tr. 58).

Inspector Helton stated that he discussed the roof fall with the section foreman and safety inspector and advised them that it was his belief that the two men who were injured by the fall were working inby roof supports and that the roof had fallen because it was unsupported (Tr. 59). He also discussed the roof-control plan, and Mr. Adams assembled the men together and reviewed the roof-control plan with them. Neither Mr. Brock nor Mr. Adams objected to his conclusions as to how the injuries were caused

and they did not discuss the roof fall further. He discussed the citation with Mr. Adams, and since the roof had already been bolted, he followed MSHA policy by informing mine management that the roof-control plan would have to be discussed

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with the employees. He was informed that some of the employees understood the plan, while others did not, and he believed that Mr. Brock and Mr. Adams understood it (Tr. 58-63).

Inspector Helton testified that he was at the mine for 2 or 3 days after the accident gathering information for Mr. Spurlock's accident report and meeting with company and state officials for the purpose of upgrading the roof-control plan so that it could be made simpler and understandable, and it was later modified and changed (Tr. 65). The citation was issued because the roof was not supported by permanent roof supports as required by the plan and miners worked in by unsupported roof. Had the roof been supported by temporary supports on 5-foot centers, he believed the rock would not have fallen (Tr. 65). He also believed that mine management should have been aware of the potential danger of the unsupported roof, but he did not know whether the injured miners had returned to work (Tr. 66). Mine management exercised good faith abatement and cooperated with him in taking corrective action. Although Leeco, Incorporated operates other mines which he has inspected and is a large mine operator, the No. 3 Mine in question is a small mining operation (Tr. 67-69).

Inspector Helton stated that he discussed the fact that respondent did not comply with the requirement for permanent roof support at the fall area with the safety director and section foreman, and as far as he can recall they made no responses (Tr. 69). He did not assist Mr. Spurlock in writing his accident report, and the notes that were made during his accident investigation and from which the report was prepared were lost after they were given to Mr. Spurlock (Tr. 70).

On cross-examination, Inspector Helton testified that while he was in the mine after the accident, he observed wooden timbers in place and they were being used. Aside from the immediate roof fall area which had been bolted after the fall, the remaining area had not been cleaned up or disturbed. He confirmed that he issued the citation because there was no roof support of any kind where the rock fell and he is sure that he asked mine management about this but received no response (Tr. 72-73). He has in the past observed roof falls which had been timbered or bolted, and it is possible for a roof to fall even if bolted or supported (Tr. 74). He did not interview the two injured miners, but a state inspector advised him that he had and that he was told that two timbers had been installed at the fall area but were knocked out by the miner. Mr. Helton indicated that he may have observed some timbers lying in the area during his investigation, but he was not sure, and he did not know for a fact that two timbers were installed at the time the roof fell (Tr. 75-77). The roof-control plan requires permanent supports when a side-cut is made and that timbers constitute temporary support (Tr. 78).

Inspector Helton stated that when he arrived at the mine to begin his investigation the day after the roof fall, the mining machine had been removed, but he could not recall whether the debris had been cleaned up. However, in order to remove the



miner and the injured men, some of the

debris had to be removed, but he could not recall whether he observed any timbers at the scene of the fall, and indicated that the roof was approximately 35 or 36 inches above the floor at the place where it fell (Tr. 114-116).

#### Respondent's Testimony

David Johnson, safety director, Leeco, Incorporated, testified that his duties include conducting underground inspections, safety training, complying with MSHA's paperwork requirements, and attending MSHA close-out conferences. He was the company safety director in August 1978, and while he did not go underground to the scene of the accident, he conducted an inquiry of the accident of August 28, 1978, in his capacity as safety director, and he did so through Mr. Adams, a safety inspector who worked for him, reviewing the roof-control plan requirements, interviewing the injured miners, and attending the MSHA assessment conference. All of this was done in an effort to determine the cause of the accident (Tr. 120-127).

Mr. Johnson stated that the roof-control plan at the mine had been approved by MSHA on December 3, 1976, and MSHA inspectors had previously observed the mining cycle and raised no questions about it. He indicated that roof-control provision No. 13 at page 6 of the plan is a "stock" paragraph approved by MSHA in all plans, but that sketch No. 3, in the second paragraph on page 14 is the specific roof-control provision specifically applicable to the mine cutting sequence. That provision provides that the "[b]elt room entry shall be bolted before sidecuts are started. The miner shall not hole through into an unsupported area." The mine rooms have five entries, numbered consecutively from left to right, and the belt entry is located in the No. 3 entry. The side-cuts in question are in fact the breaks going to either the right or the left off the belt entry, and after the breaks are through and the adjacent entries advanced, the entry becomes the No. 2 entry and is no longer considered part of the belt entry. The accident in question occurred in the No. 1 entry at the break from the No. 1 to the No. 2 and it did not occur off the belt entry. The roof-control plan only requires that side-cuts off a belt entry be permanently supported (Tr. 127-129).

Referring to the sketch of the accident scene, and relying on interviews with one of the injured miners (D. D. Smith), and Section Foreman Brock, Mr. Johnson reconstructed the accident and indicated that the continuous miner was operating in the No. 1 entry, and after taking out a 10-foot lift, the area was timbered and roof bolted and the miner continued on its cycle across the section so as to allow the roof-bolting crew time to come in and support the lift area which had been mined. The miner would then come back and timbers would be installed at the face of the coal before the miner continued mining in that area. Once the area is bolted, the timbers are removed so as not to impede the travel of the miner. In this case, timbers were installed at the break in question, and once bolted, they are removed, and this is why none were observed there after the fall (Tr. 130-133). When Mr. D. D.

Smith came into the area to continue mining, timbers were erected, and he was operating the mining machine by remote control while standing

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under the timbered roof, and while observing the machine in operation, the roof fell. Mr. Teddy Smith, the miner helper, was standing behind Mr. D. D. Smith when the roof fell (Tr. 130-137).

Mr. Johnson testified that according to roof-plan provision sketch No. 3, page 14, in the first paragraph, it was permissible to use timbers as roof support at the location where the rock fell, and this is exactly what is done on the right side of the section under the MSHA approved roof-control plan. Under the plan, timbers were acceptable as permanent roof support on the right side of the section because it was an airway and men and equipment did not travel through the area. He conceded that timbers are not acceptable as permanent roof support on the left side of the section where the accident occurred, but they were installed in this case so that the operator could operate the miner from in between the timbers. After completion of the mining cycle, the miner is removed from the area, and the roof is bolted and the timbers are removed (Tr. 137-139).

On cross-examination, Mr. Johnson stated that roof-control provision No. 13 provides for permanent roof supports before side cuts are started. Further, the face area of the side-cut must be supported by permanent supports before a side-cut is started. Paragraph No. 2, page 14 of the plan (Sketch No. 3), requires that belt room entries be roof bolted before side-cuts are started, and that was done (Tr. 147-151). Under the mining cycle in effect at the mine, after the roof bolts were installed, the miner returned and commenced mining the area where timbers were set, and once it is mined, it too is roof bolted and the timbers are removed. The roof fell because the timbers which were installed did not hold the roof draw slate (Tr. 161-162).

In response to bench questions, Mr. Johnson explained that the miners who were injured were under timbered or bolted roof when the roof fell. The miner operator was maneuvering and controlling the mining machine with an "umbilical cord" type cable and a "black-box" which controlled the machine. The machine itself was cutting virgin coal at the face under unsupported roof, and the roof where the cutting was taking place was not required to be supported (Tr. 170-174). At the time of the accident, the roof plan required the miner operator to be outby the second row of roof supports, and in his view the miner operator was in fact outby the second row of roof supports because he was under timber supported roof as provided by the plan provision at page 14. While the plan requires a room to be roof bolted, the area where the accident occurred was not a side-cut off the belt entry (Tr. 176-180).

Mine foreman Dewey Brock testified that at the time of the accident on August 28, 1978, he was employed at the mine as a section foreman, and he recalled the roof fall. He examined the area where the fall occurred about 20 minutes before the fall, took a gas test, sounded the roof, and he observed both Mr. D. D. Smith and Teddy Smith engaged in their mining duties. Referring to Exhibit P-11, the sketch of the accident scene, he explained the mining sequence which had occurred. Two cuts of coal had

been mined, and one had been roof bolted and the other timbered.  
The new cut begun at the break

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was not timbered or bolted where the miner started in. The last time he saw the two Mr. Smiths they were behind and under a roof-bolted area installing bits in the miner in preparation for starting the last cut of coal. Neither he nor anyone else suggested that they proceed in by any unsupported roof, and he did know that they were timbering around the miner because it was normal procedure to bolt the left run and timber the right one, and to take out enough timbers to permit the miner to go in and take out the last cut. He believed that this was permissible under the roof-control plan as he understood it. He saw the two men later when he helped remove them from the fallen rock. Some of the fall debris was cleaned up and removed after the fall in order to rebolt and make the area safe. He observed timbers in the area after the fall, and two timbers were still in front of the area after the rock fell and timbers were also found under the fallen rock.

Mr. Brock stated that the mining method used at the time of the fall had been used for 2 years in the mine and the roof-control plan was regularly reviewed with the two men. Mr. D. D. Smith was an experienced miner and was not the type to take risks or venture under unsupported roof. The rock which fell was about 4 to 5 inches thick, about 3 feet wide, and about 6 to 8 feet long. It fell in one piece, and had it not been for the fact that timbers were holding most of the rock weight, Teddy Smith would have been killed rather than injured. The rock did not burst the timbers, but "just crealed them over" (Tr. 193-205).

On cross-examination, Mr. Brock testified that the roof area he examined prior to the fall was at the location where the miner was going to start mining and it was about 10 feet wide. The spacing between the timbers which were installed was 4 feet. Once the miner starts in, timbers are taken out so that it can maneuver about. The miner is 20 feet long and 10 feet wide and the roof area immediately above it is not supported. After it finishes the cut, the miner is backed out, and two timbermen go in and timber the area, and the miner operator and his helper may also help in the timbering if additional timbers are needed. He had supervised Mr. D. D. Smith for 5 years prior to the accident in question and he has never known him to take short cuts. After installing the miner bits, Mr. Smith and his helper would then have proceeded to mine coal by moving forward into the cut taken by the machine and the area was timbered. Timbers, bolts, and cribs have been used to support the roof and he believed the roof fall was a "freak thing," and the timbers supporting the roof 4 feet from the rib "wasn't enough to really hold it up" (Tr. 205-215).

Mike Eslinger testified that he is a member of respondent's safety department and indicated that he prepared the accident reports submitted to MSHA. He could not recall how he determined that the miners were 12 feet in by roof support as stated in the reports (Tr 235-236). In preparing the report, he relied on the citation which was issued and did not speak with the MSHA inspector, the section foreman, or the injured employees (Tr. 238).

Inspector Spurlock was recalled and in response to a question as to the source of MSHA's Assessment Office finding that "the continuous miner operator and his helper were inby the last row of roof bolts under loose

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unsupported roof and were caught by falling materials," he answered "I would say that he got it from that report right there. From reading this accident report" (Tr. 240). The inspector went on to explain his interpretation of the roof-control plan in question and explained the mining cycle in use in the section at the time of the accident. Referring to sketch No. 3 of the roof-control plan, Exhibit P-3, he identified the cut labeled "11" as the location of the roof fall in question and described the location as a room off the belt entry, and that cut No. 11 was a side-cut into the adjacent room. Under the plan, the roof area to the right as shown on the sketch is permitted to be supported by timbers while the area to the left is under a full roof-bolting plan. In other words, there are two roof support plans in use for the same pillar on the same room section. Anytime a side-cut is turned off a room neck, whether it be a turn off the belt entry or whether it is a side-cut into a room off the belt entry, the roof must be permanently supported by roof bolts.

Inspector Spurlock disagreed with the respondent's interpretation that sketch No. 3 only applies to belt entries and indicated that MSHA does not take that position insofar as the plan is concerned (Tr. 241-251). He indicated, however, that the use of timbers as temporary roof support is permitted in the area where the roof fall occurred and explained how they are used before the side-cut is actually mined (Tr. 253-255). He also indicated that the roof-control plan was revised 2 or 3 days after the accident so as to clear up the question of what constitutes a "belt room" (Tr. 276-277).

#### Deposition of Mr. D. D. Smith

On March 13, 1980, the deposition of one of the miners injured in the roof fall in question was taken by respondent's counsel, and MSHA's counsel was present and participated therein. Mr. Smith testified that at the time of the roof fall on August 29, 1978, he was operating a Jeffrey 101 continuous mining machine, and while turning to the right and backing up, a rock approximately "nine by ten by two to eight inches thick" fell. He stated that he was familiar with the roof-control plan in effect at the time and had received instructions with respect to that plan. At the time of the fall, timbers were set, and he personally installed two timbers, and the timbermen had also timbered the area in accordance with the plan. He was under the fall when it occurred and stated that the fall occurred under supported roof (Tr. 3-5).

On cross-examination, Mr. Smith explained the remote-control operation of the continuous miner, and stated that the two timbers which he set were approximately 4 feet apart. The break which was being mined at the time of the fall was 22 feet wide, and he was turning the heading off the break, and except for the space where the 10-foot miner was operating in, the area was timbered, but not roof bolted. Mr. Smith stated further that he has 14 years of mining experience, and that the fall occurred when he encountered a roof area where slate and sandstone came



together on the left side of the break being mined and "it just  
dropped loose" (Tr. 7). In his view, had the

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roof been permanently supported the fall would not have occurred, and while he did not know whether the placement of the timbers had anything to do with the fall, he indicated that it was possible that the miner may have come in contact with the timbers causing a release of pressure on the roof (Tr. 8, 11). He could not recall discussing the roof fall with any state or MSHA mine officials, but did discuss it with company official Dave Johnson (Tr. 8).

Mr. Smith stated that prior to installing the temporary timbers he sounded the roof, and also sounded it after the timbers were installed. While operating the continuous miner, he was positioned on his knees in 30-inch coal, and he was installing two safety timbers in front of him, timbers were behind him some 3 feet away, and Teddy Smith was behind him. The roof-control plan required temporary timbers for the area being mined but did not require roof bolts (Tr. 11-12).

#### Findings and Conclusions

##### Fact of Violation

In this case respondent is charged with one alleged violation of the provisions of 30 C.F.R. 75.200, which 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, 1980. 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. 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.  
[Emphasis added.]

The citation issued by Inspector Helton charges the respondent with a violation of section 75.200 because "the approved roof control plan was not being followed in that two employees were injured while mining coal inby roof supports." During the course of the hearing, the inspector stated that the

essence of the alleged violation is the fact that respondent failed to

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install any permanent roof supports at the roof area which fell as required by the roof-control plan (Tr. 77), and respondent has stipulated that the roof area which fell was not roof bolted at the time of the fall (Tr. 57).

Section 75.200 requires a mine operator to adopt and maintain a roof-control plan suitable for its mine and it is well settled that any violation of the approved plan is also a violation of section 75.200. In addition, section 75.200 specifically prohibits anyone from proceeding beyond the last permanent roof support unless adequate temporary support is provided or unless such temporary support is not required by the plan and the absence of such temporary support will not pose a hazard to the miners. My initial interpretation of the citation issued by Inspector Helton led me to believe that the theory of the alleged violation of section 75.200 rested on the fact that two miners ventured out from under a supported roof area inby to an area which was not supported, and while mining coal were injured when the unsupported roof under which they were working fell in on them. If this is in fact the case then a violation of section 75.200 occurred when the two miners proceeded out from under roof support inby to an area which was not supported.

During the course of the hearing and the testimony presented by Inspector Helton in support of the citation, it became obvious to me that he believed a violation of section 75.200 occurred because the respondent failed to install permanent roof supports in the roof area which fell, and that since he believed the roof-control plan required the installation of such permanent supports, the failure to do so constituted a violation of the roof-control plan and section 75.200. In other words, although the narrative condition cited by the inspector, on its face, states that the roof-control plan was violated because two men were injured while working inby roof supports, thus leading me to believe that they ventured out beyond a supported roof area, the inspector's emphasis is placed on the allegation that failure to provide permanent supports for the roof area which fell as required by the roof-control plan constitutes a violation of section 75.200. When viewed in light of the conditions cited on the face of the citation, I believe these distinctions become critical to a determination of whether MSHA has carried its burden of proof in establishing the alleged violation as charged in the citation by a preponderance of the evidence. These distinctions also are critical to any determination of the question of negligence.

In support of my initial interpretation of the citation, I relied on (a) the finding made by Inspector Spurlock at page 2 of his accident report (Exh. P-2), which states that "the roof control plan was not being complied with in that miners were allowed to work inby permanent support. A violation of 75.200"; (b) the narrative findings of the MSHA assessment officer who "specially assessed" this, citation (Exh. P-4), wherein he concludes that "The operator was cited for a violation of 75.200 because the roof-control plan was not complied with. Two employees were inby permanent roof support"; (c) the accident

reports submitted by the respondent (Exhs. P-12 and P-13),  
indicating that the two injured miners failed to comply with the  
roof-control plan by being 12 feet inby the last row of roof  
bolts at the time of the

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accident; and (d) the fact that as part of the abatement, employees were cautioned not to proceed beyond supported roof (Tr. 92).

In order to clarify MSHA's position as to the condition which it believes constitutes a violation of section 75.200, I asked the inspector and counsel questions concerning the theory of their case (Tr. 87-103). Counsel conceded that the citation can be interpreted to charge the respondent with a violation for permitting two men to walk out from under unsupported roof, and it may also be interpreted to charge a violation of the roof-control plan for failure to support the roof area which fell (Tr. 96).

Counsel stated further that the theory of his case is that two miners went into an area of unsupported roof, that mine management allowed them to proceed into that area, and that mine management failed to insure that the area was supported by failing to install permanent roof supports as required by the mine plan (Tr. 89-90).

Inspector Helton testified that the unsupported roof which fell was required to be supported by permanent supports and that this should have been done at that point in time when mining was deep enough to allow the miner operator to go inby permanent supports. In the instant case, he indicated that the roof fall occurred inby the last row of permanent roof supports and that mining had proceeded approximately 43 feet inby, or one cut, and that the distance was such as to require the installation of permanent supports before continuing mining. When asked why he did not include this information as part of the narrative description on the face of the citation, he answered "that never entered my mind" (Tr. 91-93). He also indicated that the miner being used to cut coal was operated by remote control, but as long as the operator was under roof support, the miner could advance as far as the operator wanted it to as long as ventilation is maintained (Tr. 95).

MSHA's counsel conceded that had mining stopped at the point where permanent roof supports were installed, there would be no violation. He believed the violation occurred when the two miners went out under unsupported roof, and it is his position that the presence of the section foreman in the area of unsupported roof shortly before the fall supports a finding that mine management was aware of the situation and should have taken steps to install permanent roof support before permitting mining to continue. In short, counsel stated that a prima facie case has been presented to establish that two miners were working under unsupported roof, and that Inspector Spurlock's accident report supports the conclusion that the "mine foreman was aware of the area and didn't know that the requirement, or wasn't aware of the requirement, didn't remember the requirement of having permanent supports before he allowed someone to go under there" (Tr. 101).

MSHA's position is that the roof which fell was not

supported at all, either by timbers or roof bolts, and Inspector Helton reached that conclusion on the basis of the fact that he observed no timbers in the area when he

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arrived on the scene the next day, and the fact that the roof bolts which were installed at the fall area was different from the ones installed to make the roof area safe to move into, thus leading him to conclude that the roof fall area was bolted after the fall occurred. Based on these facts, the inspector concluded further, that at the time of the fall, the two injured men were in fact working under unsupported roof. Respondent's position is that at the time of the roof fall the injured men were in fact positioned under roof which was supported by timbers, rather than roof bolts, and that based on its interpretation of the approved roof-control plan, that was permissible. MSHA takes the further position that the roof which fell was not supported by permanent roof supports; that is, it was not roof bolted as required by the roof-control plan. Respondent takes the position that MSHA has not charged it with a violation of the roof-control plan for failing to install permanent roof support at the area which fell (Tr. 188-191). Respondent maintains that it is charged with failing to support the entire roof area which fell, which is not the case, and that the roof-control provision relied on by MSHA only requires permanent roof support by means of roof bolts before a side cut is made in a belt entry (Tr. 222-225).

In closing arguments, MSHA's counsel took the position that the citation issued by Inspector Helton specifically charges the respondent with a violation of its roof-control plan in that respondent performed mining in the area where the roof fell before installing the required permanent roof supports, and that this is supported by the testimony of Inspector Spurlock (Tr. 280-281).

In his closing arguments, respondent's counsel took the position that the respondent is only charged with failing to follow its roof-control plan by permitting two employees to mine coal in by roof supports, and he maintains that respondent is not charged with a violation of its plan for failure to install permanent roof supports when mining a break or taking a cut in the area in question. Even assuming the fact that the citation can be interpreted as charging the latter, counsel argued further that the record adduced here indicates that the roof-control plan was subject to interpretation, that mine management made a reasonable interpretation that only belt entries where the belt was actually present were required to be permanently roof bolted, and that assuming a violation is found to have occurred, the confusion in interpreting the plan should be taken into account in mitigation of any penalty assessed (Tr. 279-280).

Based on the testimony and evidence adduced, I find that petitioner has not established its contention that the roof area which fell was completely unsupported. While it may be true that the inspector did not observe any timbers in the fall area the day after the accident, the fact is that most of the area had been cleaned up, rebolted, and debris removed. This was done to facilitate the removal of the injured men and to secure the area from further falls. Thus, the only evidence that MSHA could produce to prove its contention that the roof was completely unsupported at the time of the fall is the after-the-fact



observations of the inspector after the area had been cleaned up.

Although respondent conceded that the roof area which fell was not permanently supported by roof bolts, its contention that it was supported by timbers is supported by the testimony of Section Foreman Brock who testified that while a new cut which had just begun was not supported, the roof area above the previous two cuts were roof bolted and timbered, that when he last observed the two injured miners they were under roof which was permanently supported by roof bolts, and that he sounded the roof area some 20 minutes before it fell. He also testified that he was at the scene assisting the injured men and observed timbers among the debris, as well as timbers still standing in front of the fall area. The deposition of injured miner D. D. Smith reflects that he and his helper were under timber-supported roof when the fall occurred. As a matter of fact, Mr. Smith testified that he personally installed two additional safety timber supports in front of where he was working at the time of the fall, that he sounded the roof after installing those timbers, and that the area behind him was also timbered.

On the face of the citation, Inspector Helton indicates that the injured men were "inby roof supports". However, he does not further clarify this conclusion so as to make it clear whether the supports were permanent or temporary. In contrast, the conclusion made by Inspector Spurlock on page 2 of his accident report, Exhibit P-2, is that injuries resulted from a fall of "unsupported roof inby permanent supports", and he further concludes at page 3 that the injured men were performing work in an unsafe manner when they advanced "inby permanent supports to perform work other than installing supports". Compounding the confusion even further, is the accident report submitted by the respondent, Exhibit P-12, which on its face states that Mr. D. D. Smith "was not in compliance with roof control plan in that he was 12 feet inby the last row of bolts." Mr. Eslinger, the person who prepared the report, could offer no further explanation or clarification of his prior statement as shown in the report.

Considering all of the testimony adduced in this proceeding, including the exhibits previously discussed, I cannot conclude that at the time of the fall the injured miners were in fact under totally unsupported roof. I find Mr. Brock's testimony to be credible and have no reason to disbelieve Mr. Smith's testimony as reflected in his deposition. Under the circumstances, I conclude that respondent has established the fact that at the time of the fall, the two injured men were working under supported roof, and petitioner's contention to the contrary is rejected. I find further that the preponderance of the testimony and evidence adduced supports the conclusions that at the time of the fall (1) the roof area which fell was not roof bolted, but was supported by timbers; (2) the face of the cut which was being taken at the time of the fall was totally unsupported; (3) the previous cut which was taken immediately before the one being mined at the time of the fall was supported by timbers; (4) the previous cut taken before the one which was timbered was roof bolted; (5) all roof areas immediately outby the fall area were either roof bolted or timbered; and finally,

(6) there is no credible evidence to support the conclusion that at the time the roof area in question fell, the two injured miners were working under a totally unsupported roof, or that respondent in any way allowed, instructed, or otherwise condoned the practice of miners working under unsupported roof.

Although I find the citation issued by Inspector Helton to be less than a model of clarity, I believe the testimony and arguments presented by the parties supports the conclusion that from MSHA's point of view, the thrust of the alleged violation is the assertion by MSHA that the applicable approved roof-control plan required the roof area which fell to be permanently supported by roof bolts, and the failure to do so exposed the miners working under that roof area to serious injuries from a fall which in fact occurred in this case. On the other hand, the respondent, while conceding that the roof area which fell was not permanently supported by roof bolts, nonetheless takes the position that the roof area in question was not required to be permanently supported by roof bolts, and that under the applicable roof-control provisions and mining procedures in effect at the time in question the roof area in question was not required to be permanently supported, and since it was in fact timbered as required by the plan, no violation occurred.

The approved roof-control plan of December 2, 1976 (Exh. P-3), which is the plan in effect at the time the citation in question was issued, contains, in pertinent part, the following roof support requirements:

(1) Page 6, numbered paragraph 13, under the section entitled "Safety Precautions for Full Bolting and Combination Plans," states as follows:

Before side cuts are started, the roof in the area from which it is turned shall be supported with permanent supports according to the approved plan.

(2) Sketch No. 3, entitled "Cut Sequence for Room Panels," provides as follows:

Miner operator shall remain outby the second row of support from the face during mining. No person shall advance inby the miner operator during mining. Belt (room)(entry) shall be bolted before side cuts are started. The miner shall not hole through to an unsupported area.

All places are to be bolted on not more than 5-foot centers except for the area shown above (extreme right place).

As indicated earlier, the citation issued in this case charges the respondent with a violation of section 75.200, because two miners violated the roof-control plan by working inby roof supports. It is clear that the failure by a mine operator to comply with a provision of an approved roof-control plan constitutes a violation of section 75.200, Peabody Coal Company, 8 IBMA 121 (1977); Affinity Mining Company, 6 IBMA 100 (1976); Dixie Fuel Company, Grays Knob Coal Company, 7 IBMA 71 (1976). It is also clear that section 75.200 is violated if persons proceed beyond the last permanent roof support without providing adequate temporary support.

On the facts presented in this case, the inspector who issued the citation did not specifically set out the specific roof-control plan which he believed was violated. The citation simply states that the plan was not being followed "in that two employees were injured while mining coal inby roof supports." By failing to designate the specific roof-control plan provision allegedly violated, it is somewhat difficult to ascertain from a reading of the condition cited the precise theory of MSHA's case. As indicated above, MSHA has failed to establish that the employees were in fact working under unsupported roof when the rock fell. I have found that respondent has established that at the time of the fall, the injured miners were located under supported roof. The critical question presented, however, is whether they were under a roof area supported permanently by roof bolts. If they were, then no violation has been established. If they were not, then a violation has been established, notwithstanding the inarticulate description of the condition on the face of the citation. The answer to this question is dependent on an interpretation of the applicable roof-control plan provision, and since respondent concedes that the roof which fell was not roof bolted, one must turn to the roof-control plan for further guidance.

I have reviewed the applicable roof-control provisions in question, and while the witnesses expressed some confusion as to which provision is applicable, their asserted confusion lies in their attempts to differentiate certain distinctions in the use of such terms as "belt entry", "breaks", "rooms", "necks", and "cuts". One would think that in dealing with such an important subject as a roof control plan on a day-to-day basis, that MSHA, as the enforcing authority, and mine management, who have the primary responsibility for insuring the safety of miners who are expected to follow the plan, understand the plan and are able to communicate with each other as to precisely what the plan means and where it applies. After listening to the testimony of the witnesses in this proceeding, it seems obvious to me that at the time the citation issued, neither MSHA nor mine management was clear as to the precise meaning or application of the plan. My conclusion in this regard is further supported by the fact that the parties indicated that the roof-control plan has since been amended and clarified to clear up any confusion which existed at the time the citation issued.

Upon review of paragraph No. 13 and sketch No. 3 of the roof-control plan, which the parties agree are the applicable plan provisions, I conclude that both provisions envision permanent roof bolting before side-cuts are mined in any room off a belt entry. While the exception stated in sketch No. 13 does permit timbering in certain areas to the right of any belt entry, it is clear to me that since the area where the fall occurred was to the left, the exception is clearly inapplicable. Further, when read together, both plan provisions require that the roof be supported permanently with roof bolts before any side-cuts are taken. On the facts presented in this case, it seems clear to me that at the time the cut in question was started, the roof was not permanently supported by roof bolts. Respondent conceded

this was the case, and Foreman Brock indicated that the cut was totally unsupported, and that the previous cut was only timbered.

Further, Mr. Smith indicated that the area from which he was beginning the new cut was only timbered and not roof bolted, and while Mr. Johnson alluded to the requirements of the plan, which permitted timbering on the right side of the entry, he obviously, and apparently erroneously, believed that the same requirements were permissible for the left side. However, it seems clear to me that while timbering was permissible on the right side, it was not so on the left, and he finally conceded this fact. What obviously occurred in this case is that timbers were installed, the miner moved out and went to another area of the mine, and upon returning to the area in question proceeded to begin a new cut before removing the timbers and installing permanent roof support by means of roof bolting. In these circumstances, I conclude and find that by failing to permanently support the roof area immediately outby the roof fall area where the miners were working respondent violated its roof-control plan, and the citation is AFFIRMED.

#### Negligence

I find that the evidence and testimony adduced in this proceeding supports a finding that the violation resulted from a condition or practice which the respondent should have been aware of, and that the respondent failed to exercise reasonable care in the circumstances. A mine operator is expected to know the provisions of his own roof-control plan and to insure that his work force is aware of it. Here, the testimony of the witnesses reflects much confusion as to the precise meaning of the plan. However, this fact does not excuse the violation nor can it serve as an absolute defense, and the fact that prior MSHA inspections did not result in any violations for the same practice is no excuse. On the facts here presented, it took a roof fall to alert the parties to the fact that the approved plan was obviously not a model of clarity, since the plan was changed to clear up the apparent ambiguity. This is not the best method to devise such changes, and it is hoped that this episode will impress the parties in this regard.

As indicated earlier in this decision, I find no basis for finding that the respondent deliberately or recklessly disregarded its plan by permitting or condoning miners working under unsupported roof. In the circumstances here presented, I find that the violation resulted from ordinary negligence.

#### Gravity

The roof fall in question injured two miners. As stated by Mr. Smith in his deposition, had the roof been permanently supported, the fall would probably not have occurred. I find that the violation was serious.

#### Good Faith Compliance

The citation in question was timely abated and I find that the respondent exercised good faith in achieving compliance.

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

The parties stipulated that the mining operation in question was small in size and that respondent will not be adversely affected by any civil penalty assessed by me in this matter, and I adopt these stipulations as my findings in this regard.

#### Prior History of Violations

The parties stipulated that respondent's history of violations before August 29, 1978, consists of 144 citations. Since the petitioner failed to introduce any further information concerning those prior violations, and in particular, whether respondent has had previous violations of section 75.200, or the time frame within which they were issued, I cannot conclude that respondent's prior history is such as to warrant an increase in any civil penalty assessed on the basis of that prior history.

#### Penalty Assessment

I take note of the fact that the initial assessment made in this case by MSHA was on the basis of a "special assessment" and that MSHA's Assessment Office waived the use of the formula contained in 30 C.F.R. 100.3, in making that initial assessment. I also take note that the initial assessment obviously took into account the allegations that the two employees were in by roof supports, and based on the Assessment Office findings, Exhibit P-4, it is further obvious that the initial assessment took into account the allegations that mine management somehow permitted or condoned this action. However, these assertions have not been established, and I am not bound by the Assessment Office evaluation of the citation, and after taking into account all of the evidence adduced in this de novo proceeding, including the circumstances surrounding the confused interpretation of the roof-control plan, and the criteria found in section 110(i) of the Act, I find that a civil penalty of \$3,500 is warranted in this case.

#### ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of \$3,500 for a violation of 30 C.F.R. 75.200, as noted in Citation No. 127294, issued on August 29, 1978, and payment is to be made within thirty (30) days of the date of this decision and order.

George A. Koutras  
Administrative Law Judge