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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. WEST 85-15
A.C. No. 05-00300-03525

v.

L.S. Wood No. 3 Mine

MIDCONTINENT RESOURCES, INC.,
RESPONDENT

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado, for Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb, Glenwood
Springs, Colorado, for Respondent.

Before: Judge Lasher

This matter was initiated by the filing of a proposal for penalty by the Secretary of Labor under the authority of Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801 et seq. (1982) (herein the Act). Subsequent to the hearing the presiding Administrative Law Judge, John A. Carlson, passed away and this matter is before me for decision.

Procedural Background

Petitioner originally sought assessment of a penalty (\$800.00) for an alleged violation of 30 C.F.R. 75.200 which is described in the subject Section 104(d)(1) Citation No. 2213098, issued June 29, 1984, as follows:

"Mining of coal in the reactivation of 2nd South and a portion of the bleeder has been in progress on a continual basis, for at least 45 days. The mining in this area of bleeder the mine was not performed under an approved roof control plan. A reply to a letter; dated March 29, 1984 to the operator, to clarify 2 items of the proposed roof control plan was not in receipt."

The alleged violation was designated "Significant and Substantial" on the face of the Citation.

The pertinent regulation (75.200) provides:

"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."

(emphasis added)

I infer from the underscored portions that the "review" contemplated is not casual since "falls" and "inadequacy of support of roof or ribs" are required to be considered. Such would seem to mandate an inspection of the mine as a prerequisite to the review.

Citation No. 2213098 in its original form was issued by MSHA Coal Mine Inspector Larry W. Ramey during an inspection of Respondent's L.S. No. 3 Wood mine at 8:15 a.m. on June 29, 1984. Respondent at that time was engaged in mining coal (T. 43). The time established for abatement was 7:00 a.m. on July 2, 1984.

MSHA Inspector Louis Villegos, at 11:10 a.m. on June 29, 1984, extended compliance time to 12 noon on July 3, 1984, with this "Justification for Action":

"Contact with the Roof Control Office in Denver, Colorado has been made by the operator via telephone. This extension will allow for delivery and approval of the proposed roof control plan." (emphasis added).

On July 10, 1984, at 1:35 p.m., Inspector Ramey again extended compliance time-- to 10:00 a.m. on July 12, 1984 - with the justification:

"(75.200) The operator has submitted a roof control plan to Denver, Colorado for approval. Therefore this extension

is granted the operator until Denver approves the roof control plan and the plan is delivered."

At 3:00 p.m. on July 10, 1984, Inspector Ramey issued a modification of Citation No. 2213098, which appears as Attachment "A" to this decision. Thus, the final theory of violation enunciated in the Citation (as finally modified) alleges a violation of the plan approved March 25, 1982, rather than mining without an approved roof control plan.

In apparent contradiction of the modified theory of violation, on July 12, 1984, Inspector Ramey once more extended abatement time-to July 19, 1984-stating:

"The operator has submitted a roof control plan to the District Office in Denver, Colorado for approval. Upon contact with Denver by telephone it was learned that the plan was still under review. Therefore this extension is granted the operator until Denver approves the roof control plan, and the plan is delivered."
(emphasis added)

On July 19 Inspector Ramey issued a final extension to July 26, 1984 with this justification:

"The operator has submitted a roof control plan to the District Office in Denver, Colorado for approval. The District Office is still in the process of reviewing the submitted plan. Therefore more time is granted to the operator until Denver approves the roof control plan and the plan is delivered." (emphasis supplied)

On July 31, 1984, the Citation was "Terminated" by Inspector Villegos with the notation that "The Roof Control Plan submitted by the operator appears adequate and has been approved."

General Findings

(1) The Respondent is an underground coal mine operator with a history of 56 violations during the 2-year period preceding the issuance of the subject citation on June 29, 1984. The alleged violation was "abated within a reasonable time" according to Petitioner's Narrative Findings for a Special Assessment" and I infer therefrom that Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the alleged violation.

(2) Production at the mine was shut down in December, 1982 (T. 109); the mine was down all of calendar year 1983 into early 1984 (T. 145). Mining or preparation for mining began in April, 1984 and was in progress at least by April 30, 1984 (Ex. RÄ33).

(3) In March, 1984, Respondent, at MSHA's suggestion, requested that the previously approved roof control plan be

~194

"reinstated". (T. 153-154, Ex. P-2) to allow secondary or pillar mining in the 2-South section and bleeder entries (T. 146-148; Ex. R-6). This area was considered "dangerous" to mine in by MSHA officials (T. 88).

(4) The last time a roof control plan for the mine had been reviewed and (even though the mine had been shut down for some five months) reapproved by MSHA was on May 4, 1983 (Ex. R-4).

(5) The pertinent May 4, 1983 roof control plan specifically addressed pillar extraction in Par. 2.12 and the accompanying diagrams. Par. 2.12 thereof provides:

"Special roof-control precautions are mandatory during pillar-extraction operations and when bottom coal is taken as part of the pillar-extraction operation. These requirements are best shown graphically and are included in this roof-control plan as Figure 2.1" (Footnote 1)

6. (a) During the hearing, Respondent's Vice President of Mine Operations, M.J. Turnipseed gave this explanation of paragraph 2.12:

Q. Well paragraph 2.12 . . .

A. Yes, this refers to when bottom coal was taken as part of the pillar extraction.

Q. All right. And that is limited context in itself? There have to be the 2 conditions present?

A. They have to have the bottom coal to extract and you have to be in pillars.

Q. All right. Is there anything in the narrative about pillaring per se?

A. Not the exact sequence.

Q. There is some general precautions?

A. There's general precautions." (T. 224)

6. (b) Inspector Villegos testified however, that it was not his impression that the pillaring sequence contained in the 1982 plan (Ex. RÄ3) was to apply only to bottom coal and it was his opinion that it applied to both bottom and top coal (T. 228, 229Ä233).

6. (c) So also, Inspector Ramey convincingly testified in support of the opinion of Inspector Villegos:

"Q. First of all, let me ask you this. Based on your experience in coal mining and your experience as a coal mine inspector, do you have an opinion as to whether or not that paragraph applies only to bottom coal extraction?

A. I believe it's self explanatory. To say that these requirements are based on-and are included in this roof control plan is figure 2.1 through figure 2.2. It details in illustrations on how you will pull bottom coal back after the top coal is pulled. As an experience, I used to be a section foreman on a pillar section and I'm fully aware of how you pull pillars.

Q. And that would include pillars that are in the coal seam that requires pulling top coal and bottom coal?

A. Yes, sir.

Q. In your history with the agency, have you ever seen the roof control plans for pulling pillars interpreted in any other way than the way you've just described?

A. No, I have not."

(T. 234Ä235)

6(d) The two inspectors who conducted the inspection, Ramey and Villegos, used the 1982 plan in doing so and both found that the 1982 plan (Ex. PÄ1) was violated; their testimony was actually couched in the specific context of the plan approved in 1982 rather than the 1983 plan (Ex. RÄ4); why the 1983 plan was not used in the inspection was not shown. Thus, Villegos testified:

A. The date that appears is May 4, 1983.

Q. Okay. And, that was the plan that was, at least, approved subsequent-or, apparently, approved subsequent to the '82 plan. Is that right?

A. Yes.

Q. Okay. And, why would you guys be using the '82 plan?

A. I have no idea.

(T. 76)

6. (e) Inspector Villegos first testified that the significance of Paragraph 2.12 of the plan is that "additional" precautions are taken during the time bottom coal is removed and that removal of bottom coal presents special problems and hazards (T. 77-78).

6. (f) The interpretation given Paragraph 2.12 (which is found identical in both the 1982 and 1983 plans in all respects material herein) by Inspectors Ramey and Villegos was endorsed by 2 MSHA supervisors, Steve Miller and Lee Smith. After Mr. Miller's attention was directed to Paragraph 2.12, this dialogue, which I find persuasive occurred:

"Q. Will you read that to yourself and having done that, can you tell me if it was first of all in your opinion whether or not that paragraph applied only to bottom coal removal or applied [sic] to pillar removal when in fact it was not to be done in 2 layers, but only the top coal taken?

A. It's very definitely, Mr. Barkley, applies 99% to just regular pillar mining. We-the bottom coal aspect of it was not a-was not our primary concern here. Was not our concern. Let me just throw a little light in on this. Maybe it will help a little bit." (T. 251)

6 (g) Accordingly, the minority opinion of Mr. Turnipseed that under 1982 plan the broad pillar mining sequence pertained only to bottom coal (T. 224, 225) is rejected in view of the four convincing opinions weighted against it. The record also reveals that the majority interpretation was the one consistently applied in enforcement over the years (T. 229-231, 235, 237, 238-239, 242-243, 246-247, 252-253, 255-257).

7. As pointed out in Petitioner's brief, there is no dispute as to what cuts were taken in the pillars observed by the inspectors. Two pillars had been cut in half in order to provide access to pillars further inby (T. 45-51, 70-72). One of the two pillars was next to a caved-in area (T. 51) and accordingly was required to bear an excessive amount of weight (T. 52). Based on the persuasive testimony of the inspectors that the cuts made by

~197

Mid-Continent were not in conformance with the pillar extraction sequence of the roof control plan (T. 52-54, 72-74, 215-216). I find that the 1982 roof control plan (last approved on May 4, 1983) was in fact contravened as alleged in the modification to the citation. To constitute a violation, however, this roof control plan would have had to have been in effect when the citation was issued.

Issues

The issue set forth in Petitioner's brief, which I do not find dispositive, is whether on June 29, 1984, and prior thereto, Respondent violated the "pillar removal sequence" of "the approved roof control plan" (RCP) by cutting roadways through two pillars, and if so, whether such violation constituted an "unwarrantable failure" of Respondent to comply with the subject safety standard within the meaning of such term in Section 104(d)(1) of the Act.

A preliminary but crux issue, however, is whether there indeed was an "approved roof control plan" in effect on June 29, 1984, which was subject to being violated by Respondent's mining method on that date.

Findings with Respect to Existence of Roof Control Plan

The roof control plan last in effect before the mine closed in December, 1982, was that approved on March 25, 1982, and which is referred to herein as the 1982 plan (Ex. P-1). As noted elsewhere, the mine was closed throughout 1983. Nevertheless, on May 4, 1983, MSHA, apparently routinely (T. 108, 110) reapproved this plan for a six-month period by letter from John W. Barton, District Manager to Respondent's Chief Engineer, Bradley J. Bourquin. This letter, which appears as a cover letter attached to what is referred to herein as the 1983 plan-Ex. R-4-states:

"The roof control plans for the subject mines have been reviewed by MSHA personnel. Since the plans appear adequate, they shall remain in effect for another six month period." (emphasis added) (See Attachment "B")

This approval thus expired by its own terms on November 4, 1983, a time prior to the mines reactivation and of course, prior to the issuance of the subject Citation. There is no evidence of a later approval or reapproval on or about November 4, 1983, or between November 4, 1983, and the time the Citation issued. The record is clear that there was no approved roof control plan in effect on June 29, 1984, when the Citation was issued (T. 85-86, 88).

~198

By letter dated March 22, 1984, to MSHA District Manager John Barton, Mr. Turnipseed, requested to "reinstitute" the "last approved" (Footnote 2) RCP, to wit:

"The L.S. Wood No. 3 Mine is being temporarily reactivated to mine coal from the 2 South section and a portion of the bleeder entries between No. 1 and No. 3 mine. The previous development was done in 1968 and the area was roof-bolted on 6 Å foot centers. The area has stood well and the roof is in good condition. Mr. Mike Stanton, RoofÅControl Specialist, MSHA, has examined the area and has knowledge of the conditions.

Permission is requested to reinstitute the last approved roof-control plan in all new mining and accept the previously bolted areas as they were installed. The previously bolted areas are shown on the attached map."

(Ex. RÅ6) (emphasis added)

This letter constitutes a recognition that the "last" approved plan was no longer in effect. It attaches a map showing the area where the "new" mining was to be conducted, i.e., an area previously developed in 1968.

Also, as will be seen subsequently, in MSHA's ultimate written approval of this plan by letter dated July 27, 1984, a significant-and-relevant-limitation on the method of pillar extraction was contained.

In his reply letter of March 29, 1984, Mr. Barton raised two questions relating generally to "outbursts" (Footnote 3) and pillar points:

"The proposed plan of reactivation of 2 South and a portion of the bleeder entries in the subject mine has been reviewed by MSHA personnel. Before the plan can be considered for possible approval, the following items need to be clarified by you or your staff:

1. What method or methods will be taken to minimize the possibility of outbursts during the second mining in the bleeder entries? Please refer to 30 CFR, 75.201Å2(a).

2. What method or methods will be taken to insure that pillar points will not be formed and to insure that pillars will not project inby the breakline? Please refer to 30 CFR, 75.201-2(g). This item needs to be considered very carefully since second mining has been done on both sides of the bleeder entries...." (emphasis supplied) (Ex. RÄ7)

Apparently, however, Section 8.2 of the 1982 RCP originally, provided as follows:

8.2 All mining areas which meet all of the following criteria will be subject to this Code of Practice for Outburst Control unless specifically exempted, in writing, by the President of Mid-Continent Resources, Inc. in conjunction with one other Company officer.

Criteria for Outburst Control:

- 1) Workings in Coal Basin Seam, B-bed coal.
- 2) First mining of development headings utilizing continuous mining machine.
- 3) Workings more than 2500 in vertical depth.

According to Mr. Turnipseed, subparagraph 3 of Section 8.2 was scratched out-at some indeterminate time-and both Respondent's Ex. 3 and Petitioner's Ex. 1 reveal this. (T. 160). According to Turnipseed, the significance of such is that under a "light cover"-something less than 2000 feet of overburden-outburst problems have not been experienced, that such problems occur only in the lower reaches in the mine, and that there was no need to take special precautions in the area referred to by District Manager Barton in his letter to Turnipseed dated March 29, 1984 (Ex. RÄ7) since such area "was not in an outburst-prone area" (T. 159, 160-161).

On April 4, 1984, Turnipseed met with MSHA officials to "clarify" the points raised in the Barton letter (T. 155, 156-158, 159).

With respect to his impression of this meeting Turnipseed testified:

"Q. During the course of the conversation on April the 4th 1984, with the MSHA people, did anyone indicate that you could not do what it was you were proposing to do in terms of pillar-portions of the bleeder return and the 2 south entry in the L.S. #3 Mine?

A. No. In fact, there was I felt like a meeting of cooperation working out the fine details which I've just given you. The outstanding points that had to be met.

Q. Was there any indication to you-or did you just dream up the fact that your request to have a plan reinstated would be approved?

A. I didn't see any problem at all. It was done at MSHA's suggestion and with their cooperation.

Q. They suggested that you request that it be reinstated?

A. Yes, in writing.

Q. And they gave you no indication that it would not be approved?

A. That's true.

Q.-was there anything else that transpired that indicated to you that the plan had been approved?

A. I assumed that we just had an approved plan and all we had to do like in many other cases is wait for the letter to come through the mail. But in the meantime don't worry about it, it's okay.

Q. Is that a frequent practice with MSHA, where there is an approval and there is some delay and wait for the letter to arrive saying, "yes, you're approved?"

A. That happens quite frequently after a meeting of ironing out details, we get down to the final point, and we get an agreement. I carry away a set of notes much like this and they say, "you can expect your approval letter in the mail."

Q. But no telling how long it might take to get the approval letter?

A. Well, it's normally said that it's coming out promptly which can be anything up to a couple of weeks many times."

(T. 163-164)

I find, however, that there was no verbal agreement manifested by MSHA at the 4-4-84 meeting to reapproval or reinstatement of the 1982 plan although Mr. Turnipseed may have assumed that such was the case. Thus, his notes of the meeting did not reflect such (T. 188-190, 200-201), and there was no suppression of such agreement by MSHA personnel (T. 197). Also, the parties discussed the matter further two days later on April 6, 1984 (T. 198).

When Respondent commenced production in April, 1984, it had not received any written (required) approval letter approving the new RCP (T. 198-199, 200-201). This has some mine safety significance since the plan for which Respondent sought approval

~201

by its letter of March 22, 1984, was significantly different from the 1982 plan (T. 114Å115, 154).

By letter dated July 26, 1984, addressed to Barton, Mr. Turnipseed enclosed the "revised" RCP:

"Enclosed is the revised roof control plan as per the conversation between J.A. Reeves Sr. and Mr. Bill Holgate on July 26, 1984. The roof control plan specifically addresses MSHA's concerns pertaining to the right-left extraction procedures referenced in your July 20, 1984 letter.

As you will find in the new roof control plan, the extraction methods recommended by Mr. Holgate are implemented in paragraph 2.13 and figure 2.2. I hope these proposed changes specifically address the concerns of MSHA.

MidÅContinent Resources appreciates MSHA's interest and will continue to address any further issues which arise. Thank you." (Footnote 4) (emphasis added)

The first approval in writing (Footnote 5) of the new (1983) RCP appearing in this record is that reflected in the letter of July 27, 1984 from Barton to John Reeves, President of Respondent, which states:

The roof control plan dated July 26, 1984, for the subject mine has been reviewed by MSHA personnel. This plan appears adequate for the roof conditions and system of mining being used, and is hereby approved. However, methods of pillar extraction depicted in Figure 2.2, pages 1 through 5, shall only be used when existing entries and crosscuts have heaved preventing pillar extraction as shown in Figure 2.1, pages 1 through 5.

All personnel required to install roof support, in accordance with the plan, shall be trained by a qualified supervisor designated by mine management before being made responsible for such work. This training shall ensure that such persons are familiar with the functions of the support being used, proper installation procedures, and the approved roof control plan.

As required by 30 CFR, 75.200, the approved plan must be reviewed by MSHA every six months. Should future conditions warrant, this plan may have to be changed.

(Ex. RÅ5)

Discussion

Contributing to the problem of sorting out this unusual record is that Respondent resumed production in the mine after it had been closed down for over a year and after the last approved plan had expired; that MSHA resumed enforcement activity by issuing Citations under the 1982 RCP during the same period that MSHA and Respondent were negotiating the "reinstitution" and reapproval of the 1982 RCP (T. 165); that the June 29, 1984, Citation as amended issued prior to the Barton letter of July 27, 1984, approving the new RCP and the method of pillar extraction depicted in Figure 2.2 thereof only upon the condition that such could be used "when existing entries and crosscuts have heaved", preventing pillar extraction as shown in Figure 2.1 . . ."; that MSHA in its brief (Footnote 6) has abandoned its theory of violation that Respondent was operating without an approved RCP; that the two issuing inspectors used the old 1982 RCP as their enforcement guideline; that MSHA was aware that the mine was operating while it was negotiating with Turnipseed the conditions and provisions of a new RCP, i.e., the one ultimately approved on July 27, 1984 (Ex. RÅ5).

It should also be mentioned that Petitioner tried --- without recognizable objection from Respondent --- the matter on the basis of alternate or hypothetical (T. 19) claims of violation, that Respondent either mined without an approved roof control plan being in effect, or in the alternative, if a roof control plan was in effect the pillar removal sequence provided therein was not followed. Such alternate pleading, if not interposed for purposes of delay, harassment, etc., is properly recognized in Commission proceedings. See Commission Rule 1(b)

~203

and Rule 8(e)(2) of the Federal Rules of Civil Procedure. At the commencement of hearing, the presiding judge considered Petitioner to have made a motion to amend and, upon reviewing both the original Citation and the July 10, 1984 modification thereof (Attachment "A" hereto) specifically charging an infraction of the Roof Control Plan dated March 25, 1982, ruled that the modification was not a "substitution" of the theory of violation contained in the original Citation but was a supplemental allegation. Petitioner was allowed to proceed in the alternative.

Nevertheless, in both its final oral argument (Transcript of April 14, 1987, at page 5) and post-hearing brief, Petitioner abandoned-without significant explanation --- its theory that Respondent had commenced mining without there being an approved roof control plan in effect. In its brief and in final oral argument (T. 5Ä6) Petitioner also alleged that the roof control plan which was in fact contravened was the plan whose latest approval was on May 4, 1983 (Ex. RÄ4) rather than the plan approved on March 25, 1982 (Exs. PÄ1 and RÄ3) which was specifically referred to in the July 10, 1984 modification to the Citation (Footnote 7). I note again and parenthetically that while this plan (the 1982 RCP) was the one used as the sole frame of reference in the inspector's testimony, the pertinent paragraph therein, 2.12, and the 10 diagrams referenced therein, do appear identical to their counterparts in the 1983 plan.

Although Respondent has argued that a roof control plan, being "an operator's document", remains in effect until disapproved by MSHA, the last approval of such plan by MSHA on May 4, 1983, had a specific six-month term and expired on November 4 (or November 3 at midnight), 1983. The understanding of the parties and I believe acquiescence by Respondent that it did not is strongly manifested by the chain of correspondence initiated by Respondent's letter to MSHA of March 22, 1984, proposing to

reinstate its old plan at a time when its mine had been down for well over a year. Without commenting on the wisdom of the May 4, 1983 "routine" approval of the plan at a time when the mine had already been down for a period of several months, the record is clear that no written approval of the proposed roof control plan issued from MSHA until July 26, 1984, nearly a month after the original Citation issued, and also after the final modification of the Citation issued. As this record clearly reveals, when the proposed plan was finally approved in writing (as required by 30 C.F.R. 75.200-4) such approval contained limitations highly important to mine safety. (Footnote 8)

In a matter involving a mine's ventilation plan, *Ziegler Coal Company v. Kleppe*, 536 F.2d 398 (D.C.Cir.1976), as part of its analysis of mine safety law in general, the author of the Court's opinion, Judge Wilkey, noted the analogy between ventilation plans and roof control plans, observed that the reasoning of the decision might be applicable in many instances to such other plans as well, and upheld the enforceability of such plans once duly adopted (See footnotes 11 and 54).

In *Jim Walter Resources, Inc.*, 9 FMSHRC 93 (1987), again involving a ventilation plan, the Commission set forth this excellent overview of plan enforcement:

"Ventilation plans are approved by the Secretary and adopted by mine operator pursuant to section 75.316 and section 303(o) of the Mine Act. The approval and adoption process is bilateral and results in the Secretary and the operator, through consultation, discussion, and negotiation, mutually agreeing to ventilation plans suitable to the specific conditions at particular mines. *Ziegler v. Kleppe*, 536 F.2d 398, 406-407 (D.C.Cir.1976); *Carbon County Coal Co.*, 6 FMSHRC 1123 (May 1984). The process is flexible, contemplates negotiation toward complete agreement, and is aimed at compliance with mine safety and health requirements. Under the approval and adoption process, the operator submits a plan to the Secretary who may approve it or suggest changes. The operator is not bound to acquiesce in the Secretary's suggested changes. The operator and the Secretary are bound, however, to negotiate in good faith over disputes as to the plan's provisions and if they remain at odds they may seek resolution of their disputes in enforcement proceedings before the Commission. *Carbon County Coal Company*, 7 FMSHRC 1367, 1370-71 (September 1985). The

ultimate goal of the approval and adoption process is a mine-specific plan with provisions understood by both the Secretary and the operator and with which they are in full accord. Once the plan is approved and adopted, these provisions are enforceable at the mine as mandatory safety standards. Ziegler, supra at 409; Carbon County, 7 FMSHRC at 1370; Penn Allegh.

In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation. In plan violation cases the Secretary must establish that the provision allegedly violated is part of the approved and adopted plan and that the cited condition or practice violates the provision."
(emphasis added)

Finally, in a matter also involving a ventilation plan, the Commission set forth some characteristics of such plans which would appear to be generally applicable to roof control plans. In this case, Secretary v. Penn Allegh Coal Company, 3 FMSHRC 2767 (1981), the Commission stated:

"We hold that ventilation and dust control plans are continuous in nature; a plan does not expire at the end of a six-month period simply because the parties have failed to finally resolve a suggested revision. In the present case, in light of our previous conclusion that the Secretary validly rescinded the mistaken approval of Penn Allegh's revision to the original plan, we conclude that the original plan remained in effect. This leaves the parties with the ability, in fact the duty, to negotiate in good faith over a resolution of the "flow-static" measurement controversy. At the same time it affords miners the protections of the plan previously adopted by Penn Allegh and approved by the Secretary."

Penn Allegh is the most analogous precedent to the unique facts presented here uncovered by my research. Nevertheless, after consideration of the record in the matter before me, I conclude that the situation here is distinguishable, and should be distinguished, from the general "continuous running" concept set forth in Penn Allegh, supra. To begin with unlike Penn Allegh the mine was closed for a period of over one year, overrunning two normal six-month plan review periods. The last six-month review approval period elapsed while the mine was closed. Both parties, if not actually recognizing the mine safety need for a new plan, at least accepted and engaged in the procedure of negotiating a proposed plan, which process commenced after the

~206

last six-month period ran and before the mine reopened and commenced production (Footnote 9). In submitting the proposed plan, Respondent in its letter of March 22, 1984, demonstrated its intention to mine in a specific different (T. 214) area of the mine which the record shows and MSHA felt "could be dangerous to mine in" (T. 88, 114, 115, 122, 154, 214-215). It is also specifically found that the plan submitted with Respondent's letter to MSHA of March 22, 1984, was a "proposed roof control plan" within the meaning of 30 C.F.R. 75.200-4. See fn 5, supra.

Accordingly, these general conclusions are reached: (1) the decision in Penn Allegh that ventilation -and presumably roof control-plans are continuous in nature is not an expression of an unflinching rule having universal application, (2) the precise holding of Penn Allegh, arising out of circumstances where the mine involved was in continuous operation, is not applicable here, and (3) in the instant case, and in situations where a mine is closed for a lengthy period and the 6-month periodic review required by 30 C.F.R. 75.200 is no longer carried on, the viability of the previous plan ends.

It is therefore held that when the Citation and its modification issued, there was no approved roof control plan in effect. Since it expressly is Petitioner's sole theory of violation that a provision of an approved roof control plan was infringed, I find that no violation was proven. Jim Walters Resources, Inc., supra.

ORDER

Citation No. 2213098 and its modifications are vacated and this proceeding is dismissed.

Michael A. Lasher, Jr.
Administrative Law Judge

AAAAAAAAAAAAAAAAAAAAAAAAAA
Footnote starts here:-

~Footnote_one

1 Paragraph 2.12 of the 1982 plan is identical in all material respects other than referring to "figure 2.1 through 2.2" in the last sentence, to wit:

"Special roof-control precautions are mandatory during pillar-extraction operations and when bottom coal is taken as part of the pillar-extraction operation. These requirements are best shown graphically and are included in this roof-control plan as Figure 2.1 through Figure 2.2."

Comparison of the 2 plans also reveals that there are no other material differences in them (See T. 100, 152).

~Footnote_two

2 As shown herein, the "last approved" plan was that approved on May 4, 1983 (Ex. R-4), which was essentially identical to the 1982 RCP approved on March 25, 1982 (Ex. PÄ1).

~Footnote_three

3 Sections 8.1 through 8.4.7 of both the 1982 RCP (Exhs RÄ3 and PÄ1) and the 1983 RCP (Ex. RÄ4) provide for outburst control. Comparison of these provisions in the two plans reveals that they are identical.

~Footnote_four

4 This letter is contained in the exhibits folder after Ex. RÄ7 without a separate Exhibit number. The second and fourth sentences of this letter indicate inferentially that there was no prior approval of the 1983 RCP and I so find (T. 165Ä166, Exs. RÄ7, RÄ8).

~Footnote_five

5 Written approval is required. Thus, 30 CFR 75.200Ä4 provides:

"The appropriate District Manager shall notify the operator in writing of the approval of a proposed roof control plan. If revisions are required for approval, the changes required will be specified and the operator will be afforded an opportunity to discuss the revisions with the District Manager."
(emphasis added)

~Footnote_six

6 Immediately following the close of the evidentiary record, both parties on August 30, 1985, were given the opportunity to present oral closing argument, which Petitioner waived and of which Respondent availed itself. Respondent also was given the opportunity to file-within 15 days of receipt thereof (T. 269Ä270)-a reply brief to Petitioner's post-hearing brief. It did so. The parties subsequently presented further oral argumen (contained in a separate transcript).

~Footnote_seven

7 Thus, at page 1 of its Brief, Petitioner states:

"This case involves an alleged failure to comply with the pillar removal sequence of a roof control plan. It was tried on two alternative theories that respondent either mined without an approved roof control plan or, in the alternative, if a roof control plan was in effect, the pillar removal sequence was not followed. Petitioner no longer adheres to the theory that a roof control plan was not in effect . . ."

XXX XXX XXX

MidÄContinent Resources operates the L.S. Wood mine. A

roof control plan for the L.S. Wood mine had been reviewed and reapproved by MSHA on May 4, 1983 (Exhibit RÄ4)."

~Footnote_eight

8 The Federal Mine Safety and Health Review Commission itself pointed out in *Secretary v. Halfway, Inc.*, 8 FMSHRC 8, at p. 13 (1986): "Our decisions have stressed the fact that roof falls remain the leading cause of death in underground mines".

~Footnote_nine

9 From the record and pleadings it is not ascertainable whether Petitioner also is claiming that an operator, upon reopening a closed mine, can bring back to life its old plan, which was not reviewed and approved after a six-month period expired, by merely picking it up and following it, or-as it alleges in this case-by not following it.

Citation No. 2213098 is modified to show that the operator was not complying with the approved roof control plan dated March 25, 1982. The operator had split through one block of coal, leaving only two fenders, and was using this block as a roadway to mine the 2nd block inby, a total of 25 feet had been mined from the 2nd block, and in addition two fenders had been left to the right of the 1st pillar split, the supt. Tom Scott said that he intended to go back and get these two fenders to the right of the 1st pillar split. Below is a diagram of the practice being used.

~209

Attachment "B"

COAL MINE SAFETY AND HEALTH-District 9

May 4, 1983

Mr. Bradley J. Bourquin
Chief Engineer
Mid-Continent Resources, Inc.
Box 158
Carbondale, CO 81623

RE: L.S. Wood Mine, I.D. No. 05-00300 Dutch Creek No. 2
Mine, I.D. No. 05-00469 Roof Control Plans

Dear Mr. Bourquin:

The roof control plans for the subject mines have been reviewed by MSHA personnel. Since the plans appear adequate, they shall remain in effect for another six month period.

Sincerely,

John W. Barton
District Manager