

CCASE:
SOL (MSHA) V. MATHIES COAL
DDATE:
19820608
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

Civil Penalty Proceeding

Docket No. PENN 82-5
A.O. No. 36-00963-03171

v.

Contest of Citation

MATHIES COAL COMPANY,
CONTESTANT-RESPONDENT

Docket No. PENN 81-230-R
Citation No. 1050403 7/30/81

Mathies Mine

DECISION

Appearances: Covette Rooney, Attorney, U.S. Department of Labor,
Philadelphia, Pennsylvania, for the petitioner-respondent
H. Juanita M. Littlejohn, Esquire, Pittsburgh, Pennsylvania,
for the contestant-respondent

Before: Judge Koutras

Statement of the Proceedings

These consolidated cases concern a contest filed by Contestant-Respondent Mathies Coal Company challenging the legality of one citation issued by an MSHA inspector on July 30, 1981, pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977. In addition, Petitioner-Respondent MSHA seeks a civil penalty pursuant to section 110(a) of the Act for the alleged violation stated in the citation. A hearing was conducted in Pittsburgh, Pennsylvania on March 18, 1982, and the parties appeared and participated therein. The parties waived the filing of posthearing arguments.

Issues

The issues presented in this proceeding include the question as to whether contestant-respondent violated the provisions of the mandatory safety standard cited by the inspector in the citation, whether the violation was "significant and substantial", and the appropriate civil penalty which should be assessed for the alleged violation.

Applicable Statutory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., particularly sections 104(a) and 104(d)(1).

~1122

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, 20 C.F.R. 2700.1 et seq.

Discussion

The section 104(a) citation no. 1050403, was issued on July 30, 1981, by MSHA Inspector Joseph J. Baniak, and the condition or practice cited is described on the face of the citation as follows:

Evidence observed and measured showed that workers were 7-1/2 feet in by roof supports and a danger board while installing line brattice in the unsupported face area of No. 2 entry 26 Butt section ID 056. This was left from the mid-night shift. NOTE: This condition was corrected; however, the citation shall not be terminated until the approved roof control plan is reviewed with the mid-night shift crew members who left this condition. (No. signs were evident in the soft muddy bottom that any type of support was installed.

Inspector Baniak charged a violation of mandatory safety standard 30 CFR 75.200, and also included a finding in the citation that the cited condition or practice constituted a "significant and substantial" violation of section 75.200. The abatement time was fixed as 8:30 a.m., July 31, 1981.

Inspector Baniak terminated the citation on July 31, 1981, at 8:00 a.m., and the action taken by the operator to abate the conditions cited is described on the face of the abatement notice as follows:

The approved roof control plan was reviewed with the mid-night shift crew members that worked in the 26 Butt Section I.D. 506.

Stipulations

The parties stipulated to the following (Tr. 5-6):

1. The Mathies Mine is owned and operated by the respondent, Mathies Coal Company.
2. The Mathies Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject citations were properly served by a duly authorized representative of the Secretary of Labor at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance and for the truthfulness or relevancy of any statement asserted therein.

5. The assessment of a civil penalty in this proceeding will not affect respondent's ability to continue in business.

6. The appropriateness of the penalty, if any, to the size of the coal operator's business, should be based upon the fact that the respondent's Company and Mine's annual production tonnage is one million, four hundred, fifty four thousand, three hundred forty nine.

7. The respondent demonstrated ordinary good faith in it's handling of compliance after the issuance of the citation.

8. The Mathies Mine was assessed a total of one thousand, one hundred, ninety one violations during the twenty-four month period preceding the issuance of the instant citation. Two hundred five of these violations were issued for violation of 30 CFR 75.200.

9. The parties stipulate to the authenticity of their exhibits, but not to their relevance or for the truth of the matters asserted therein.

Testimony and evidence adduced by the petitioner

MSHA Inspector Joseph T. Baniak, testified as to his background and experience, and indicated that he has been a mine inspector for some eleven years. He confirmed that he inspected the mine on July 30, 1981, as part of an MSHA "ventilation saturation inspection", and confirmed that he issued the citation in question (exhibit P-1). The citation was abated by another inspector and Mr. Baniak identified a copy of the termination notice (exhibit P-2). Mr. Baniak stated that he rode the mantrip into the section with inspector escort Tom Rigotti and section foreman Allan Tedeschi and they proceeded to the working places through the number three entry to the number two entry. Mr. Baniak stated that he wanted to inspect the area to determine how it was left by the previous midnight shift.

Mr. Baniak testified that upon inspection of the number 2 entry he observed that part of the line brattice was hung 7-1/2 feet inby temporary roof supports in the last place which had been mined. He measured the

~1124

distance with a rule, observed three temporary jacks which had been installed, two of which were visible, and the other one was behind the curtain. He issued the citation because he observed the brattice line attached to the roof and the area was not supported. The mine bottom was muddy and he observed nothing to indicate that temporary roof support jacks had been installed five feet from the permanently supported roof in the entry crosscut as required by the approved roof control plan. He also observed foot prints in the area where the line curtain was installed and he assumed that someone from the previous shift had walked beyond permanent roof supports to install the line curtain without installing temporary roof jacks for support. The three temporary jacks which he observed were installed directly under the roof bolted area in the crosscut and the roof area there was completely bolted in accordance with the roof control plan (Tr. 9-14).

Mr. Baniak identified a sketch which he prepared for the hearing and he testified as to the location of the temporary jacks and line curtain as shown on the sketch (exhibit P-3). He indicated that mine management agreed with his citation and were in complete agreement with the conditions which he noted on the citation. He stated that the three temporary jacks he observed were 4 or 5 feet apart, that the cut of coal was completed, and that the entry is approximately 11 feet wide. He is familiar with the mining method used in the section and indicated that 20 feet deep cuts are taken in the entry, and ventilation tubing is installed, and the entry is then cleaned (Tr. 14-19).

Mr. Baniak testified that the line curtain in question would have been hung at the end of the midnight shift. He indicated that the curtain is used when the auxiliary fan is down and that based on the position in which he found the curtain the fan could not have been down because the width of the mining machine would have torn it down. He described the clean-up procedures and indicated that once the first cut or lift is taken, the machine makes a clean-up pass and ventilation is then provided to a depth of ten feet. A second pass is made and the clean-up repeats. During this process, the temporary jack nearest the fan need not be removed to make a clean-up pass.

Mr. Baniak identified a copy of the applicable roof control plan for the mine (exhibit P-4) and stated that the conditions he cited were in violation of mandatory safety standard 75.200 as well as safety precautions 3-C and 4 found on page 6 of the plan. He indicated that a small warning danger sign was posted on one of the temporary roof jacks which were installed. He also identified a copy of his notes which he made at the time the citation was issued, as well as a sketch of the scene which are part of his notes (exhibit P-5), (Tr. 20-21). He believed that the roof control plan was violated for the following reasons (Tr. 22):

There was no evidence of a temporary support installed in or near where the spad was driven supporting the check curtain that was left in number two entry. However, there were many visible signs of footprints because of the soft muddy bottom. The area was thoroughly examined prior to issuance of the citation, and it was agreed upon by management personnel.

Mr. Baniak believed that the violation was "significant and substantial" because anytime anyone is under unsupported roof doing work serious injuries could result (Tr. 27). He also indicated that there have been 36 fatal accidents in his district and 24 of them were the result of men working inby permanent roof support. He believed that the respondent was aware of the conditions because the section foreman and crew members are required to know about the roof control plan provisions. If a roof fall had occurred, one or more people would have been directly affected (Tr. 27).

On cross-examination, Mr. Baniak confirmed that he saw no one walk under unsupported roof and that his conclusion that they did are based on the foot prints, the position of the brattice line in an area 7-1/2 feet inby permanent supports, and no signs in the mud that any temporary supports had been installed where the curtain was attached to the roof (Tr. 32, 34). He also stated that Mr. Ricotti asked him to make the citation out to him because he was "partly responsible" for the roof support material (Tr. 35, 37-38) .

Mr. Baniak conceded that the sketch he drew in his notes at pg. 4 is different from exhibit P-3, and he explained that his notes were intended as a "reference" to the area where the violations were cited (Tr. 40, 44). He confirmed that at the time he issued the citation he did not speak with anyone on the previous midnight shift and did not know for a fact that anyone walked out under unsupported roof to install the line curtain (Tr. 47). He stated that the line curtain is hung after the cut of coal is completed and the machine is moved out. Clean-up could not have been accomplished with the line curtain installed in the center of the entry because the machine could not get into the area (Tr. 48). Had the line curtain been adjacent to the rib, there would be no need to remove the temporary jacks to clean up. The section was using an auxiliary fan and tubing for ventilation and this system does not require temporary support to provide face ventilation (Tr. 50).

Alan Tedeschi testified that he is currently employed by the Jones and Laughlin Coal Company in a management position and that he previously worked for the respondent as a section foreman. He confirmed that he was discharged by the respondent on August 17, 1981, for refusal to work a scheduled shift. His refusal to work was based on the fact that he had worked two straight 8-hour shifts and would not work a third one because he didn't believe he could perform his duties safely. He also confirmed a prior disciplinary action against him for missing a day of work, but he denied harboring a grudge against the respondent (Tr. 86-91).

~1126

Mr. Tedeschi stated that he was the section foreman on the day shift at the time the citation issued and that he accompanied Mr. Baniak on his inspection. The violation was issued on his shift, but the conditions cited by Mr. Baniak concern the prior midnight shift. Mr. Tedeschi confirmed that a cut of coal had been taken out and three temporary jacks were installed. He observed two of the roof jacks on the right side of the line curtain and confirmed that part of curtain was in by these supports. The curtain was 4 or 5 feet from the left hand rib. He reviewed the sketch prepared by Mr. Baniak and agreed that it generally depicted the area in question. He also confirmed the fact that he voiced no objections at the time the citation was issued (Tr. 92-94).

Mr. Tedeschi then described the mining procedures which he followed in cutting the coal, installing roof support jacks, and the clean-up process. He saw no foot prints in the area described by Mr. Baniak because he was not looking for any and he indicated that anyone working at the face should be aware of the roof control plan. He stated that roof jacks were to be installed along the left rib line, but the clean-up should take place before the jacks are set. Further, after the second cycle of coal is taken out the jacks are not supposed to be removed (Tr. 97-98).

On cross-examination, Mr. Tedeschi reiterated the circumstances surrounding his termination from the respondent's employ and stated that he was fired for not showing up for work, and denied that he was discharged by the mine superintendent for lying to him about his failure to report to work as scheduled (Tr. 99-103). He confirmed that he did have a grudge against the respondent at the time he was fired because he had lost his job, and confirmed that he told the superintendent that "he couldn't get away with this" and that he was "going to get Consol" for firing him (Tr. 105). He also confirmed that he spoke with Inspector Baniak two weeks before he was subpoenaed and that Mr. Baniak asked him whether he recalled the incident connected with the issuance of the citation, but denied that he was pressured by Mr. Baniak and that his testimony is from his independent memory of the circumstances (Tr. 109-110).

Mr. Tedeschi stated that he heard no arguments between Mr. Rigotti and Mr. Baniak over the citation (Tr. 113), and conceded that the condition cited by Mr. Baniak "was there", and he agreed that the roof control plan prohibited anyone going in by the last row of permanent supports (Tr. 115), but he did not know how the line curtain in question was attached to the roof because he was not there and made no further inquiries in this regard. Abatement was achieved by supporting the area with three roof jacks and he assumed that the condition was left by the preceding crew (Tr. 117).

Respondent's testimony and evidence

Thomas Rigotti testified that he is employed by the respondent as a mine environmental technician and that part of

his duties are acting as an escort for MSHA inspectors. He confirmed that he escorted Mr. Baniak

~1127

into the number 2 entry on the 26 Butt Section on July 30, 1981, and that Mr. Baniak served the citation on him. He indicated that the citation was issued after Mr. Baniak advised him that he saw evidence that men had worked under unsupported roof. Mr. Baniak assumed that someone worked under unsupported roof after observing that part of the line curtain was hung in an area where he believed no temporary roof supports had been installed. Mr. Rigotti observed no foot prints in the area and he did not discuss the citation with Mr. Baniak at that time, but did so later. He denied that he agreed with Mr. Baniak's action in issuing the citation but he did discuss the fact that Mr. Baniak saw no evidence that roof jacks had been installed. In addition, Mr. Rigotti indicated that he wanted to review the roof control plan first to determine whether proper procedures were followed in advancing the line curtain and installing the roof jacks (Tr. 126-127).

Mr. Rigotti stated that company policy prohibits employees from proceeding or working inby unsupported roof and that employees are disciplined if they are in violation of this policy (Tr. 128). Mr. Rigotti reviewed Mr. Baniak's sketch (exhibit P-3) and disagreed that three temporary jacks were installed in the place shown. He stated that he observed two roof jacks set further into the entry and marked the exhibit accordingly. He also disagreed with the position of the line curtain as shown on the sketch and stated that it was further inby the entry along the left rib and marked the sketch accordingly and stated that the curtain was 8 to 10 feet from the face (Tr. 130-132).

Mr. Rigotti stated that he left Mr. Baniak on two occasions to check on other mine areas and to use the mine phone. He described the mine bottom in the number two entry as wet and indicated that it had been cleaned. He stated that the entry was 16 feet wide, that the floor is cleaned with the miner pan, and that the miner passing through the area during the clean-up process would have destroyed any evidence of jacks being installed. He also indicated that jacks would have been set along the left hand rib line (Tr. 134).

On cross-examination, Mr. Rigotti stated that he could not recall who went into the mine with him and Mr. Baniak because a "blitz" inspection was taking place and there was a lot of confusion. He confirmed that he did not argue with Mr. Baniak about the citation, and agreed that there was no evidence that temporary jacks had been set. He also confirmed that he has never observed employees going under unsupported roof (Tr. 138).

Mr. Rigotti stated that after the citation was issued he made an inquiry as to whether anyone had worked under the unsupported roof. He learned that section Foreman Frank Coccagna had installed jacks and advanced them as the cuts of coal were taken out. Mr. Rigotti did not know whether anyone was in the area between the time the midnight shift ended and the time he and Mr. Baniak arrived on the scene. He did not lift the curtain to see whether another jack was behind it and he indicated that line curtain and tubing are used for ventilation when coal is

being mined. When line curtain is used, the auxiliary fan is normally used and both are operating at the same time (Tr. 139-146).

~1128

In response to bench questions, Mr. Rigotti stated that pg. 6, item 4, of the approved roof control plan permits the installation of a minimum of two temporary jacks or posts on five foot centers after one half a cut of coal is taken, the advancement of canvas or tubing, and the performance of work as long as men stay under the roof support. The temporary supports can then be removed remotely by use of a jack handle, and then the other side of the cut can be mined (Tr. 148). He also indicated that Inspector Baniak should not have assumed that anyone was inby roof support without investigating the matter further (Tr. 150).

Mr. Rigotti stated that he observed no equipment in the working place in question when he and Mr. Baniak arrived on the section, that the area was completely mined out, and immediately outby the curtain there was a warning device there to keep people from entering the area. The line curtain was beyond the warning place and no roof supports were there and he believed someone pulled them out remotely in accordance with the roof plan. However, they could have been left in, but this is discretionary (Tr. 151-152).

Frank A. Coccagna, section foreman, testified that he holds a degree in economics and political science from the University of Pittsburgh and a two-year degree in mining technology from Penn State University. He stated that he was familiar with the roof control plan in effect on July 30, 1981, as well as company policy which prohibits anyone from going inby unsupported roof for any reason except to install roof support jacks (Tr. 166-168).

Mr. Coccagna identified a sketch of the scene of the citation as he recalled it on July 30, 1981, and he described the work performed in the area during his midnight shift (Ex. C-1; Tr. 168-170). He stated that the line curtain was hung up on the last roof jack which was installed next to the ventilation tubing and the curtain was no more than a foot from the jack where a person could reach it (Tr. 170). The jacks were about five feet from the rib, and after the curtain was hung the first line jack was removed by means of reaching in with a jack handle. He removed the jack in order to use it across the face of the cut to facilitate the hanging of a danger board to alert miners on the next shift not to walk inby unsupported roof (Tr. 171-172).

Mr. Coccagna stated that after the jacks were taken out and the line curtain hung, they proceeded to mine the second half of the lift, backed the miner up and cleaned up along the curtain in such a manner as to not disturb the curtain. The section was dry with a little water from the sprays. Since the jacks were installed two feet from the line curtain, the clean-up would have destroyed any visible evidence that the jacks had been set. There would not have been a third jack behind the line curtain, and during the entire mining process the roof control plan was complied with at all times. At no time was work performed under unsupported roof, and he was on the section during the entire shift supervising the operation. He has gone out under

unsupported roof, but only to support it, and he does not condone his men going under unsupported roof, nor has he ever ordered them to do so (Tr. 173-176).

~1129

Mr. Coccagna stated that he first learned about the citation at noon the day it was issued. Mine superintendent Karazsia telephoned him at home and asked him how the line curtain came to be located in by unsupported roof. He explained the mining procedures which were followed on his shift and Mr. Karazsia responded "fine" (Tr. 177).

Mr. Coccagna testified that three or four weeks prior to the hearing Inspector Baniak was in the mine and engaged him in a conversation concerning the citation in question and told him "You were wrong, you were wrong", and that this went on for two and half hours while he was escorting Mr. Baniak on his inspection rounds (Tr. 178).

On cross-examination, Mr. Coccagna stated that at the time the cut was being mined and the area cleaned up, they were following roof control plan "drawing number 1-B" and safety precaution number 4, found on page six of the plan (Tr. 180). He described the clean-up process, including the operation of the continuous miner cutting heads during the clean-up cycle (Tr. 180-186).

Mr. Coccagna stated that when the curtain was hung, a foot of left over material was tucked behind it. One of his crew members inserted a spad into the roof with a spad gun and he connected the curtain to the spad. The ventilation tubing was left a little behind the roof bolts so that it could be pulled out. Permanent roof supports were present in the entry when the auxiliary fan tubing was pulled out. The curtain was hung while under temporary support (Tr. 186-190).

In response to bench questions, Mr. Coccagna stated that Mr. Baniak's "rough sketch" of the scene as depicted in his notes resembled the area at the time the citation issued, except that the line curtain was closer to the rib and did not "curve out" (Tr. 199). He also indicated that Mr. Baniak's "hearing sketch" was not accurate in that the curtain was not in the middle of the entry as shown and the first cut of coal had been taken out a week earlier (Tr. 200).

George Karazsia, mine superintendent, Gamble Portal, Mathies Mine, testified that when he learned that the citation had been issued by Mr. Baniak he telephoned section foreman Frank Coccagna to inquire about the allegation that men worked under unsupported roof on his shift. Mr. Coccagna explained the procedures which were followed in installing the line curtain and assured him that it was done in full compliance with the roof control plan and that no one on his crew worked under unsupported roof. After speaking with Mr. Coccagna he called Mr. Baniak to discuss the matter but Mr. Baniak refused to discuss the citation with him. Since that time Mr. Baniak visited the mine three times to discuss the citation with mine employees and with him. Mr. Karazsia stated that he advised Mr. Baniak that since the matter was being litigated and was in court he did not believe he should discuss the matter with him or his men (Tr. 204-208).

~1130

On cross-examination, Mr. Karazsia confirmed that he instructed Mr. Baniak not to speak with or discuss his citation with his salaried personnel because the matter was in litigation and the men felt that Mr. Baniak was harrassing them because of his attempts to discuss the citation with them during his mine visits after the citation was issued and before the present hearing was convened (Tr. 208-210).

George Puskarich, retired shuttle car operator, testified that he was so employed on the section midnight shift in question on July 30, 1981. He stated that he observed the curtain in question during the end of the shift and he observed that two jacks were set and the curtain was then hung. The jacks were then moved back and Mr. Coccagna put a danger board across them. Mr. Puskarich observed no one under unsupported top during the shift and if they do "they are crazy" (Tr. 216-217). Referring to the sketch (Ex. C-1), Mr. Puskarich described how the entry was mined, cleaned, and how the jacks and curtain were installed during the shift (Tr. 219-220).

Inspector Baniak was recalled by me and testified as follows (Tr. 229-231):

Q. Leave the practicalities out of it. I want to know what happened that night. He claimed they were using tubing and curtain?

A. Both.

Q. Both.

A. Okay.

Q. All I'm asking you is, can you confirm that? Were they in fact using tubing and curtain to ventilate?

A. Well, your Honor, I based the condition I cited by the fan being in that position and the check curtain, mostly was in the center of the place. Whether it be fifteen feet inby, whether it be twenty feet outby from the permanent support, it was seven and a half feet inby, and hung approximately center of the entry.

Q. Yes, but my question is, if they followed the procedure that Mr. Coccagna testified to as to how they installed that line curtain inby with the permanent supports, would that still be a violation?

A. Yes, from what I saw I'd still have go [sic], yes. If this was hung at the completion of the cut, why would, whether it be one or two temporary supports, why would they have to possibly be removed? And this is the condition that I made.

Why would they be moved? If there was one they were still inby. If there were two or if there was one at the canvas, they're too far. And I was just basing mine on the check curtain.

In fact I think I measured that the check curtain was seven and a half feet inby. And this was my whole case. And the position of the curtain.

Q. Had Mr. Coccogna been right there on the scene and explained to you how that check curtain came to be installed in the manner in which you found it, had he explained to you that he set two temporary jacks on the side along the rib line, installed the check curtain and then removed the jacks with a thirty foot bar and hung a danger board up there and left the area, would that have been a violation?

Just a hypothetical?

A. Okay. From the position I saw the check curtain, this is what I'm basing it on. Probably the way he had explained it using that, it's a possibility that it could be done.

But the way I saw it when I was in the section and the curtain being in such, in the center of the face, there would be no need to remove any temporary supports.

* * * * *

Q. But you heard him testify that he did in fact, remove the two that were along the line curtain.

A. To place here.

Q. Yes, and put them back where he claims they were.

A. Um-hum, okay, well there's a possibility.

Mr. Baniak also confirmed that the citation was abated by another inspector and that he was not present when the inspector met with the midnight crew to discuss his citation and the approved roof control plan (Tr. 238).

Findings and Conclusions

Fact of Violation

The critical question in this case is whether MSHA has established a violation by a preponderance of the credible evidence and testimony adduced in this case. MSHA has the burden of proving that miners were in by roof supports and the posted danger board at the time the line brattice in question was installed. Since no one observed anyone in by these areas, MSHA's case rests essentially on the testimony of Inspector Baniak. In issuing the citation in question, Mr. Baniak arrived at certain conclusions based on assumptions and speculations with respect to the approved roof control plan, the method of mining and clean-up being utilized by the midnight shift immediately prior to the time he observed the conditions cited, and certain foot prints which he states he observed at the scene. The crux of MSHA's case lies in the inspector's belief that someone was under unsupported roof and they attached one end of the ventilation line curtain to a roof spad which extended some 7 1/2 feet in by the last row of roof supports. In short, the Inspector saw some foot prints, saw no evidence that temporary jacks had been installed at or near where the curtain was attached to the roof, and came to the conclusion that someone had installed the curtain while under unsupported roof (Tr. 52-54). MSHA also presented the testimony of the former day shift foreman, Alan Tedeschi, who confirmed what the inspector observed at the time the cited conditions were found.

The crux of the defense to the citation is the assertion by the respondent that the line curtain was installed in full compliance with the approved roof control plan. In support of this defense, respondent presented the testimony of the section foreman who was responsible for the work performed on the shift immediately preceding the one on which the conditions were found. Mr. Coccagna testified that he supervised the work which had taken place at the location of the line curtain in question, and he described in detail the procedures followed in supporting the roof and hanging the curtain in question. He also stated that the installation of temporary supports, their subsequent removal after the curtain was installed, and the installation of the curtain itself, were all accomplished in full compliance with the approved roof control plan (exhibit P-4, Safety Precaution No. 4, pg. 6, and Drawing 1(b)). Mr. Coccagna's testimony was corroborated by former shuttle car operator George Puskarich, and mine superintendent George Karazsia confirmed that Mr. Coccagna explained the procedure he followed in hanging the curtain in question when he questioned him shortly after the citation was issued.

The record establishes that the roof in the entry crosscut in the immediate vicinity of the curtain was fully supported and bolted in accordance with the roof control plan. In addition, petitioner's counsel conceded that there is no evidence that anyone was under unsupported roof while the auxiliary ventilation tubing was installed in the area in question, and

that had any other hazards or violations been observed by the inspector, he would have issued additional citations (Tr. 190). Given these circumstances,

~1133

I find it unlikely that the section foreman on the midnight shift would expose himself to a citation by such a foolhardy act as leaving a curtain installed in full view of an inspector if he (the foreman) did not believe what he had done was in full compliance with his roof control plan.

Both Mr. Coccagna and Mr. Puskarich impressed me as straightforward credible witnesses. Mr. Coccagna is a college graduate, with two years of post-graduate study in mining technology. He impressed me as being most knowledgeable with respect to the detailed provisions of the roof control plan, and I accept his explanation as to how the line curtain in question was installed. Mr. Puskarich was retired at the time he testified and was no longer employed by the respondent, and I see no reason why he would not tell the truth. Further, all of the respondent's witnesses were sequestered during the hearing, and having viewed them on the stand, I find their testimony to be credible. In addition, Inspector Baniak conceded that it was possible that the curtain in question was installed, and the temporary jacks removed, as explained by Mr. Coccagna (Tr. 230-231).

Although there is no dispute as to what Inspector Baniak observed at the time the citation issued, I cannot conclude that MSHA has established a violation. In short, MSHA's "circumstantial case" that someone had been under unsupported roof at the time one end of the line curtain in question was fastened to the roof spad has been rebutted by the testimony and evidence presented by the respondent in this case. Under the circumstances, Citation No. 1050403, July 30, 1981, citing a "significant and substantial" violation of mandatory safety standard 30 CFR 75.200, IS VACATED.

ORDER

In view of the foregoing findings and conclusions, the civil penalty proceeding, Docket No. PENN 82-5, IS DISMISSED. Contestant's contest of the vacated citation, Docket No. PENN 81-230-R, IS SUSTAINED.

George A. Koutras
Administrative Law Judge