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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. WEST 86-225 A.C. No. 42-00093-03532
v.	Sunnyside No. 1 Mine
SKAISER COAL CORPORATION OF SUNNYSIDE, RESPONDENT	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; James A. Holtkamp, Esq., VanCott, Bagley, Cornwall and McCarthy, Salt Lake City, Utah, for Respondent.

Before: Judge Cetti

This is an enforcement proceeding brought by the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charging the operator of an underground coal mine with the violation of safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., (the Mine Act).

The Secretary charges the operator with the violation of safety standard 30 C.F.R. 75.205 with respect to the requirement that the operator test ribs of the mine as well as the roof and face before any work or machine is started, and as frequently thereafter as may be necessary to ensure safety.

The respondent filed a timely appeal from the Secretary's proposal for penalty dated September 2, 1986. After proper notice to the parties this matter came on regularly for hearing before me as a administrative law judge of the Federal Mine Safety and Health Review Commission on February 4, 1987, at Salt Lake City, Utah. Oral and documentary evidence was introduced, both parties were ably represented by counsel. Post-trial briefs were filed, and the case was submitted on March 30, 1987.

Issues

The issues presented in this case are:

(1) Whether the practice at the mine of examining but not testing the ribs of the mine constitutes a violation of 30 C.F.R

75.205, and (2) whether the alleged violation was "significan and substantial".

Stipulations

1. Kaiser Coal Corporation of Sunnyside is engaged in mining and selling of coal in the United States, and its mining operations affect interstate commerce.

2. Kaiser Coal Corporation of Sunnyside is the operator of Sunnyside Mine No. 1, MSHA I.D. 42Ä0093Ä03532.

3. Sunnyside Mine No. 1 is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent, Kaiser Coal Corporation of Sunnyside, on the dates and at the places stated therein, and may be admitted into evidence for the purpose of establishing issuance of the citations, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalty will not affect respondent's ability to continue in business.

8. The operator demonstrated good faith in abating the violation.

9. Kaiser Coal Corporation of Sunnyside is a large mine operator with 817,276 tons of production in 1986.

10. The certified copy of the MSHA assessed violations history accurately reflects the history of this mine for the two years prior to the date of the citation.

11. If a violation of 30 C.F.R. 75.205 is found the Secretary's $1,000 proposed penalty is the appropriate civil penalty.

Applicable, Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301 et seq. Sections 104(a) and 101(c)

2. The safety standard, 30 C.F.R. 75.205.

Summary of Evidence

On March 7, 1986, Jerry Dimick, a safety engineer, was kneeling next to a rib. In that position, while examining a malfunctioning crusher, he was fatally injured when a large piece of the rib slid down and rolled over him. The piece of rib which fell on him was approximately 6þ x 4þ x 2þ , with a feathered edge on one side. Five to seven people were required to lift the piece of coal off Mr. Dimick.

The citation alleges a violation of safety standard 30 C.F.R. 75.205 which provides:

> Where miners are exposed to danger from falls of roof, face, and ribs the operator shall examine and test the roof, face, and ribs before any work or machine is started, and as frequently thereafter as may be necessary to insure safety. When dangerous conditions are found, they shall be corrected immediately.

Under the heading "condition or practice" the citation alleges the following:

> A test of the rib condition was not conducted after a visual examination was made for crosscut No. 28 and inby to the longwall face of the 129th Left longwall section. A service representative was performing an examination of a piece of equiptment [sic] that was not operating properly. This person was required to place himself in a close proximity to the lower rib. The untested rib fell striking the victim causing fatal injuries. This violation was issued during the investigation of a fatal accident which occurred on March 7, 1986.

The Respondent's Case

The respondent, Kaiser Coal Corporation of Sunnyside, in its post-hearing brief accurately summarizes the evidence upon which it is relying to prove its case. Respondent states that on March 7, 1986, Jerry Dimick, a service engineer for Halbach and Braun, arrived at the Kaiser Sunnyside No. 1 Mine for the purpose of examining a malfunctioning Halbach and Braun crusher at the 19th left outside longwall area (Tr. 29Ä30). Mr. Dimick was an experienced miner, having worked underground several years prior to becoming a service representative (Tr. 44). Mr. Dimick met Duane Wood, the general longwall foreman, at the bathhouse and asked to go with Mr. Wood into the mine to take a look at the crusher (also referred to a chunk breaker and as a stage loader) (Tr. 157).

Mr. Dimick and Mr. Wood reached the longwall face at 19th Left after 11:00 a.m. (Tr. 157Ä58). They first noticed water leaking from a hose going to the crusher. After the leak was repaired, Mr. Dimick checked the valves on the controller of the crusher (Tr. 158).

Mr. Dimick knelt down between the crusher and the rib to look at the equipment. Mr. Dimick's back was toward the rib (Tr. 162Ä63). Mr. Wood crossed over the crusher to the "up-dip" side to look at the crusher from the other side (Tr. 159). While Mr. Dimick was kneeling down looking at the crusher, Mr. Gary Kuhns, a section foreman, came from the bottom of track entry and walked by Mr. Dimick on his way to the face (Tr. 92). Mr. Kuhns proceeded to help the headgate operator shovel loose coal from the bottom jacks. As he looked toward the area where Mr. Dimick was kneeling, Mr. Kuhns saw the rib slide down and roll over in the area where Mr. Dimick was kneeling (Tr. 34, 92Ä93). Mr. Kuhns estimated the piece of rib which fell on Mr. Dimick to be six feet by four feet by two feet, with a feathered edge on one side (Tr. 93).

Mr. Kuhns ran to Mr. Dimick and shouted for Mr. Wood. Mr. Wood came over the crusher and, with Mr. Kuhns, tried to lift the coal but could not. The section crew came down the face and five to seven people were required to lift the piece of coal off Mr. Dimick (Tr. 160).

Mr. Dimick was transported to the hospital and passed away while in intensive care that evening.

An investigation team composed of representatives from the Mine Safety and Health Administration ("MSHA"), the Company, the State Mine Inspector, and the miners undertook an investigation beginning at about 6:00 p.m. on March 7 (Tr. 15Ä16). At approximately 8:00 p.m., the investigation team was notified that Mr. Dimick has passed away. At that time, the MSHA inspectors issued a section 103(k) withdrawal order (Order No. 2834841) (Tr. 27).

MSHA subsequently interviewed a number of employees of Kaiser, including those who had worked and traveled in the area prior to the accident. All of the miners reported that they had visually examined the rib as they traveled and could see no apparent anomaly or problem (Tr. 33Ä34, 38, 58). During the hearing, both Mr. Wood and Mr. Kuhns testified that they had carefully examined the rib visually immediately before the accident and had concluded that the rib was sound (Tr. 91Ä92, 155Ä56). In fact, Mr. Kuhns testified that he had been though the area "a dozen times or more during that shift, and there had been no changes, and I pay particular attention to changes" (Tr. 95).

Mr. Wood testified that Tony Gabossi, the manager of the MSHA office in Price, told him that if there had not been a fatality, the citation would not have been issued (Tr. 171). In addition, Mr. Andrews testified that if Mr. Dimick had survived, no closure order would have been issued (Tr. 63Ä64).

Rib Conditions in Mine Generally

The Kaiser Sunnyside No. 1 Mine is a deep mine with up to 2,500 feet of overburden, which places considerable weight upon the coal. The coal is "soft," meaning that it yields to pressure from the weight. As a result, there is considerable sloughing of

coal (Tr. 142). There has never been any suggestion from MSHA that the sloughage be cleaned up regularly, as it actually serves to help support the ribs (Tr. 143Ä44).

Because of the nature of the coal in the mine, sounding or tapping and listening to the ribs is ineffective in detecting problems because the coal sounds the same whether it is tight or loose (Tr. 40, 41, 79Ä80, 129). The practice of the miners at Kaiser is to examine visually the ribs in their working and travel areas. If a crack, overhang, or other problem is identified, the procedure is to bar the rib down using a pry bar or equivalent before beginning work (Tr. 142, 147).

Mr. Wood and Mr. Howell testified that during their years at the Sunnyside No. 1 Mine, they had accompanied MSHA inspectors many times underground, and except for visits by Mr. Lee Smith of MSHA in the aftermath of the accident, they recalled no inspector either tapping or directing that someone tap the ribs for the purpose of testing their soundness (Tr. 152, 201Ä02). In fact, the citation was abated through hazard training of the employees on roof and rib control, which did not include any instruction on physical testing of the ribs (Tr. 74Ä75). It is significant that Mr. Andrews attended the training which constituted the abatement, and did not either instruct the miners himself that physical tapping is necessary or require that the company instruct the miners on the need for physical tapping of the ribs (Tr. 74Ä75, 187Ä88).

Mr. Wood and Mr. Kuhns testified that tapping the ribs at the Sunnyside No. 1 Mine could present a hazard because, even if the coal had been tight before the tapping, the tapping could act to loosen the coal. At that point, the loose coal would be a hazard and would have to be barred down (Tr. 96, 148Ä49).

Mr. Andrews, the MSHA inspector who issued the citation, testified that tapping the coal to observe visually whether there is any problem, either through movement or through chunks falling from the ribs, was the best way to determine its soundness. In fact, Mr. Andrews testified that after hitting a rib to test it, an individual should hit it again "to see if the first test had caused it to become loose enough to fall when you tapped it again, or if it would create some type of crack which you could visually see and try to bar down" (Tr. 61). However, Mr. Andrews also testified that if sloughage comes off the rib after it is hit, it does not necessarily mean the rib is loose (Tr. 62).

Mr. Andrews could not identify either time or distance intervals within which the tapping should be done, except to state that under ideal rib conditions, the rib should be tapped every two or three steps, stopping if "there was a different sound" (Tr. 69Ä73). However, in the twelve and one-half years he worked in and inspected the Sunnyside No. 3 Mine, he could recall no instance where he walked along a rib, tapped it, and detected a problem through sound (Tr. 73Ä74).

Mr. Andrews testified that even if tapping and sounding is ineffective, he would require it as an MSHA inspector because the regulation requires both visual and physical examination and testing (Tr. 85).

Petitioner's Case

On March 7, 1986 Bruce Andrews, a coal mine safety and health inspector, received information that a serious accident had occurred at the Kaiser Sunnyside Mine No. 1. Mr. Andrews, along with another coal mine Inspector Jerry Lemon, proceeded to the mine and arrived at the Sunnyside Mine at approximately 6:00 p.m. on March 7, 1986 (Tr. 15). Upon arrival at the mine Mr. Andrews and Mr. Lemon were met by the safety director for Kaiser Coal, Jerry Howell. Mr. Howell accompanied the inspectors underground and the party proceeded to the 19th left longwall section crosscut 28, the site of the accident (Tr. 16).

Upon arrival at the accident site, Mr. Lemon conducted a visual examination and testing of the ribs next to the lower part of the crusher (Tr. 22). Mr. Lemon then proceeded across the crusher to the uphill side of the ribs. There he noticed that there were cracks in the ribs and was told by the safety director that no one was allowed to be on the topside of the crusher or the uphill rib because of the unsafe condition of the ribs (Tr. 23). Mr. Lemon, however, did perform tests on the rib at that time (Tr. 211, 212). While performing those tests, Mr. Lemon asked to be brought a scaling bar so that he could bar down the loose ribs (Tr. 26).

The next morning, March 8, 1987, Mr. Andrews returned to the accident site. He was accompanied by Ted Caughman, a Senior Special Investigator for MSHA, and Tony Gabossi, supervisor in the MSHA Price Field Office (Tr. 28). The inspectors conducted interviews with persons who were in the area of the accident and who had information regarding the accident (Tr. 29).

The interviews with these persons showed that the victim of the accident, Mr. Jerry Dimick, arrived at the mine on the morning of March 7th (Tr. 30). Mr. Dimick, a representative from Halbach and Braun a mining service company, reported to the mine to check the malfunctioning crusher (Tr. 30). Mr. Dimick was met by Duane Wood, the general longwall foreman for Kaiser Coal, and the two men proceeded underground to the crusher zone area (Tr. 31). Upon arriving at the crusher Mr. Wood indicated that he conducted a visual examination of the roof and ribs in that area (Tr. 31, 155). Mr. Wood looked at the rib in the area near where Mr. Dimick would be working on the crusher and saw no cracks in the ribs. He had traveled the area several times that morning with crew members who also visually examined the rib and did not see any problems (Tr. 155). Prior to Mr. Dimick entering the area however, no testing of the ribs was conducted (Tr. 35). Mr. Dimick then proceeded to examine the crusher. In order to conduct the examination Mr. Dimick knelt down on the downhill side of the rib between the crusher and the rib (Tr. 32). While

Mr. Dimick was in that position, Mr. Wood crossed over the crusher to the other side and was looking underneath the crusher from the uphill side of the rib. Although the safety director indicated to Mr. Lemon that no one was to be on that uphill side, Mr. Wood indicated that on that particular day he crossed to the upper rib, visually examined the rib, but conducted no testing on that uphill side (Tr. 178).

While Mr. Dimick was examining the crusher from the kneeling position, two miners, Gary Kuhns, a section foreman, and Darrell Leonard, passed by him on the lower side of the crusher. Both of these miners indicated that they visually examined the rib as they walked by Mr. Dimick but did no testing (Tr. 33, 34). Mr. Kuhns testified that when walking past Mr. Dimick, he had no more than two feet of space in which to walk between Mr. Dimick and the rib (Tr. 91). In fact, Mr. Kuhns had to turn to the side in order to get around Mr. Dimick (Tr. 91). Mr. Kuhns walked past Mr. Dimick and proceeded to the head gate area of the longwall section. While he was helping the head gate operator Mr. Kuhns looked down the entry, saw Mr. Wood on the uphill side of the crusher but could not see Mr. Dimick on the bottom of the downhill rib (Tr. 34). Mr. Kuhns then saw a rib, approximately 6þ x 4þ and 2þ thick, slide and tip over in the area where he had seen Mr. Dimick kneeling (Tr. 34, 93). Mr. Kuhns shouted to Mr. Wood and the two men ran over to find Mr. Dimick trapped under the fallen rib (Tr. 34, 93, 94).

On the day of the accident, March 7, 1987, several other miners had been traveling in the area and passing between the crusher and the downhill rib. The area was a walkway for the longwall crew who passed through this section when they went to work in the morning, when they went to lunch, and when they left the area at the end of the day. Anyone traveling from the longwall face to the head gate had to pass through this particular area (Tr. 35). The miners passing through this area on March 7th indicated that they had conducted a visual examination of the rib but had not conducted any testing of the ribs on the lower side of the crusher (Tr. 35).

Mr. Kuhns indicated that when he walked past Mr. Dimick to the headgate area, he visually inspected the rib as he walked by but did not conduct any physical test of the rib nor did he observe anyone else conducting a physical test of the rib (Tr. 94). In fact, Mr. Kuhns testified that he does not make it a practice to physically test those ribs (Tr. 95). During the time Mr. Dimick was in the area between the rib and the crusher, no one conducted a test of the rib, nor were there any test of the rib conducted prior to Mr. Dimick's entering the area (Tr. 42).

It is the Secretary's position that prior to the accident, several things occurred in the longwall section that indicated that the ribs should have been tested.

The ribs in this mine could have been tested prior to the accident in one of two ways to determine if there were any

hazards present. First, a sounding test, also known as the sound and vibration test could have been conducted. Sounding to test the rib is merely to hit the rib and listen for the sound. A sharp ringing sound will indicate the rib is fairly stable and a drummy hollow sound will indicate that the rib is weak or fractured (Tr. 111). Where the ribs are prone to sloughing or pressure they will sound hollow or loose. A hollow sound indicates that the rib should be scaled down (Tr. 40). Although a sounding test is not always accurate it is one of the several ways in which to determine the competency of the ribs and is more valuable in some areas of the mine than others (Tr. 111, 112).

The second test that can be done to determine the competency of a rib is a physical test. A physical test is conducted in much the same way as the sound and vibration test. The test is conducted by hitting the rib with a scaling bar or some other long instrument. Once the rib has been hit or tapped the person conducting the test can then watch the rib to see if there are any indications of movement in that piece of coal or rib. A movement will indicate a need to pull down the rib (Tr. 39, 40, 114).

While neither of these two methods of testing roof and ribs is fool proof, they are helpful in locating unstable ribs (Tr. 112). A visual observation alone may fail to detect a hazard that a sounding method or the physical method of testing may detect. The test may also confirm a hazard that is already suspected (Tr. 112). The two tests, the sounding test and the physical test, are both conducted with a long bar or stick.

In the Sunnyside Mine both the sounding test and the physical test are appropriate (Tr. 120). It is acknowledged, however, that different types of ribs require different types of control and evaluation (Tr. 121). It is the Secretary's position that the conditions or type of rib will not excuse an operator from conducting the tests required by the regulation. Which test to use, sounding or physical, depends on the condition of the mine and the ribs at the time. Mr. Wood testified that sounding probably would not have told them anything about the rib in the area of the accident on March 7th (Tr. 179). However, he did admit that a visual examination of a rib cannot always tell where there is a problem (Tr. 181), and that it is possible that a physical test, that is tapping of the rib and then observing to see if anything occurred, would have shown a problem in the area of the accident (Tr. 179, 191, 192). The mine inspectors agree that a sounding test in this mine may give a false indication but a physical test is the best indication of a problem, partly because this mine uses yieldable pillars which are prone to sloughage (Tr. 41). A visual examination alone is not an accurate indication of the condition of the ribs and does not always reveal a fall danger (Tr. 102, 210). Therefore, in working around roof and ribs a miner first makes a visual examination or observation to detect a hazard and then additional tests are conducted to reveal the presence of any further hazards (Tr. 102).

It is the Secretary's contention that tests, in addition to visual examination, are required under the Mine Safety and Health act when certain conditions exist that may post a danger to a miner (Tr. 43). There are several indications that would reveal to a miner that he may be exposed to danger and more than a visual examination is necessary. The indications present in this case were listed by the Mine Safety and Health inspectors who testified in this case.

Bruce Andrews has been a mine inspector for nine and a half years, has worked at the Sunnyside No. 1 mine, and has extensive experience with roof and rib control (Tr. 12, 14). Lee Smith is, and has been for one and a half years, a supervisor roof control specialist for the Mine Safety and Health Administration (Tr. 98). Prior to becoming the supervisor roof control specialist Mr. Smith was a Mine Safety and Health inspector for seven years and worked in the coal mines for approximately four and a half years (Tr. 99). Mr. Smith is in charge of all roof control plans; his primary specialty is roof control and he has had extensive training in roof and rib control (Tr. 99, 100).

Mr. Andrews and Mr. Smith both indicated that under the circumstances present at the Sunnyside No. 1 mine on March 7, 1987, a physical test should have been conducted of the ribs in the area where Mr. Dimick was working based on four specific items. These items should have been known by the management and should have indicated to mine management a danger from a rib fall and a need for a test. The four items are: 1) the history of the mine; 2) the proximity of Mr. Dimick to the rib; 3) the fact that Mr. Dimick was not an employee of the mine; and 4) the shearing operation that had occurred approximately fifteen minutes prior to the accident.

The testimony is undisputed that the Sunnyside No. 1 mine has a history of bad ribs. Mr. Smith has conducted an inspection of the Sunnyside No. 1 mine on two occasions; each time for the purpose of examining the roof and ribs. The first inspection occurred in the summer of 1986, several months prior to this accident and was prompted by the fact that Sunnyside Mine had been listed as a mine with a high incident rate of accidents resulting from fall of roof and ribs (Tr. 105, 108, 109). On his first visit Mr. Smith was conducting a six-month review of the Sunnyside No. 1 mine roof control plan. On that visit Mr. Smith found that the areas in the Sunnyside Mine he visited had ribs that were unstable, showed evidence of sloughage and appeared to be incompetent (Tr. 106). The sloughage and the problem with the ribs began shortly after initial development in the areas he visited (Tr. 106). The problem is in part caused by overburden at this mine that exerts pressure on the coal seam in a downward manner and places excessive weight on the ribs (Tr. 108). On his first visit to the mine Mr. Smith discussed problems concerning the ribs with mine management and was told by management that they were certain that the ribs were incompetent and acknowledged that the rib problem was due to various conditions, one of them being the amount of overburden (Tr. 108, 109).

Mr. Smith made his second visit to the Sunnyside No. 1 mine on February 7, 1987, and again inspected the rib conditions. Again, the ribs showed evidence of sloughage, there were fracture lines and evidence that the ribs were unstable (Tr. 110).

Based on his observations of the Sunnyside No. 1 mine, Mr. Smith considers it proper to first conduct a visual observation of the ribs. Then, using the sounding method or the physical test, the miner should determine if the ribs are loose and should be pried down (Tr. 111). In a mine with these conditions, where there is a history of the mine that indicates a particular coal seam has poor or substandard ribs, then more than a visual observation is required to prevent a hazard (Tr. 113). Again, the visual observation of a rib may not always indicate a hazard but the history of the mine indicates that further testing should be completed (Tr. 113). Here given the history of the Sunnyside Mine and the unstable ribs along with the incident rate indicated by Mr. Smith, there is a need to do tests to determine if a hazard exists (Tr. 115, 116).

Bruce Andrews, a coal mine safety and health inspector, who has extensive experience in coal mines and has worked in the Sunnyside Mine agreed with Mr. Smith that it is general knowledge that the condition of the ribs in that mine are substandard (Tr. 47). Mr. Andrews also indicated that the overburden was a particular problem and contributed to the unstable condition of the ribs (Tr. 47). The substandard condition of the ribs should have been known to the miners who work in that mine and in the particular area of the accident (Tr. 47).

Mr. Kuhns, a miner and section foreman at Kaiser Coal, indicated that he was aware that the ribs were not particularly good in that mine (Tr. 91) and the two witnesses for the operator, Duane Wood and Jerry Howell, agreed that they were aware of the substandard condition of the ribs in the Sunnyside Mine. Mr. Wood indicated that mine management is aware of the ribs problem (Tr. 176) and that MSHA has always discussed sloughage in entries with Kaiser Coal (Tr. 174). In fact, that subject has come up with almost every inspector involving Kaiser. There was sloughage caused by the poor condition of the ribs around the area where Mr. Dimick was working and that sloughage made it difficult to walk in the area (Tr. 175, 176). In most cases throughout the mine, Mr. Howell testified, the ribs are soft, they show signs of sloughage and failure, making it necessary for Kaiser to keep a close eye on the ribs and to pry down the bad spots (Tr. 176). Finally, Jerry Howell, safety manager at Kaiser Coal, indicated in his testimony that ribs were bad at the time of the accident in March of 1986 (Tr. 206).

As Mr. Smith testified, when he visited the mine he saw sloughage which indicated that the ribs were loose, were being subjected to stress, and indicating that the ribs could become unstable and incompetent (Tr. 118). Mr. Smith's testimony along with that of Mr. Andrews and the miners who worked in the Sunnyside Mine leave no doubt that there was a history of sloughage

and bad ribs in the Sunnyside Mine. The Secretary points out that this factor is very important in considering when a test of the ribs should be conducted.

The second factor addressed by the mine inspectors in considering that a test was necessary prior to the accident is the proximity of the workplace to the rib. When a miner's work position brings him into close proximity of the rib a physical test is appropriate (Tr. 103). In certain areas of the Sunnyside Mine where there is no equipment, miners can walk in the center of the walkway a distance from the rib thereby avoiding exposure to a hazard from a rib fall. In fact, in most areas of the mine the miners as well as the mine inspectors, walk in the middle of the walkway so as not to get too close to the ribs (Tr. 82, 207). Sunnyside Mine instructs its miners to walk in the middle of the entry to, in effect, position themselves as far away from the ribs as possible (Tr. 116). However, in the area where the accident occurred, it was necessary to walk closer to the rib than in other areas of the mine (Tr. 82). Whenever a miner's work position would place him closer to a rib than the center of the entry, there is a need to test the rib (Tr. 117).

Here Mr. Dimick was positioned between the crusher and the lower rib. He was in a kneeling position with his back towards the rib, a dangerous position as it would be difficult for him to observe the rib from that location and be aware of the condition of the rib (Tr. 117).

Not only was the kneeling position significant, but the fact that Mr. Dimick was in close proximity to the rib, within a few feet and directly in line for any fall of the rib. Mr. Kuhns testified that he was required to walk sideways in order to pass Mr. Dimick, indicating that Mr. Dimick was kneeling within a few feet of the rib. In addition, on March 7th other miners were traveling in the longwall area and had no choice but to walk very close to the rib. This was another indication that a physical test should have been conducted. Since Mr. Dimick was required to work just a few feet from the rib in a confined area, the ribs should have been tested (Tr. 43).

In conjunction with Mr. Dimick's working position in the mine, that is, kneeling very close to the rib, mine inspector, Mr. Andrews and the supervisory roof control specialist, Mr. Smith, both indicated that another factor they considered in determining whether a test of the rib should have been conducted is that Mr. Dimick was not an employee of the mine (Tr. 44). In fact, Mr. Wood, the longwall foreman who accompanied Mr. Dimick underground, testified that he would go to an extra length to inspect the ribs when accompanying someone into the mine who is not an employee of Kaiser Coal (Tr. 177). The obvious reason for conducting a test when a non-employee is present in the mine is that the non-employee may not be aware of the history or condition of the ribs and, therefore, may be unknowingly subjecting himself to a hazard.

The fourth, and final, factor discussed by the inspectors in this case relative to the need for a physical or sounding test is that mining was going on near the location where Mr. Dimick was working and the shearing process had been completed only fifteen minutes prior to the accident. As Mr. Smith testified, most roof fall fatalities occur within 25 feet of the face. The closer you get to where the coal production is being done the greater your chances of being involved in a fatal accident (Tr. 118).

Mr. Dimick was working in an area near the headgate entry at the crusher. The headgate entry is an area of primary activity where the actual mining of coal is being conducted (Tr. 36). Just prior to the accident, approximately fifteen minutes earlier, the longwall shearing machine had come down and cut through the headgate entry and then traveled back up the longwall face (Tr. 36). This shearing procedure involves weight transference or a transfer of stress, which in turn has an effect on the rib (Tr. 103). The procedure generally causes sloughage and the ribs to loosen (Tr. 36). The closer the shearing process is to the rib, the more likely it is to cause a problem or weaken the rib, particularly in the case of the yieldable pillar that is present in the Sunnyside Mine (Tr. 104).

Mr. Andrews, who worked in this mine, was aware of the effect that the shearing procedure had on the ribs (Tr. 37). It follows then, that miners and management who work in the mine would be aware of the effect of the shearing process on the ribs. Since this process had occurred approximately fifteen minutes prior to the accident, changes would have occurred in the area where Mr. Dimick was working, thereby exposing him to a danger of rib fall (Tr. 37). Therefore, because of the work being done in the longwall section, the conditions of the rib were continually changing, and a test should have been conducted prior to Mr. Dimick working in a position directly next to the rib (Tr. 84).

It is the Secretary's position that the standards express testing requirement (in addition to visual observation) was written as a result of the large number of fatalities and serious injuries due to rib and roof falls. The standard has a two-part requirement, first, the mine operator must observe or visually examine and, second, it must conduct a test (Tr. 122). The frequency of testing depends on the mining conditions, the characteristics of the coal seam, the position of the worker, and the type of work being performed, among others (Tr. 122). Even though testing is required by this standard, prior to the accident that took the life of Mr. Dimick, no one at the Sunnyside No. mine had been instructed to do any sound testing or physical testing of the ribs. Respondent does not instruct the miners in the Sunnyside Mine to physically test the ribs at any time (Tr. 207).

Discussion and Findings

At the hearing the parties stated that the primary issue in this case is the proper interpretation of the safety standard 30

C.F.R. 75.205 as it applies to the condition of the ribs in the Sunnyside No. 1 mine. The standard, in pertinent part, provides as follows:

> Where miners are exposed to danger from falls of roof, face, and ribs the operator shall examine and test the roof, face, and ribs before any work or machine is started, and as frequently thereafter as may be necessary to insure safety.

It is the operator's position that testing the ribs in this mine is not only ineffective in detecting hazards but would actually increase the potential hazard. Therefore, respondent argues the safety standard as it applies to the mine in question should be interpreted to require visual examination of the ribs but not testing. It is the operator's contention that the testing of the ribs in the Kaiser Sunnyside No. 1 Mine is useless because it wouldn't demonstrate any problem and would weaken the ribs and thus would create a potential hazard. In other words that testing the ribs would diminish safety rather than enhance safety.

The safety standard 30 C.F.R. 75.205 reflects the provisions of Section 302(f) of the Mine Act. It is well established that the meaning of a statute or regulation must, in the first instance, be sought in the language in which it is framed, and if that is plain the sole function of the Courts is to enforce it according to its terms. Caminetti v. The United States, 242 U.S. 470. When the language is clear and unambiguous it must be held to mean what it plainly expresses. Thus, the safety standard by use of the conjunctive "and" clearly requires both visual examination and testing of the ribs where miners are exposed to danger from falls of ribs.

With respect to respondent's contention that testing of ribs is useless, it is noted that Mr. Wood, Kaiser's general longwall foreman, when asked if testing of the rib adjacent to where Mr. Dimick was kneeling (the rib that came down and crushed him) would have alerted him to the fact that there was a defect or a potential hazard, replied "I don't know if the tapping procedure would have done any good or not" (Tr. 191, 192).

Even assuming, arguendo, that respondent is correct in its contention that testing of the ribs in the Sunnyside No. 1 mine diminishes safety rather than enhances it, the remedy does not lie in obtaining a ruling in an enforcement proceeding that the mandatory standard as applied to its mine requires an interpretation of the standard that is different than that applied to mines generally i.e. that visual examination without testing is sufficient to comply with the requirement of the safety standard. Such a ruling would not only defy the plain meaning of the regulation but conflicts with the previous Review Commission's rulings on the defense of diminution of safety and the need to comply with the provisions of 101(c) of the Mine Act.

In Sewell Coal, 5 FMSHRC 2026, the Review Commission stated that section 101(c) of the Mine Act preserves the same basis for granting a variance that were contained in section 301(c) of the 1969 Coal Act. Under the modification provisions of the Mine Act, the decision to grant or withhold a variance is made by the Secretary of Labor. The MSHA regulation implementing section 101(c) provides for an initial decision by an administrator of MSHA with the right of appeal ultimately to the Assistant Secretary of Labor for Mine Safety and Health. 30 C.F.R. 44.13 44.33.

The Review Commission pointed out in Sewell Coal that the phrase "diminution of safety" in Section 101(c) of the Mine Act: "serves as one of the following two bases for a determination by the Secretary that an operator may depart from otherwise mandated compliance with a standard: (1) If an alternative method of achieving the results of the standard exists with no loss in the measure of protection afforded to the miners by the standard; or (2) if application of the standard to the mine will diminish the safety of the miners."

In Penn Allegh Coal Company, Inc., 3 FMSHRC 1392 at 1397Ä98, the Review Commission ruled that an operator is foreclosed from bypassing this statutory modification procedure and unilaterally determining to forego compliance with a mandatory standard.

In Florence Mining Co., 5 FMSHRC 189, the Review Commission stated that questions of diminution of safety must first be pursued and resolved in the context of a modification proceeding provided for in Section 101(c) of the Act and held that the Review Commission does not have jurisdiction to rule on petitions for modification in enforcement proceedings.

With respect to respondent's argument that it relied or should be allowed to rely on the acts and statements of MSHA officials implementing regulations, the U.S. Court of Appeals in Emery Mining Corp., (CA 10) 1983), sub nom Emery Mining Corp., v. Labor Department (Secretary) affirmed 3 MSHC 1001, 3 MSHC 1585 held that to the extent that an operator relies on interpretation by MSHA officials of the Act's implementing regulations, the operator assumes the risk that the interpretation was in error. Estoppel does not run against the federal government. Federal Crop Insurance v. Merril, 332 U.S. 381.

Section 30 C.F.R. 75.205 is a mandatory safety standard that requires visual inspection and testing of the ribs where miners are exposed to dangers from falls of the ribs. In this case it is clear from the evidence that the decedent Mr. Dimick and other miners were in an area where they were exposed to danger from falls of the ribs. It is undisputed that the Sunnyside No. 1 mine has a history of bad ribs; that Mr. Dimick had to work in a kneeling position in close proximity to the rib; that other miners had to turn almost sideways when they passed between Mr. Dimick and the rib; and that approximately fifteen

minutes before the accident the longwall shearing machine had come down and cut through the headgate entry and traveled back up the longwall face.

The violation of 30 C.F.R. 75.205 was a significant and substantial violation of a mandatory safety standard. The MSHA inspectors testified that there was a serious safety hazard because the operator failed to test the ribs. Even Mr. Wood, respondent's longwall foreman admitted that physical testing of the rib might disclose the hazard in that area (Tr. 179, 191). There was a reasonable likelihood that the hazard contributed to what would and did result in Mr. Dimick's fatal injury. There was a reasonable likelihood that the injury in question would be and in fact was of a reasonable serious nature.

The parties stipulated that if a violation of 30 C.F.R. 75.205 was found that the appropriate penalty would be the $1,000 penalty proposed by the Secretary. This stipulation is accepted and the appropriate civil penalty is found to be $1,000.

Findings of Fact and Conclusions of Law

1. Kaiser Coal Corporation of Sunnyside is engaged in mining and selling of coal in the United States, and its mining operations affect interstate commerce.

2. Kaiser Coal Corporation of Sunnyside is the operator of Sunnyside Mine No. 1, MSHA I.D. No. 42Ä00093.03532.

3. Sunnyside Mine No. 1 is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, U.S.C. 801 et seq. ("the Act").

4. As an Administrative Law Judge of the Federal Mine Safety and Health Review Commission I have jurisdiction to hear and decide this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent, Kaiser Coal Corporation of Sunnyside, on the dates and at the places stated therein.

6. Mr. Dimick and other miners were exposed to a danger from the fall of the ribs and the operator did not test the ribs and thus was in violation of the mandatory safety standard 30 C.F.R. 75.205

7. The violation is significant and substantial.

8. Kaiser Coal Corporation of Sunnyside is a large mine operator with 817,276 tons of production in 1986.

9. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citation.

10. The operator demonstrated good faith in abating the violation.

11. The $1,000 proposed civil penalty will not affect respondent's ability to continue in business.

12. The appropriate penalty for the violation of 30 C.F.R. 75.205 is $1,000.

ORDER

Based upon the above findings of fact and conclusions of law it is ordered that respondent shall pay the above civil penalty of $1,000 within 30 days of this decision.

August F. Cetti
Administrative Law Judge