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

PEABODY COAL COMPANY,  
CONTESTANT

v.

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

UNITED MINE WORKERS OF AMERICA,  
(UMWA),

RESPONDENTS

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

v.

PEABODY COAL COMPANY,  
RESPONDENT

Contest of Citation

Docket No. KENT 81-92-R

Citation No. 1032760  
February 2, 1981

Star North Underground Mine

Civil Penalty Proceeding

Docket No. KENT 81-155  
A.O. No. 15-03161-03075V

Star North Underground Mine

DECISIONS

Appearances: Thomas A. Gallagher, Esq., St. Louis, Missouri, for  
contestant-respondent Peabody Coal Company;  
Thomas A. Grooms, Esq., U.S. Department of Labor,  
Nashville, Tennessee, for respondent-petitioner  
Secretary of Labor.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern an unwarrantable  
failure citation served on Peabody Coal Company by an MSHA  
inspector pursuant to section 104(d)(1) of the Federal Mine  
Safety and Health Act of 1977, and a subsequent

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civil penalty proposal filed by MSHA pursuant to section 110(a) of the Act, seeking a civil penalty assessment based on the alleged violation as described in the citation.

Peabody filed a timely notice of contest challenging the inspector's unwarrantable failure findings, as well as his finding that the citation was significant and substantial. On motion by MSHA, the dockets were consolidated for hearing at Nashville, Tennessee, on September 2, 1981, and MSHA and Peabody appeared, but the UMWA did not.

#### Applicable Statutory Provisions

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

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i), which requires consideration of the following criteria before a civil penalty may be assessed for a proven violation: (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.

3. Commission Rules, 29 C.F.R. 2700.1 et seq.  
Stipulations

The parties stipulated to the following (Tr. 4):

1. The Administrative Law Judge has jurisdiction over these matters.

2. Peabody Coal Company engages in business which affects interstate commerce.

3. Peabody Coal Company is a large coal operator.

4. The amount of the penalty which may be imposed will not affect Peabody Coal Company's ability to remain in business.

#### Issues

The issues presented in these proceedings includes the following: (1) whether the conditions or practices cited by the inspector on the face of the citation constituted a violation of the cited mandatory safety standard, (2) whether the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other safety or health hazard, and if such violation was caused by the unwarrantable failure of the operator to comply with the mandatory health or safety standard, (3) the appropriate civil penalty which should be assessed against the operator for

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the alleged violation based upon the criteria set forth in section 110 of the Act. Additional issues raised are identified and disposed of where appropriate in the course of these decisions.

#### DISCUSSION

Section 104(d)(1) Citation No. 1032760, issued by MSHA inspector Arthur J. Parks, on February 2, 1981, charges a violation of 30 C.F.R. 75.1306, and the inspector concluded that the conditions cited constituted a "significant and substantial" violation. The citation was issued because the inspector believed that the explosive magazine on the No. 7 mining unit was not adequately protected from a potential roof fall. The condition or practice cited by the inspector on the face of the citation is as follows:

The explosives magazine on the No. 7 unit (025) was not adequately protected from potential roof fall. The magazine was sitting in a room neck (approximately 10p deep) next to intersection (spad No. 246) approximately 25p outby a roof fall in the No. 6 entry. The roof was cracked from the fall along the rib into the room neck and a crack from the fall extended [sic] into the crosscut opposite the magazine (this crosscut was 24p wide at the mouth). Management knew of the abnormal condition (the roof fall) but there were only three timbers set around the magazine and one of the three crossbars between the magazine and fall was broken.

The conditions cited were subsequently abated, and the citation was terminated the same day it was issued, and the action taken to abate the conditions is described by the inspector as follows: "The area was timbered and the magazine was moved to another area."

#### MSHA's Testimony and Evidence

MSHA inspector Arthur J. Parks testified that he issued the citation in question on February 2, 1981, after he observed a magazine containing explosives situated close to a massive roof fall which had occurred in the No. 7 unit of the No. 6 entry. He stated that at least 8 feet of the roof had caved in and a mixture of both small and large rocks had broken off. The inspector pointed to a diagram showing the location of the violation which he had prepared from his notes after issuing the citation (Exh. G-2). He indicated that the section magazine was sitting in a room neck that was about 10 feet deep and 18 feet wide. There were three timbers positioned around the magazine. Mr. Parks stated that there were cracks which ran directly from the roof fall into the area where the magazine was located. One fracture ran almost 25 feet from the brow of the roof fall to near the magazine. He also pointed to a fracture on the right side of the diagram which was about 12 to 14 feet long. He testified that these fractures indicated that the roof was about

to fall. In his opinion, the fractures were not caused by a cutting machine or other instrument. He stated that the cutting machine marks located on the rib opposite the magazine were distinguishable from the fractures (Tr. 7-17).

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Mr. Parks referred to a previously issued imminent-danger order issued on December 22, 1980, for a violation of the roof-control plan (Exh. G-7). In describing the conditions which led to him issuing that order, he stated that Jesse Campbell, the foreman, had acknowledged that the roof was in extremely bad condition but that they were proud of the fact that no one had been injured due to rock falls. The inspector stated that he was worried about the attitude of the mine's management because they would wait until the roof started to break up before bolting it or timbering it (Tr. 37-41).

Mr. Parks explained the notations on Exhibit G-5 which showed the location of prior orders and citations issued in connection with rock falls and also showed the location of the rock falls that were reported. He indicated that these roof condition violations had all occurred in the same general area where the citation in question occurred (Tr. 43-44).

On cross-examination, Mr. Parks admitted that his diagram of the violation (Exh. G-2) was not to scale and that he had not actually measured the cracks. He agreed that the diagram showed that there were two crossbars outby the brow of the fall and that this would be sufficient support under the roof-control plan. The inspector testified that the plan required a minimum of 36-inch roof bolts and that the operator was using 48-inch resin bolts in the room neck (Tr. 67-72).

Mr. Parks stated that the three timbers around the magazine provided additional support but not adequate protection for the magazine. He felt that additional timbers in front of the crossbars were needed. He also thought that the intersection leading to the magazine should only be wide enough to let a scoop in to retrieve the magazine (Tr. 72).

Mr. Parks confirmed that a preshift inspection had taken place on February 2, 1981. He also testified that management corrected the cited condition as expediently as possible. He admitted that he had not checked the timbers surrounding the powder magazine to see if they were snug. He agreed that if in fact the roof was coming down, the timbers would have been firmly in place. The inspector also stated that he had not asked Mr. Todd why he located the magazine in this particular position (Tr. 74-92).

On redirect examination, Mr. Parks noted that the roof-control plan specifications were only a minimum and that additional precautions were necessary for abnormal conditions. He felt that the conditions of February 2, 1981, necessitated additional support. He stated that there was just 18 inches of clearance over the top of the powder magazine (Tr. 93-94, 140). He agreed that the three posts in front of the magazine provided additional support. He also admitted that the ribs provided some support (Tr. 94, 143).

In response to bench questioning, Mr. Parks stated that he did not know whether the roof had cracked before it had fallen.

The roof fall had been

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reported on February 1, 1981. He stated that he would not have issued any citations if the fallen crossbars had been in place, the entryway had been 20 feet instead of 24 feet wide, and the powder magazine had not been underneath the roof fall (Tr. 104, 135-139).

Jeffrey Bivens, representative of the union, testified that he accompanied Inspector Parks on his inspection of the mine on February 2, 1981. He testified that he observed the powder magazine which had two timbers on one side of it and one on the other. He noticed cracks running from the rock fall into the room neck where the magazine was situated, and thought that the fractures were caused by the weight of the roof breaking rather than by a cutting machine. He noted that machines make very distinct markings unlike fractures. In his opinion, the powder magazine was not adequately protected from a roof fall, and that there were considerable problems with the roof conditions in this area. At times, the roof would fall before it could be supported (Tr. 106-110).

Mr. Bivens described the powder magazine as being a 5-foot by 8-foot wooden box. It had a partition on one end with one section used for storing electric detonators. The rest of the box was used for storing the actual powder. The magazine was moved around the mine by a scoop. He had never observed this particular magazine in this position prior to February 2, 1981, although he had seen similar magazines stored in other niches with posts around them. In these other areas, when there were adverse roof conditions, extra steps had been taken to protect the magazines. He did not know whether the three posts surrounding the magazine in question had been installed in connection with the roof fall or prior to it (Tr. 116-120).

Charles Willis, a member of the safety committee, testified that he was shown all the conditions, including the cracks and the roof fall, which led to issuance of the citation in question.

He stated that he has been around underground mining for about 22 years, although he does not work underground. Mr. Willis testified that the fractures were probably caused by the stress of the fall when it took weight in the entry. He stated that a cutting machine would make a wide, straight cut and that these cracks were circular and narrow. Mr. Willis testified that he was aware of problems with the roof and that No. 7 unit was having more problems than the other units at the time (Tr. 123-128).

#### Operator's Testimony and Evidence

Finis Todd, a section foreman for Peabody Coal Company, testified that he had arrived at the No. 7 unit around 4 o'clock on February 2. After making an onshift examination and noting that the powder magazine was in "good shape and adequately protected," he was told that Inspector Parks and Jim Young wanted to see the powder box. Upon finding Mr. Parks, he was told about some voltage cable violations. After correcting these, he



returned to the No. 6 entry and saw Jim Young setting up a row of timbers across the intersection, as part of the additional support ordered by the inspector. Mr. Todd testified that he then found Mr. Parks in the crosscut between the

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No. 2 and No. 3 entries and was shown some cracks which needed bolting or timbering before he could run the entry. Since he did not have a trussbolt operator, Mr. Todd decided to move the unit to the rooms on the return side. He ordered the scoop operator to knock the timbers out and remove the powder magazine from the room neck in the No. 6 entry. Mr. Todd described the powder box as being 6 feet wide and 8 feet long and 36 inches in height, and it was located about 4 feet from the intersection. After informing Mr. Parks of his action, the inspector told him he was issuing a section 104(d)(1) order on the powder magazine even though he had moved it. Mr. Todd stated that he was baffled because it was the first time that he knew anything about the citation on the powder magazine (Tr. 145-157).

Mr. Todd testified that the rock fall in the No. 6 entry posed no danger to the powder magazine. The roof had been crossbarred prior to the rockfall and the area outby the crossbars was hard and sounded good. He indicated that the cracks on the left side of the entry were small and did not run toward the powder box while the cracks on the right side were caused by the cutter bar butting the roof while cutting the corner of the inby rib. Mr. Todd testified that the area of the roof fall was in conformance with the roof control plan except for the wide crosscut. He stated that this wide area did not constitute any danger to the powder magazine sitting in the room neck. The powder magazine also had the face and left rib of the room neck for support (Tr. 158-169).

Mr. Todd testified that the roof was draw rock and that it would crack up as soon as coal was extracted or even a week afterwards. He indicated that header boards on each pin were used to keep the draw rock from breaking up, and that they had discovered a pattern of slips in the roof from the roof falls which had occurred earlier in the year. In the No. 6 entry they noticed water leaking in the top and had set two rows of timbers down the middle of it (Tr. 167-179).

On cross examination, Mr. Todd admitted that the face and rib support around the powder box would not help if the roof fell. He also stated that the magazine was not literally snug against the corner since a timber separated the magazine from the back wall. He testified that the pattern of slips was used to predict the next area of slips. Once they found the top breaking up they would trussbolt it. He stated that the February 2 fall was impossible to predict since the only indication of bad condition was the water coming out of the top (Tr. 190-196).

Jim Allen, safety manager for Peabody Coal testified that he had prepared respondent's Exhibit 4 showing the area of the roof fall in the No. 6 entry. He had investigated the circumstances surrounding the issuance of the 104(d)(1) order and took down measurements and observed the roof conditions. Mr. Allen stated that the mouth of the crosscut measured 25 feet and that this was a violation of the roof control plan. He testified that the timbers around the powder box was a practice initiated under an old enforcement policy which was no longer in effect (Tr.

230-334).

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On recall, Mr. Parks testified that he did not dispute Mr. Todd's testimony that one rib was deliberately cut down with a cutting machine. He agreed that it was sheared by the machine to allow the shuttle car to come around it. He indicated that the stress cut ran through the crack made by the cutter, and was bad enough to indicate a potential roof fall (Tr. 260-261).

#### Findings and Conclusions

Contestant has challenged the section 104(d)(1) Citation No. 1032760 issued to it for an alleged violation of 30 C.F.R. 75.1306. Section 104(d)(1) of the Act provides in part, that

(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

Therefore, in order for the citation in question to be valid, MSHA bears the burden of showing that a violation of 30 C.F.R. 75.1306 existed, that it was of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and it was caused by the unwarrantable failure of the operator.

#### Fact of Violation

Peabody Coal Company is charged with a violation of 30 C.F.R. 75.1306, which provides as follows:

When supplies of explosives and detonators for use in one or more working sections are stored underground, they shall be kept in section boxes or magazines of substantial construction with no metal exposed on the inside, located at least 25 feet from roadways and power wires, and in a dry, well rockdusted location protected from falls of roof, except in pitching beds, where it is not possible to comply with the location requirement, such boxes shall be placed in niches cut into the solid coal or rock.

Under this standard, MSHA must show first that the powder magazine in question was located in an area where there was a possible danger of a roof fall. Once this fact is established, the Secretary must prove that the magazine was not adequately protected from a potential roof fall.

The evidence of record indicates that the No. 7 unit, in which the alleged violation occurred, was the site of five reported roof falls in the previous 4 months (Exhs. G-6 and G-7). The most recent roof fall of February 1, 1981, had taken place next to an intersection which bordered the roomneck in which the powder magazine was located. Cracks and deteriorated roof were visible and extended from the area of the roof fall into the roomneck containing explosives. While the operator contends that these roof fractures were caused by a cutting machine rather than by the stress of the roof fall, the testimony and evidence supports an opposite conclusion. The inspector stated that the cracks originated at the brow of the fall and ran almost 25 feet to the magazine. Jeffrey Bevins substantiated this observation. Mr. Willis testified that they had been having problems with the roof in No. 7 unit and that he had been shown the cracks by Mr. Parks on February 3, 1981. Additionally, he described the cracks as being narrow and noted that those made by cutting machines are usually 6 to 7 inches wide. Mr. Bevins also indicated that cutting machine fractures were very distinct from stress fractures. Therefore, even though Mr. Todd asserted that there was only a small stress crack which did not run toward the powder box and another crack which had been caused by a cutter bar, the preponderance of the evidence warrants the conclusion that the roof near the powder box contained deteriorated or fractured roof. The description of the cracks, their location, and the inspector's familiarity with roof conditions and potential problems indicates that there was a possible danger of a roof fall in the area where the powder magazine was located.

The issue then becomes whether the magazine was adequately protected from a roof fall. While Mr. Todd initially contended that the face and left rib of the room neck provided support for the powder magazine, he later admitted that these surfaces would give no protection in the event of a roof fall. Roof bolts but not crossbars had been placed in the roof over the powder magazine. The three timbers that surrounded the explosive's box provided the only protection for it. Considering the history of roof falls in this entry and the fact that the inspector cited the operator with a violation of the roof control plan on this same day near the same intersection shared by the roomneck in question, the operator should have provided the powder magazine with additional protection. The method of abatement which included timbering and correcting the wide entry in the intersection indicates that such additional protection was possible. Under the circumstances of this case, I find that MSHA has established by a preponderance of the evidence that there was a danger of a roof fall and that the powder magazine was not adequately protected. Accordingly, a violation of section 75.1306 has been established and the citation is AFFIRMED.

Significant and Substantial Contribution to the Cause and Effect of a Mine Safety Hazard

In *Secretary of Labor v. Cement Division, National Gypsum Company*, 3 FMSHRC 822, 825 (1981), the Commission defined the phrase significant and substantial violation as being one if,

"based upon the particular facts surrounding [the] violation,  
there exists a reasonable likelihood that the hazard contributed  
to will result in an injury or illness of a reasonably

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serious nature." In making this determination, the Commission noted that "the inspector's independent judgment is an important element in making significant and substantial findings, which should not be circumvented."

Here the facts show that there was a danger of a roof fall in the area where the powder magazine was located. As the inspector stated in his report, "there is enough evidence to believe that the intersection might fall." (Exh. G-2). If a roof fall had occurred over the magazine, the explosives could detonate causing fatal injury. Since the inspector found that over 10 persons could have been affected by such an explosion, this violation presented a hazard that was of an extremely serious nature. Leaving aside the inspector's opinion on this violation, I find that the fact of violation, together with the fact that men worked in this entry satisfies the Commission's requirements for a significant and substantial violation. Any explosion in a mine could result in an injury of a reasonably serious nature. Therefore, MSHA has established that the violation of section 75.1306 was of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.

#### Unwarrantable Failure

A violation of a mandatory standard is caused by an unwarrantable failure to comply with the standard where "the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of lack of due diligence, or because of indifference or lack of reasonable care." Zeigler Coal Company, 7 IBMA 280, 295-296 (1977). The evidence in this case, while not showing indifference on the part of the operator, does show knowledge of deteriorating roof conditions and a lack of reasonable care.

The inspector listed several factors which led to his issuance of an unwarrantable failure citation. The roof was cracked and broken and should have been observed by the operator. Additionally, the powder magazine was located near a roof fall and near an obvious violation of the roof control plan in that a crosscut was too wide. The inspector testified as to prior roof falls and the general bad condition of the roof. He stated that he was worried about the attitude of the operator and its employees. They were proud of the fact that no person had been injured due to rock falls. If the roof started breaking, they would then bolt it or timber it, but they would not take any preventative measures (Tr. 37-41). Jeffrey Bevins verified this practice of "wait and see" by the operator. He noted that there had considerable problems with roof falls, bad tops and fractures, and that "it fell in before we could do anything." (Tr. p. 111).

The operator's witness, Mr. Todd, testified that it was impossible to predict the fall of February 2, 1981, since the only indication of a bad condition was the water coming out of

the top (Tr. p. 176). He stated that they had been studying the pattern of slips and trussbolting the roof



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according to the pattern of roof falls. Since the area where the powder magazine was located was outside the predicted roof fall zones, they had not considered it to be dangerous (Tr. 209).

Having considered the testimony and evidence presented, it is apparent to me that the operator was aware of the bad roof conditions in the No. 6 entry. I have found that the powder magazine was not adequately protected and the resulting explosion could result in serious injury and I find that the violation of section 75.1306 was caused by the unwarrantable failure of the operator. Accordingly, the citation issued under section 104(d)(1) is valid.

#### Civil Penalty

#### Negligence

Although I have found that the violation of section 75.1306 was caused by the unwarrantable failure of the operator, I do not conclude that the operator was grossly negligent. The facts show that the operator had provided some protection for the powder magazine in that three timbers surrounded it. The operator contends that the roof around the magazine was not deteriorated and it was not necessary to put up crossbars or additional timbers. While I do not agree with this latter contention by the operator, I find that the failure to exercise reasonable care with regard to the powder magazine constitutes ordinary negligence.

#### Gravity

The finding that this was a "significant and substantial violation" warrants the conclusion that this was a serious violation. As Mr. Parks noted in his report, even if the roof fall itself did not cause an explosion, the aftermath of the roof fall or subsequent recovery of the magazine might cause the powders to detonate. (Exh. G-2). Accordingly, this violation was serious.

#### Good Faith Compliance

The inspector stated in his report the violation was abated within the time specified and he considered this to be normal compliance. At the hearing, however, Mr. Parks testified that mine management corrected the condition as quickly as possible once the violation was brought to their attention. This indicates rapid compliance and I have considered this in assessing the penalty for this violation.

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

The parties have stipulated that Peabody Coal is a large operator and that the penalty which I impose will not affect its ability to remain in business. I have adopted this stipulation in making my assessment of a civil penalty.

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#### History of Prior Violations

The assessed violation history report filed in this proceeding indicates a rather extensive history of violations in the 2 years preceding the issuance of the citation in question. Particularly, I have given considerable weight to the fact that the company was cited for five roof control violations in the No. 7 unit during a 4-month period ending with the February 1, 1981, roof fall. This history of roof falls is reflected in the civil penalty assessment.

#### Penalty Assessment and Order

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that a civil penalty in the amount of \$1,000 is reasonable and appropriate for Citation No. 1032760, and respondent is ORDERED to pay the penalty within thirty (30) days of the date of this decision.

George A. Koutras  
Administrative Law Judge