

CCASE:  
HELEN MINING V. SOL (MSHA)  
DDATE:  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

THE HELEN MINING COMPANY,  
CONTESTANT

CONTEST PROCEEDING

v.

Docket No. PENN 86-94-R  
Order No. 2696214; 1/28/86

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

Homer City Mine

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

CIVIL PENALTY PROCEEDING

v.

Docket No. PENN 86-181  
A.C. No. 36-00926-03634

THE HELEN MINING COMPANY,  
RESPONDENT

Homer City Mine

DECISION

Appearances: William T. Salzer, Esq, Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for the Secretary of Labor;  
Ronald B. Johnson, Esq., Wheeling, West Virginia,  
for the Helen Mining Company.

Before: Judge Weisberger

Statement of the Case

In these proceedings, Helen Mining Company (Respondent) seeks to contest a section 104(d)(2) order issued on January 28, 1986. The Secretary (Petitioner) seeks a civil penalty for an alleged violation of 30 C.F.R. 77.200. Pursuant to notice, these cases were heard in Pittsburgh, Pennsylvania, on December 16 & 17, 1986, and February 2 & 3, 1987. William McClure, Roger Jordan, George Hazuza, Shirley Rine, and Robert Nelson, testified for the Petitioner. Josep Dunn, Victor Tagliati, and Lynn Harding testified for the Respondent.

On February 26, 1987, in Pittsburgh, Pennsylvania, the Secretary took a deposition of Charles S. Battistoni.

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The Petitioner submitted its Proposed Findings of Fact and Memorandum on April 13, 1987, and the Respondent submitted its Proposed Findings of Fact and Posthearing Brief on April 21, 1987. Time was allowed for Reply Briefs to be submitted, and Respondent submitted its Reply Brief on May 29, 1987. Petitioner did not file any Reply Brief.

On May 7, 1987, Petitioner filed a Motion for Decision and Order Approving Settlement to approve a settlement reached between the parties concerning order number 2696220.

#### Stipulations

1. The Helen Mining Company owns and operates the Homer City Mine and is subject to the jurisdiction of the Federal Coal Mine Safety and Health Act of 1977, Public Law 95-173, as amended by Public Law 95-164 (Act).

2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the 1977 Act.

3. The subject order (number 2696214) and termination thereto were properly served by a duly authorized representative of the Secretary, William McClure.

4. A copy of order number 2696214 (attached to the Petition for Assessment of Civil Penalty) is an authentic copy of the original citation.

5. No intervening clean inspection within the meaning of the Act has been conducted at the Homer City Mine; consequently, the contestant is within the chain sequence of section 104(d) orders.

6. The appropriateness of the penalty, if any, to the size of the coal operator's business should be determined based on the fact that the Homer City Mine had an annual production for 1985 of 807,434 tons of coal and production to the third quarter of 1986 of 617,250 tons of coal.

7. At the time of the issuance of order number 2696214 by Inspector Bill McClure, 13 of 53 forepole pad extensions were not in contact with the mine roof along the Butt No. 4 shortwall panel of the Homer City Mine.

8. At the time of the issuance of order number 2696214, the gap between the top of the forepole pad and the mine roof, at the 13 shields in question, ranged from between 2 to 14 inches.

Findings of Fact

1. On January 28, 1986, 9:45 a.m., MSHA Resident Inspector William McClure conducted a quarterly inspection at the HÄButt No. 4 shortwall panel at the Homer City Mine owned by The Helen Mining Company.

2. The shortwall method of mining utilizes a continuous mining machine which moves along the face of the shortwall panel and cuts a ten foot wide block of coal from the face. The length of the shortwall face at the HÄButt No. 4 panel was between 250 and 300 feet. The shortwall system employs a mechanized roof support systemÄhydraulically powered shields, made by GullickÄDobson Ltd., that advance with the face.

3. Support is provided by a pressure arch from the main canopy of the shield to the coal face. This causes pressure to be exerted in the face area.

4. As the continuous miner makes its cut along the face, the individual shields on the headgate side of the panel are partially advanced into the void created by the miner's cut. As the shield is partially advanced, the forepole extension is extended towards the face in the area where coal has been removed. It takes approximately 2 hours for the miner to complete a pass.

5. The forepole pad component of the shield measures 48 inches wide by 28 inches long. The forepole pad is hydraulically extended out from within the forward canopy of the shield towards the face for a distance of approximately 5 feet. The forepole is designed to support up to approximately 14 tons where it is against the roof. If it is not against the roof, there is uncertainty as to its support capacity if hit by material falling from the roof.

6. The function of the forepole extension is to reduce the area of unsupported roof between the forward canopy tip and the face. (Tr. 98, 437; Deposition Tr. pp. 19Ä20.) It is not a critical area of a support (Tr. 440).

7. After McClure observed that some of the forepole pads were not touching the roof, Mick Lloyd, a representative of the manufacturer, who was present, told him that the forepoles should be in contact with the roof. I adopted this testimony as it was corroborated by Robert G. Nelson, a supervising Coal Mine Safety Health Inspector for MSHA, who testified for Petitioner. Also I note that in a deposition taken on February 26, 1987, Charles S. Battistoni, a MSHA Mine Health Safety Specialist on roof control, in essence stated, that on February 5, 1986, at a meeting with Respondent's staff, Lloyd agreed that the canopy tips should be

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against the roof once the miner has cleared the shield.  
(Deposition Tr. 20-21.) It is significant that this is reflected  
in notes taken by Battistoni on the day of the meeting  
(Deposition 9-12, 21).

8. At the time of Inspector McClure's inspection, a void or caved area existed above three to four shields in the headgate entry where the operator had previously used cribbing and additional roof bolts to provide roof support over these shields. According to McClure this indicated to him that there was a "bad roof" at the headpole entry and "approximately" into the coal face (Tr. 104). The following day there were breaks and cracks observed over the shields in the immediate face area. (Tr. 506.)

9. Four of the 13 forepoles were not in contact with the mine roof due to a cavity in the roof above the pad where the roof had fractured and had fallen.

10. The 13 forepole pads not in contact with the roof were within 4 feet of the face. As a consequence of the cavity over two of the shields whose pads did not touch the roof, the area of the roof that was unsupported was approximately 8 feet by 3 feet. The remaining nine forepole pads were not in contact with the mine roof due to the fact that the continuous miner operator had cut too high into the mine roof.

11. The continuous miner was cutting too deeply into the roof since January 7, 1986, the date of the installation of the miner, 3 weeks prior to the issuance of order number 2696214. This problem was due to poor mining practices and Respondent was aware of this problem. Failure to correct the gap created by the miner at the end of a pass led to a bigger gap during the next pass by the miner.

12. Of the 13 forepole pads not in contact with the roof, four were adjacent.

13. Eight to 10 feet of mine roof extending outby the face was unsupported due to the lack of contact between the 13 forepole pads and the mine roof.

14. During a shift, five or six workers may travel underneath the forepole extensions to fulfill their work assignments. This finding is based upon the uncontradicted testimony of Roger Jordan, who works as a beltman for Respondent, and who serves as the Union's Safety Committee Man. He testified that every time he was at the face, at the shortwall section, he saw miners walking under the forepole pads.

15. In this section of the mine, pot outs occur on a daily basis.

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16. Five or 6 of the 13 forepole pads not in contact with the roof, were approximately 2 inches below the roof. Contact with the roof could have been made by placing logging in the gap. This can be done from under the adjacent support.

17. There was approximately a 6 inch gap between the roof and 3 or 4 of the forepole pads. Contact with the roof could have been made by placing one crib block between the gap and the pad.

18. There was approximately a 14 inch gap between the roof and 3 or 4 of the forepole pads. This gap could have been bridged by constructing cribbing. A worker constructing such cribbing would be exposed to unsupported roof.

19. Respondent's approved roof control plan does not explicitly provide that the forepole pads be in contact with the roof.

20. Prior to the issuance of the subject order, Respondent did not have any knowledge that a failure to maintain roof contact with the forepole pad, at a point no greater than 4 feet from the face, constituted a violation of the roof control plan.

#### Regulatory Provision

30 C.F.R. 75.200 provides as follows:

Each Operator shall undertake to carry out on a continuing 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, travel ways, 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.

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Approved Roof Control Plan

Drawing No. 16(b) states as follows:

3. The space in between the shield canopy extensions and the coal face shall not exceed 4 feet. Where this spacing is exceeded, roof supports shall be installed not to exceed 4 foot spacing before any work or travel is permitted in this unsupported area, except for the purpose of installing supports.

#### Issues

1. Whether the Respondent violated the approved roof control plan.

2. Whether the approved roof control plan provided that the forepole pads of the Gulick-Dobson shield be in contact with the roof.

3. If the Respondent did not violate the roof control plan, whether it violated 30 C.F.R. 75.200.

4. If a violation of a regulatory provision or the approved roof control plan occurred, was it of such a nature as could have significantly and substantially contributed to the cause and affect of a safety hazard.

5. If a violation of a regulatory provision or the approved roof control plan occurred, whether such violation was caused by Respondent's unwarrantable failure.

#### Discussion and Conclusions of Law

Based upon the Parties' stipulations, I conclude that the Helen Mining Company is subject to the jurisdiction of the Federal Coal Mine Safety and Health Act of 1977, and that I have jurisdiction over this proceeding.

#### I

On January 28, 1986, when Federal Mine Inspector William McClure inspected the shortwall section of Respondent's Homer City Mine, 13 of 53 forepole pad extensions of the Gulick-Dobson shields, which were positioned within 4 feet of the face, were not in contact with the roof. McClure issued a 104(d)(2) order predicated upon the language of paragraph 3 of Drawing Number 16(b) of the approved roof control plan. However, a plain reading

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of paragraph 3, supra, reveals that it does not specifically require the forepole pads to be in contact with the roof at a point no more than 4 feet from the face. Furthermore, the second sentence of paragraph 3, supra, requires roof supports before any travel is permitted in the area "where this spacing is exceeded." The spacing that is referred to, clearly relates back to the first sentence of paragraph 3, which sets forth a maximum of 4 feet between the shield's canopy extensions, (the forepole pads) and the coal face. Inasmuch as all the forepole extension pads in question were not more than 4 feet from the face, it would appear that the installation of roof supports, pursuant to the second sentence of paragraph 3, supra, is not required.

Petitioner argues, in essence, that contact with the roof is the "requisite element of roof support." Although the record, in general, appears to support this proposition, it must be concluded, due to the language of paragraph 3, supra, that the roof control plan did not specifically require the forepole pads to be in contact with the roof no more than 4 feet from the face.

Furthermore, Petitioner has failed to establish that it was the clear intent of the parties, for the approved roof control plan to require that the forepole pads be in contact with the roof. On the other hand, in this connection, it is significant that Lynn Harding, who had served as Respondent's assistant safety director and safety director since 1976, has indicated, in essence, that the approved roof control plan for the shortwall operation using shields similar to those involved in the instant case, has been in effect for over 10 years and that MSHA never issued a citation or a safe-guard or an order pertaining to gaps between the forepole pads and the roof. This would tend to have some probative value with regard to the intent of MSHA when the language contained in paragraph 3, supra, was drafted. Joseph Dunn, Respondent's general mine foreman, indicated that he wrote the shortwall roof control plan 10 years ago, and that it was not his intent, in preparing the plan, that the forepole had to be in contact with the roof.

Inasmuch as a roof control plan, once approved, must be followed in the same fashion as a mandatory regulatory standard, it is of critical importance that the plan be unambiguous as to the requirements imposed upon the mine operator. I thus find that inasmuch as paragraph 3, supra, does not specifically mandate roof supports where the forepole pad extension is not in contact with the roof, the order issued herein cannot be predicated upon a violation of the approved roof control plan.

## II

At the hearing, Counsel were asked to brief the issue as to whether, assuming a finding that the roof control plan was not violated, there still could be found a violation of a mandatory



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regulatory standard. The Respondent, in essence, argues that because the inspector relied on the requirements of the roof control plan, this case must be decided upon a consideration of the requirements of that plan. In essence, Respondent argues that if it be found that it has not violated its roof control plan, then there should not be any consideration of whether a violation of the regulatory standard, section 75.200, supra, has occurred. In support of its position, Respondent relies upon the Commission's decision of Secretary v. U.S. Steel Mining Company, 7 FMSHRC 1125 (August 1985). In its decision, the Commission, in 7 FMSHRC, supra, at 1133, vacated the conclusion of the Judge, who originally heard the case, that section 75.200, supra, was violated even though the roof control plan was not. The Commission's action in this regard was based upon its remand to the Judge to make further specific findings with regard to the requirements of the roof control plan in question. As such, the Commission did not find, as a matter of law, that once it has been determined that a roof control plan has not been violated, that an inquiry may not be made as to whether section 75.200, supra, was violated. The Commission's usual practice, upon announcing a rule of law, is to present a thorough discussion of the legal issues involved along with citations to pertinent authorities. In contrast, in U.S. Steel Mining Co., supra, the Commission limited its decision to a discussion of the need to ascertain the requirements of the roof control plan in question. It did not present any discussion as to whether, as a matter of law, a violation of section 75.200, supra, can occur absent a violation of a specific roof control plan.

In contrast, in cases before the Interior Board of Mine Operations Appeals, the Board had held that it is not necessary to provide a violation of a roof control plan to sustain the violation where the roof is not adequately supported. (See North American Coal Corp., IBMA Docket No. 73Ä42, 3 IBMA 93 (April 17, 1979); Ziegler Coal Co., Docket No. 73Ä29, 2 IBMA 216 (September 18, 1973).) It is significant to note that in Rushton Mining Company, IBMA Docket No. 77Ä19, 8 IBMA 14 (June 23, 1977), the Board held that the roof control plan is the minimum and it does not absolve the operator of the responsibility for additional supports. These cases have been followed by Commission Judges in cases cited by the Petitioner (See, Secretary v. CF & I Steel Corporation, 3 FMSHRC 1870 (July 1981); Secretary v. Leslie Coal Mining Company, 3 FMSHRC 1648 (June 1981)).

Furthermore, the Federal Mine Safety and Health Act of 1977, supra, is a manifestation of the Congressional concern to enact legislation that would have the effect of protecting miners from the hazards of roof falls (see Secretary of Labor v. Consolidation Coal Company, 6 FMSHRC 34, 37 n. 4 (January 1984)). Thus to preclude an inquiry as to whether the statutory standard, section 75.200, supra, has been violated strictly on the basis that the Inspector's order was predicated upon a violation of the roof

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control plan alone, would appear thwart Congressional intent to have miners protected from the hazards of roof falls. Accordingly, even though the Respondent herein did not violate the roof control plan, an inquiry must be had as to whether the regulatory provision, section 75.200, supra, has been violated.

As pertinent, section 75.200, supra, provides that " the roof of all working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs." In Secretary v. Canon Coal Company, 9 FMSHRC 667 (April 1987), the Commission set forth the test to be used in determining whether section 75.200, supra, has been violated. The Commission, Secretary of Labor v. Canon Coal Company, supra, at 668 stated as follows:

Questions of liability for alleged violations of this broad aspect of this standard are to be resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the standard seeks to prevent. c.f. Ozark-Mahoning Co., 8 FMSHRC 190, 191-92 (February 1986); Great Western Electric Co., 5 FMSHRC 840, 841-42 (May 1983); U.S. Steel Corp., 5 FMSHRC 35 (January 1983); Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982). Specifically, the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard. We emphasize that the reasonably prudent person test contemplates an objective—not subjective—analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue. See, e.g., Great Western, supra, 5 FMSHRC at 842-43; U.S. Steel, supra, 5 FMSHRC at 5-6.

Respondent's position, in essence, is that the manufacturer of the Gulick-Dobson shield never advised it that the forepole pad has to be in contact with the roof, that MSHA had never cited it in the past for not having forepole pads in contact with the roof, and that MSHA had never required it in the past to have the pads in contact with the roof. Respondent also relies upon testimony from Victor Tagliati; its shortwall coordinator, as well as from Dunn and Harding to the effect that the forepole pad does not have any support function and just serves as overhead protection from falling material. Also relied upon is Dunn's testimony that the forepole pads provide equivalent support whether they are in contact with the roof or 14 inches below the roof.

I do not find Respondent's arguments to be persuasive. Dunn and Tagliati testified, in essence, that from July 1985, when the Gulick-Dobson shields were installed until January 28, 1986, when the citation was issued, representatives from the manufacturer of the shields were at the mine on a daily basis. They each testified that they were never told by the manufacturer's representatives that it was not proper not to have the forepole pads in contact with the roof. However, I accepted the testimony of McClure, as corroborated by Nelson, that after he observed, on January 28, 1986, that some of the forepole pads were not touching the roof, the manufacturer's representative, Mick Lloyd told him the forepole pads should be in contact with the roof. I therefore, conclude that in fact Lloyd made this statement to McClure. It thus might be inferred that since Lloyd told McClure that the forepole pads should be in contact with the roof, it is likely that Lloyd made the same statement on other occasions to Respondent's employees.

Tagliati, Dunn, and Harding, all testified, in essence, that the forepole pad does not have any support function and its purpose is for overhead protection from rocks. While the record is clear that in creating a pressure arch the main support comes from the canopy portion of the shield, the forepole pads are, nonetheless, designed to support 13.9 tons. Dunn testified that the forepole pad does not have to come in contact with the roof and that it provides equivalent support if it is in contact with the roof or if it is 14 inches below. On the other hand, George Hazuzza, who presently reviews roof control plans on behalf of MSHA, testified, in essence, that although the forepole pad can support, in a static situation, approximately 13.9 tons, it is uncertain how much weight the forepole pad can support if it is not in contact with the roof, as it would depend upon the size and weight of material falling from the roof and the amount of distance it would fall from the roof to the forepole pad. I find this testimony of Hazuzza to be well reasoned, and I adopt it. Hence, it is clear that a reasonably prudent person familiar with the mining industry would have recognized the hazard created in not having the forepole pad placed up against the roof. This is especially true in the case of the four adjacent shields, whose forepole pads were not in contact with the roof, leaving a unsupported area of approximately 160 square feet.

I have taken in to account the testimony of Tagliati that a 14 inch gap, which existed between 3 or 4 of the forepole pads and the roof, could be bridged by constructing cribbing. Respondent argues that the individual constructing such cribbing would be exposed to an unsupported roof. Inspector McClure was of the opinion that a unsupported roof is a greater hazard than the exposure to an individual to an unsupported roof while constructing cribbing to support the roof. I adopt the opinion of McClure. I find

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that a substantial hazard to exist as the gap between the roof and the forepole pad, can lead to unsupported roof being exposed for the duration of a pass by the miner which can take up to 2 hours.

Based on all the above, I conclude that Respondent violated section 75.200, supra.

### III

Petitioner has, in essence, alleged that the nature of Respondent's violations of section 75.200, supra, fall within the purview of section 104(d)(1) of the Act, as they "could significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard" (section 104(d), supra) In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission set forth the elements of a "significant and substantial" violation as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and, (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. (6 FMSHRC, supra, at 3A4.)

As discussed above, infra, I have already found that a mandatory safety standard, i.e., 30 C.F.R. 75.200, has been violated. Accordingly, the first element of Mathies, supra, has been satisfied.

The evidence establishes that in the Respondent's shortwall section the Gulick-Dobson shields create a pressure arch which causes pressure on the face. According to the uncontradicted testimony of McClure, at the date of inspection, there was a caved-in area above three or four shields in the headgate entry which indicated to him that there was "bad roof" at that point and also "approximately" into the face (Tr. 104). Dunn and Tagliati testified that the roof condition, on the section in question on the date the citation was issued, was "good." However, it is noted that Tagliati indicated in the area in which the citation occurred there are pot outs on a daily basis and there could have been pot outs on the day of the order. Indeed, it was the uncontradicted testimony of Shirley Rine, a MSHA Coal Mine Inspector assigned to roof control duties, that the day after the citation was issued, he observed "cracks and breaks over top (sic.) shield right into the immediate face area." (Tr. 506.) Further, it is significant to note that four adjacent

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shields had forepole pads not in contact with the roof, thus leaving an area of approximately 160 feet unsupported. Moreover, this area could have remained unsupported for the duration of a pass which takes approximately 2 hours. In addition, I noted the fact that 3 or 4 forepole pads were 14 inches below the roof, thus creating uncertainty as to the weight the pad would support if hit by falling rock. Taking all these factors into account, I conclude that a discrete safety hazard was created with a reasonable likelihood that this hazard will result in injury. It further is clear, as established by all witnesses to whom the question was posed, that rock falling from an unsupported roof could seriously injure or kill a person below. In this connection, I conclude, based upon the credible testimony of Jordan and McClure, that as many as five or six workers during the shift may travel underneath the forepole extensions to fulfill their work assignments (see finding 14). I therefore conclude that the violation 30 C.F.R. 75.200 was such a nature as could significantly and substantially contribute to the cause and affect of a coal mine safety hazard.

#### IV

It is the Secretary's position that the violation herein constitutes a "unwarrantable failure" to comply to the provisions of 30 C.F.R. 75.200. The Commission, in *United States Steel Corporation v. Secretary of Labor*, 6 FMSHRC 1423 (June 1984), held that:

an unwarrantable failure to comply may be proved by a showing that the violative condition or practice was not corrected or remedied prior to the issuance of a citation order because of indifference, willful intent, or a serious lack of reasonable care. (*United States Steel Corporation v. Secretary of Labor*, 6 FMSHRC, supra, at 1437).

Petitioner argues, in essence, that the gap between the forepole pad and the roof was caused by the Respondent's poor mining practices in not handling the remote control continuous miner properly. Petitioner also argues that in preshift inspections it should have been observed that 13 forepole pads were not in contact with the roof. Although the violative condition was caused by Respondent's poor mining practices and was readily observable at the date the citation was issued, I find that the Petitioner has not established that the reason for the Respondent not remedying the violative condition was due either indifference, willful intent, or serious lack of reasonable care. The critical issue is not what caused the violative condition, but rather the operator's motive in not correcting the violative condition. It is noted, in this connection, that the roof control plan did not

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explicitly require the forepole pads to be in contact with the roof. Further, according to the uncontradicted testimony of Dunn, Tagliati, and Harding, for 10 years prior to the date the citation was issued, MSHA had never written a citation for forepole pads not being in contact with the roof, in spite of, according to the uncontradicted testimony of Tagliati, the inspectors being present when such conditions have existed. Based upon these factors it must be concluded that operator's failure to have forepole pads in contact with the roof was neither as a result indifference or willful intent. Further, although I have held infra, that a reasonably prudent person familiar with the mining industry would have recognized the hazardous condition of an unsupported roof caused by the forepole pads not being in contact with the roof, I am not deciding that this established a serious lack of reasonable care. (c.f. U.S. Steel Corporation, supra.) The operator's lack of reasonable care did not reach this high degree as it was based upon its reasonable interpretation of its roof plan, the long history of not being cited for similar conditions, and its reasonable belief that a serious hazard was entailed in placing supports in the gap between the pads and the roof. Accordingly it is concluded that violation herein of 30 C.F.R 75.200 does not constitute an unwarrantable failure to comply with the Act.

V

I have considered all the criteria in section 110(i) of the Act. The Parties has stipulated as the size of the operator's business which I interpret as being large. I find that there is no evidence that the civil penalty proposed by the Secretary will have any detrimental affect on the operator's ability to continue in business. I also find that the operator did demonstrate good faith in abating the violation in a timely fashion. I further find that the operator, in violating 30 C.F.R 75.200, was negligent to a moderate degree, but that its action did not indicate a serious lack of reasonable care. I further find that the gravity of the violation was serious with regard to the 3 or 4 of forepole pads that were approximately 14 inches lower than the roof. I also find that the gravity of violation was serious with regard to the four adjacent forepole pads not in contact with the roof. However, I find that the gravity was only slight with regard to the 5 or 6 of the 13 forepole pads that were only approximately 2 inches below the roof. Based upon all these factors I find that a penalty of \$600 is appropriate.

Concerning order number 2696200, issued on February 3, 1986, Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from \$700 to \$150 is proposed. I have considered the representations and

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documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. I further conclude that the modifications of the order to a section 104(a) citation is proper.

ORDER

It is ORDERED that the operator pay the sum of \$750, within 30 days of this decision, as a civil penalty for the violations found herein.

It is further ORDERED that order number 26926220 be modified to a Section 104(a) Citation. As modified the citation is affirmed. The contest is thus GRANTED in PART and DENIED in PART.

Avram Weisberger  
Administrative Law Judge