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

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

CIVIL PENALTY PROCEEDING

Docket No. PENN 85-201
A.C. No. 36-06478-03518

v.

Pitt Gas Mine

CANNON COAL COMPANY,
RESPONDENT

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Penn-
sylvania, for Petitioner;
Joseph Mack, III, Esq., Thorp, Reed & Arm-
strong, Pittsburgh, Pennsylvania, for
Respondent.

Before: Judge Maurer

Statement of the Case

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801, et seq., the "Act," in which the Secretary has charged the Canon Coal Company with five violations of the mandatory safety standards. Prior to the commencement of taking testimony in this case, however, the parties settled 104(a) citation number 2403073, alleging a violation of 30 C.F.R. 75.202 and proposing a \$58.00 civil penalty and a second 104(a) citation, number 2403082, which alleged a violation of 30 C.F.R. 75.200 and assessed a \$98.00 civil penalty. There was no reduction in the assessed penalties proposed, and I granted the motion to approve settlement on the record (Tr. 9).

The remaining three alleged violations were tried before me at a scheduled hearing on January 9, 1986, at Pittsburgh, Pennsylvania. Documentary evidence and oral testimony were received on behalf of both parties, and both parties have filed post-hearing briefs, including proposed findings of fact and conclusions of law.

The general issues before me are whether the company has violated the regulatory standards as alleged in the petition and, if so, the appropriate civil penalty to be assessed for the violation(s).

The Mandatory Standard

The mandatory standard involved in each of the three remaining violations is 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, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

The Cited Conditions and/or Practices

On October 9, 1984, a fatal roof fall accident occurred at Canon Coal Company's Pitt Gas Mine. As a result of the subsequent Federal Mine Safety and Health Administration investigation, the following citations, still at issue, were issued to the company.

Section 104(a) Citation No. 2403072 cites a violation of 30 C.F.R. 75.200 for the following alleged practice:

Based on evidence disclosed during the investigation of a fatal roof fall accident, the torque was not tested on any of the roof bolts installed in the area just outby the accident scene as required by Item No. 12 on page 7 of the safety precautions of the approved roof control plan.

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Paragraph No. 12 on page 7 of the approved roof control plan states:

Immediately after the first bolt is installed in each place and prior to installing the second bolt, the torque shall be tested on the first bolt and thereafter at least one roof bolt out of every four shall be tested by a qualified person. If any of the bolts tested do not fall within the required torque range, the remaining previously installed bolts on this cycle shall be tested. If the majority of the bolts still fall outside the required torque range, necessary adjustments shall be made and the required torque range obtained. If the required torque ranges are not obtained, supplementary support such as different length bolts with adequate anchorage, posts, cribs, and/or crossbars shall be installed.

The second citation still at issue in this case, 104(a) Citation No. 2403074, likewise cites a violation of 30 C.F.R. 75.200 and states:

During the course of a fatal roof fall accident it was revealed that in the haulage entry outby the accident scene, temporary roof supports were not properly installed as required by safety precaution No. 19 in that 2 rows of jacks (2 in each row) were installed in the unsupported area that varied from 16 to 18 feet in width. The approved roof control plan requires temporary supports to be installed across the opening on not more than 5 foot centers. This violation did not contribute to the roof fall accident.

Paragraph No. 19(a)(2) on page 8 of the approved roof control plan states:

19(a). Where roof falls have occurred and at all overcast, boom hole, and other construction sites that require removal of mine roof material, (e.g., by blasting, by ripping with a continuous-mining machine, by cutting with a cutting machine, or other means), the roof shall be considered unsupported. If miners are required to enter such areas, either to travel over the fallen material, to clean it up, or to perform other duties, the roof shall be supported adequately. Mine management shall devise and have posted in writing at

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the scene of such unsupported roof a plan incorporating, but not limited to, the following procedures:

** ** *

(2) Adequate temporary support on not more than 5-foot centers shall be installed at the edge of the fall where work is to be started. A minimum of four posts or jacks shall be used.

Finally, 104(d)(1) Order No. 2403083, also citing 30 C.F.R. 75.200 states:

During the course of a fatal roof fall accident investigation, it was revealed that a miner was working under inadequately supported roof along the main track haulage 450 feet outby the No. 3 belt drive on 10984. Roof, about 45 inches thick, 6 feet long and 13 feet wide fell, striking the miner.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 12-13):

1. The Pitt Gas Mine is owned and operated by the Respondent, Canon Coal Company.

2. Canon Coal Company's Pitt Gas 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 upon an agent of the Respondent, at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing the issuance, and not for truthfulness, or relevancy of any statements asserted therein.

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

6. The appropriateness of the penalty, if any, to the small size of the coal operator's business should be based upon the fact that the Pitt Gas Mine's annual production

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tonnage is one hundred twenty-one thousand eight hundred and twenty (121,820), annual production tons, and the Canon Coal Company's annual production tonnage is one hundred twenty-one thousand eight hundred and twenty (121,820).

7. The Respondent demonstrated good faith in attaining compliance after the issuance of the 104(a) citation.

8. The parties stipulate to the authenticity of their exhibits, but not to their relevance, nor the truth of the matters asserted therein.

Discussion and Analysis

Taking the citations in the order presented, I will first deal with Citation No. 2403072, concerning the issue of whether the torque was or was not tested on the roof bolts just outby the accident scene as required by the approved roof control plan.

The Secretary's first witness concerning this part of the case was Mr. Barry Sadler, a miner employed by the Canon Coal Company. He had been working "off and on" as a roof bolter helper on the day of the fatal accident, assisting Bobby Rock, the roofbolter. The job that day was to trim low roof areas along the main track haulageway using a Dosco mining machine. They would first trim the roof with the Dosco, then back the Dosco out so that a roof bolting machine could be brought in, bolt the newly trimmed portion of roof and so on, repeating the process.

Sadler states that they were installing four (4) foot roof bolts on the edges and six (6) foot in the middle. As the bolts were being installed, he asked Rock how well they were anchoring and he (Rock) said they were anchoring "good."

Most importantly to the Secretary's case, Sadler testified that there was a torque wrench on the roofbolting machine but he never observed him (Rock) using the wrench that day. However, he was unable to unequivocally state whether or not he did use it. This was further clarified during cross-examination of Mr. Sadler. He agreed he had spent a considerable amount of time away from the bolter, going back and forth to get bolts, changing bits, and getting cribs. He had also been to lunch while others continued to bolt. The following exchange took place at Tr. 50Å51:

Q. Okay. So, you weren't observing the bolter working all day, I take it?

A. No, I only seen him that one time when he was drillin' there, and I seen that little bit of- -it was like, was loose there, you know.

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Q. Okay.

A. And, I told Rocky about it. Rocky says, don't worry about it. He shoved the bolt up in it, tightened it, and it just- -it went tight.

Q. So, Rocky was bolting, Steiner was bolting, Koci, did he do any bolting?

A. Not- -I don't know who was boltin'. They- -they both were supposed to have been boltin'.

Q. Okay.

A. But, I don't know who was boltin', though.

Q. So, it is possible, isn't it, that they, when you weren't watching, they took a wrench out, and- -

A. Could of, yeah, right. You mean torquin', you mean, right?

Q. Yes.

A. No, they did- -could have, right.

Q. So, they could have been using the wrench that was on the- -

A. Yeah.

Q. Bolting machine, to torque the- -

A. Yes, this was- -

Q. To check the torque- -

A. Yeah.

Inspector Moody also testified concerning this alleged violation. He interviewed Mr. Sadler during the investigation subsequent to the accident. His interpretation of what Sadler told him led him to conclude that none of the roof bolts in the haulageway were being torqued on the day of the accident, and the instant citation was issued on the basis of this conversation with Sadler.

Inspector Moody had also tested the torque on the roof bolts that were installed outby the roof fall area on the day following the accident. He torqued twenty-four (24)

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roof bolts and found nine (9) below a hundred foot-pounds of torque and fifteen (15) above a hundred foot-pounds of torque. He concedes, however, that it would be fairly common for the torque to either lessen or increase a day after it was installed. In any event, he testified that the torque tests he performed had nothing to do with his issuance of this citation. He relied entirely on the interview with Mr. Sadler.

The Secretary's reliance on Sadler to prove up this violation is misplaced. I find that the testimony of Mr. Sadler is at best neutral. He did not see any bolts being torqued, but nor is he able to say how many, if any, were torqued, or that none were torqued. There is simply no direct evidence in this record that the pertinent provision of the roof control plan was or was not being complied with. Additionally, reading the record as a whole, there is no reliable circumstantial evidence to resolve this dilemma either. In short, the Secretary has failed to bear his burden of proof necessary to establish the violation cited in the instant citation, and it must be dismissed.

Curiously, the Secretary did not present any direct evidence from the miners who actually bolted on the day in question as to whether or not they had been complying with the roof control plan concerning checking torque.

The second citation at issue in this case, Citation No. 2403074, concerns an alleged violation of Safety Precaution 19(a)(2) of the roof control plan. The Secretary contends that the temporary supports being utilized by the bolters on the day in question were inadequate because the applicable provision requires that temporary supports be installed on not more than five-foot centers at the edge of the fall where work is to be started. They were using two rows of jacks, two per row in the unsupported area of the haulage track entry which varied in width, but was greater than 15 feet in some places. Ergo, in those places where the haulageway was greater than 15 feet in width, the supports were on greater than 5 foot centers and there would therefore be a violation of the cited standard.

The respondent, however, contends that Safety Precaution 19(a)(2) applies only where work is being performed at the edge of a fall. It is not contended that the work in question in this case was being performed at the edge of a fall.

The statute and the standard require the parties to agree on a roof-control plan. Once the operator has adopted

and MSHA has approved the plan, its provisions are enforceable as though they were mandatory standards. *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C.Cir.1976). Thus, a question concerning the parties' intent and understanding as expressed in an approved plan is an important one. Before we can undertake to determine whether a plan was violated, we first need findings as to what the plan requires. *Shamrock Coal Co.*, 5 FMSHRC 845, 848Å52 (May 1983); *Penn Allegh Coal Co.*, 3 FMSHRC 2757, 2769Å70 (December 1981). Only after this is determined can those requirements be applied to particular facts to resolve whether a violation of the plan has occurred. *Id.* The same principle applies to the more basic question of whether a particular provision of the plan is applicable to the situation at hand.

In this case, the paragraph in question (19(a)) begins: "Where roof falls have occurred and at all overcast, boom hole, and other construction sites that require removal of mine roof material...." This main paragraph goes on to require that the roof shall be considered unsupported at all these sites and further that if miners are required to enter any of these enumerated areas, the roof shall be adequately supported. Subparagraph (2) under paragraph 19(a) then specifically addresses only one of the conditions addressed in the main paragraph, i.e., roof falls, stating that "adequate temporary support on not more than 5Åfoot centers shall be installed at the edge of the fall where work is to be started" (emphasis added).

The respondent argues that this requirement contained in subparagraph (2) addresses a particular type of work site, and there is no indication that it is intended to apply to the other types of work sites addressed in the introductory paragraph. Counsel states in his brief that "[h]ad the parties intended otherwise, they could easily have so provided." I agree they could have easily drafted the requirements more concisely.

On the other hand, the Secretary's position is and Inspector Moody testified that the term "fall" as utilized within Safety Precaution No. 19(a)(2) encompasses not only roof falls with reference to the term "at the edge of the fall," but also, falls of roof caused by the removal of roof by blasting, ripping with a continuous mining machine, or cutting with a cutting machine or other means at the construction site. As a practical matter, this interpretation of the requirement is the only one that makes any sense, reading the paragraph and its subparagraphs together in their entirety. Therefore, I find that the provision of the roof control plan cited in the instant citation is applicable in this case and is sufficiently definite to be legally enforceable.

I will now turn to the facts of the alleged violation of the cited standard. Mr. Sadler's testimony that the roof bolting process used on October 9, 1984, utilized a total of four (4) jacks, two jacks per row, is unrebutted and apparently uncontested. Therefore, I find as a fact that two rows of jacks, two jacks per row, were installed as temporary support during the roof bolting process in the haulage entry outby the accident scene on the day of the accident.

Inspector Moody testified that he had taken measurements of the entire area that was bolted that day. The width of the entry according to his notes ranged from 14 feet, 10 inches to 18 feet, 6 inches.(FOOTNOTE 1) He conceded that for those areas in which the entry was sixteen (16) feet wide or less, the use of the two jacks per row would have been adequate and there was no violation. However, in those four areas where the entry was wider than sixteen feet, the company was in violation of the roof control plan, and on that basis, the citation was issued. Inspector Moody calculated the width of the haulageway by measuring the distances between roof bolts placed across the haulageway and then adding up those measurements to obtain a total width. Since the roof bolts were not placed in exactly a straight line across the haulageway, I understand that these measurements would be skewed to the high side. However, I find that the essence of the Inspector's testimony, which I find credible, is that there were four areas wider than fifteen (15) feet bolted that day utilizing temporary supports on centers in excess of five (5) feet in violation of the roof control plan and I so find.

Mr. Remington, the respondent's safety director, also testified that the width of the haulageway is anywhere from fourteen (14) to a little over eighteen (18) feet, "depending on where you measured it up through there."

Mr. James Kaczmark, the mine foreman, had examined the roof in the haulage area that day and had found an area that sounded "drummy." He stated that this did not necessarily mean bad top but you should be cautious of the top. He specifically told his crew to be cautious in securing the roof and he was in the area throughout the shift. This indicates to me that he knew or should have known that his men were not complying with paragraph 19(a)(2) of the roof control plan in those areas of the haulageway that were wider than fifteen (15) feet. His realization that caution was in order in securing the roof should have made him even more aware of the importance of compliance with the roof control

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plan. It was readily discernible that his men were only using two jacks per row and the operator is certainly chargeable with the knowledge of how wide the haulageway is and the contents of the roof control plan. I therefore find that the operator's negligence with reference to this citation was high. I further find, based on the testimony of Inspector Moody, that the gravity of the cited violation is serious in that even though this violation had nothing to do with the roof fall that did occur later that day, it created the type of hazard that would be reasonably likely to result in a roof fall and serious or fatal injuries to at least one miner. A penalty of \$79 is assessed, as proposed.

Finally, Order No. 2403083 was issued subsequent to a fatal roof fall accident for an alleged violation of 30 C.F.R. 75.200 (inadequately supported roof).

More specifically, it is the Secretary's position that the roof along the left side of the haulage track rib, for the distance of the overhanging brow, was inadequately supported in that the distances from the rib to the first roof bolt were in excess of five feet in several instances, and that a roof fall did in fact occur in the area which was inadequately supported and one miner was killed.

In order to set the scene where and when the fatal roof fall occurred, it is necessary to go back and reiterate the substance of what had occurred earlier that day.

On the day of the accident, the Dosco miner was bogged down at the beginning of the shift and had to be freed by using cribs to level it. There were places in this haulageway that the Dosco could not be moved laterally because its weight and the soft ground caused it to sink into the muddy floor. The Dosco has an oscillating head on it which normally would allow the roof to be cut down "rib to rib," but in this instance, it would not go all the way over to the left rib in these muddy and soft areas. Even using cribs to level it, the miner would still sink on the left side making it impossible to get a clean cut on the left. As a consequence, the roof trimming left a brow along the left rib. Further, because the boom of the Dosco was aimed at the left rib, as it mined it deposited debris under the brow. Because the Dosco itself prevented bringing in wagons to load the debris, the respondent planned to remove it after the Dosco had passed through the area, and then secure the brow with cribs.

The roof-trimming operation proceeded that day in a cycle of first cutting with the Dosco, then taking the Dosco out far enough that a roof-bolting machine could be

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brought out from a crosscut, then bolting the trimmed portion of roof and so on until the final cut of that day. Since that cut only involved about a foot of low roof separating two bolted areas, the Dosco was trammed inby after the trimming was completed. James Steiner, the deceased, and Barry Sadler were instructed to watch the miner's trailing cable until it cleared the area. At one point Steiner observed that the cable was hung up in some debris along the left rib, under the brow. He went to free it. As he was attempting to free the cable, Sadler, who was approximately eight (8) feet outby Steiner, observed the mine roof dripping. As Sadler yelled a warning, Steiner stepped out into the haulageway where a large rock fell out of the roof, killing him. Shortly thereafter, several feet of roof adjacent to the space left by the rock that killed Steiner also fell.

The respondent's position is that Steiner was killed by a large rock that fell without warning from a roof that was considered excellent, had stood completely unsupported without falls for many years before it was bolted in 1978 and, in addition, was thoroughly bolted at the time it fell.

The Pitt Gas Mine was first opened in 1912 and worked continuously until 1943 when it was abandoned. The mine was reopened in 1978, at which time the new owner bolted the theretofore wholly unsupported haulageway. This haulageway had never had falls in the past and was considered to be "excellent roof in both directions [from the fall] for thousands of feet." It was composed of several inches of roof coal under several feet of sandrock.

As hereinbefore stated, on the day of the accident, Kaczmark had found a portion of the roof "drummy" and had cautioned his men to be careful securing the roof. At the hearing, both he and Safety Director Mel Remington testified that the "drumminess" in the Pitt Gas Mine was not uncommon and was due to the gradual separation of roof coal from the underlying rock. "Drumminess" was not thought to indicate the presence of a "bad top," although it warranted caution due to the possibility that roof coal could fall. Furthermore, the statements of the miners working in the haulageway that day given to the inspectors investigating the accident gave no indication that they observed anything untoward about the roof prior to the fall.

Inspector Moody testified and included in his Report of Investigation that after the accident a slip and clay vein was visible in the haulageway where the roof had

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fallen. However, he conceded that he could not determine whether this condition was observable before the roof fell.

Respondent's Safety Director, Mr. Remington, conducted his own after-accident investigation of the scene. Remington inspected the rock that fell on Steiner, as well as each roof bolt recovered from the fall site. He also took measurements of the depth of each bolt hole that was left in the roof following the accident. Respondent's Exhibit No. 1 sets out the results of these measurements and depicts the location of bolt holes in the fall area.

Remington's findings may be summarized as follows:

(1) The rock that killed Steiner was shaped like an elongated triangle or inverted "V" formed by the convergence of two slips.

(2) The base of the "triangle" of rock was approximately 6'8 feet long and the rock was approximately 13 feet wide and 6 feet high from the base to the apex of the "triangle." Three bolts were almost entirely imbedded from the base to the apex of the "triangle" along its width (i.e. across the entry) protruding from 1 to 3 inches through the apex into the solid rock above. A fourth bolt went through the tapered edge of the rock on its left end, anchoring approximately 50 inches into the rock above.

(3) Twenty-nine (29) roof bolts were recovered from the fall site of which twenty-eight (28) had been installed that day as opposed to the 1978 bolting.

(4) The measurement of the holes left by bolts that either came down during the roof fall or were removed during the clean-up indicated that there had been 6'foot bolts along the brow on the left side of the haulageway, directly over the place where Steiner was at the time of the accident. Because no 6'foot bolts had been installed during the 1978 bolting of the haulageway, these were newly installed roof bolts. Therefore, his conclusion was that the roof directly over Steiner at the time of the accident had been bolted that same day with 6'foot bolts.

(5) Roof coal adhered to the base of this rock so that all that was visible from the entry was coal top and coal ribs.

Apropos this last finding, whether the rock that fell out on Steiner was located at the convergence of two slips

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as urged by the respondent or at a slip and clay vein as testified to by Inspector Moody, there is no proof in this record that the defect or fault was observable before the rock fell out, killing Mr. Steiner.

There are several places in this record where, as the respondent suggests, it is obvious that Inspectors Moody and Swarrow are of the belief that a roof fall is in and of itself, without more, conclusive proof that the roof was inadequately supported, and therefore a violation of 30 C.F.R. 75.200 is proven. I believe more of a showing of culpability is required. The regulations do not impose absolute liability on operators to be insurers of mine roofs. The regulations do require a reasonable standard of care on the part of mine operators to see that their miners are working under adequately supported roof. What is adequate must depend on all the circumstances of which the operator is actually aware as well as those with which he is chargeable with knowledge of.

Other than the fact that the roof fell, Inspector Moody is of the belief that the roof was inadequately supported because of the spacing of the bolts and the lack of bolts along the left side of the haulageway for the distance of the overhanging brow. More specifically, the distances from the left-hand rib to the first roof bolt were in excess of five (5) feet in several instances where the overhanging brow ran along the left side of the entry. The longest distance was eight (8) feet, six (6) inches immediately outby the roof fall area.

Mr. Sadler testified that this was because of the overhanging brow and the debris located along the left rib. He stated that they were bolting as near to the lip as they could. Otherwise, they were bolting on approximately four to five foot centers. The brow itself was approximately two (2) to three (3) feet wide. Therefore, the measurements between the edge of the brow and the first bolts would be approximately three (3) to six (6) feet varying along its length.

The respondent's evidence regarding the adequacy of the bolting in the roof-fall area and immediately outby the accident scene is credible and convincing. That evidence, depicted on Respondent's Exhibit No. 1, shows the location of 29 roof-bolt holes and their measured depth in and immediately outby the fall area. They represent twenty-nine 4 and 6 foot roof bolts installed on approximately 4 to 5 foot centers throughout the area of the fall. Twenty-eight of them had been installed on the very day of the accident.

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Four of them were in the rock that killed Steiner. Unfortunately, only one of the four went completely through the inverted V-shaped triangular rock far enough to anchor into the strata above. The other three did not anchor into the solid strata above that rock because they were put into the apex of the inverted "V," which was approximately six (6) feet thick. They anchored into the rock itself. The holes of these three bolts are depicted and circled on Exhibit No. RÄ1 as extending 3" , 1" , and 2" into the mine roof, from right to left, respectively. The fourth bolt (also circled in blue on RÄ1) went through the edge of the rock and anchored some 50" into the strata above, but was obviously not enough to hold the rock up by itself.

There has been no allegation that the respondent violated it's roof control plan with regard to the number of roof bolts installed in this area or their pattern of installation. While the Secretary correctly points out that it is not necessary to prove a violation of the roof control plan in order to sustain a violation of 30 C.F.R. 75.200, the evidence must show that the operator knew or should have known that a condition existed that required additional support and yet it was not provided.

Inspector Robert E. Swarrow issued the instant 104(d)(1) order on October 10, 1984, the day after the accident. He testified concerning that issuance at Tr. 185:

Q. Okay. And, did you and Mr. Moody talk about this Citation?

A. Yes.

Q. Did you and he agree that this Citation should be issued?

A. Yes.

Q. And, upon what basis?

A. The mine roof in that area was not adequately supported.

Q. In your opinion, why wasn't it adequately supported?

A. Because the roof fell.

Q. Any other factors?

A. No.

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Inspector Moody is of a like opinion. He testified at Tr.

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Q. Okay. So, is it your position that no matter what the company did, if there is a fall you would have an inadequately supported roof?

A. I believe that would be a good position.

** ** *

Q. I didn't ask you that. You testified that because there was a fall there, you concluded that the roof was inadequately supported, and that's your position?

A. That's correct.

I have to agree with the respondent's assertion that these two inspectors apparently decided a day after the accident and before the investigation was fairly underway, let alone completed, that there is a violation of 30 C.F.R. 75.200 any time a roof falls. Consequently, they apparently did not think it necessary to investigate much farther than documenting the fact of the roof fall itself and the tragic death of Mr. Steiner. Most importantly, they failed to produce any evidence to the effect that any objective signs existed prior to the accident that would have alerted a reasonably prudent mine operator to a condition that required roof support over and above that normally required.

In summary, the Secretary has not borne his burden of proof to demonstrate that the area was inadequately supported considering the circumstances that the operator either actually knew or with due diligence could have ascertained prior to the accident. For the reasons stated herein, Order No. 2403083 is dismissed.

ORDER

Based on the foregoing facts and conclusions of law, I enter the following order:

1. The motion for approval of settlement concerning Citation No. 2403073 is granted and a penalty of \$58 is assessed.

2. The motion for approval of settlement concerning Citation No. 2403082 is granted and a penalty of \$98 is assessed.

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3. Citation No. 2403072 and all penalties therefor are vacated.

4. Citation No. 2403074 is affirmed and a penalty of \$79 is assessed.

5. Order No. 2403083 and all penalties therefor are vacated.

Accordingly, the respondent is ORDERED TO PAY the sum of \$235 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

FOOTNOTES START HERE

1 Inspector Moody's notes reflect the following width measurements: 15' 5"; 14' 10"; 15' 6"; 15' 0"; 16' 2"; 16' 11"; 18' 6"; and 16' 4" (GXÄ6).