CCASE:
UTAH POWER & LIGHT V. SOL (MSHA)
DDATE:
19880411
TTEXT:

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

UTAH POWER & LIGHT COMPANY, MINING DIVISION, CONTESTANT	CONTEST PROCEEDING Docket No. WEST 87-226-R Citation 3043248; 6/23/87
v.	Cottonwood Mine Mine ID 42-01944
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	

DECISION

Appearances: Susan E. Chetlin, Esq., Crowell & Moring, Washington, D.C., for Contestant;
Robert Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Lasher

Background

This proceeding arose upon the filing of a notice of contest on July 23, 1987, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d) (1977), herein the Act. There was no related penalty docket extant at the time of the hearing in this matter. (Footnote 1)

By its initiation of the proceeding the Contestant (herein UPL) sought to obtain review of Section 104(a) Citation No. 3043248 issued June 23, 1987, by MSHA Inspector Robert L. Huggins, charging it with a violation of 30 C.F.R. 75.200 which provides in pertinent part:

> "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 sup

> ported or otherwise controlled adequately to protect persons from falls of the roof or ribs."

The Citation, in section 8 thereof, describes the alleged violation as follows:

> "The travelway in the 5th east bleeder (Footnote 2) is not adequately supported to protect persons from falls of roof and ribs. The cribs being used for roof supports are crushing and starting to roll out at numerous locations in the bleeder. The crosscuts next to the bleeder entry have no additional supports and they are riding over into the bleeder entry pushing out the cribs."

In its Notice of Contest filed herein on July 23, 1987, UPL listed four grounds for its contest:

> 1. The citation does not identify the location of the offending cribs and therefore is too vague to have adequately informed UP & L as to which of the hundreds of cribs along the 4,500Äfoot bleeder entry were not providing adequate travelway support.
>
> 2. On June 3, 1987, mine management declared approximately 1,800 feet of the 5th East Bleeder too dangerous to travel pursuant to 30 C.F.R. 75.316Ä2(f)(3) because of serious roof and ground hazards.(Footnote 3) To the extent the Citation covers cribs in that area, it is invalid because the closed portion of the bleeder entry was not an active area, a prerequisite for applicability of 75.200.
>
> 3. The remainder of the travelway in the 5th East Bleeder was adequately supported by the cribs installed along the entry and no violation of 30 C.F.R. 75.200 occurred.
>
> 4. If it is held that certain cribs in the active areas of the 5th East Bleeder entry were not providing adequate support, the hazard of setting posts or attempting other means of abatement was greater than the hazard of leaving

> the area undisturbed, there was no other way to protect the miners and a petition for modification would have been inappropriate in light of the provisions of 30 C.F.R. 75.316Ä2(f)(3).
>
> (emphasis added)

30 C.F.R. 75.316Ä2 is entitled "Criteria for approval of ventilation system and methane and dust control plan." Subparagraphs (f)(1), (2) and (3), of particular pertinence here, provide:

> "(f)(1) Bleeder entries developed after June 28, 1970, should be adequately maintained and free of water to permit safe travel or, if such bleeder entries cannot be traveled without exposing the mine examiner to undue hazard, such bleeder system should be designed and maintained so that bleeder entry performance can be evaluated for adequacy and continuity by a means approved by the Coal Mine Safety District Manager.(Footnote 4)
> (2) When the mine operator deems that safe examination can be made such examination should be made at least once each week by a certified person designated by the operator to do so and the results of such examinations shall be recorded in a book as prescribed in 75.305. The certified person shall place his initials, the time and the date at as many locations in the bleeder entries as are necessary to indicate that the entire length has been examined.
> (3) When bleeder entry travel is considered unsafe the evaluation of bleeder entry performance should be adequate to indicate that the bleeder system is functioning as specified in 75.316Ä3(e)(1) and shall be made at least once each week by a certified person or persons and the results shall be recorded in a book as prescribed in 75.305. To protect the safety of the miners when bleeder entry performance evaluation requires altering the normal airflow through the affected area, such evaluation should be made during idle shifts with power cut off from the affected area. Due precaution should be taken so as not to endanger any other area of the mine and suitable examinations for methane should be made at the edges of the pillar and such other places as may be required." (Footnote 5)

Enlightening with respect to the nature and purpose of bleeder entries and systems is Subsection "e" of 30 C.F.R. 75.316Ä2, likewise pertaining to "Ventilation system and methane and dust control plan":

> "(e) Bleeder entries, bleeder systems, or equivalent means should be used in all active pillaring areas to ventilate the mined areas from which the pillars have been wholly or partially extracted, so as to control the methane content in such areas. Bleeder entries or bleeder systems established after June 28, 1970, should conform with the requirements of this 75.316Ä2.
> (1) Bleeder entries shall be defined as special aircourses developed and maintained as part of the mine ventilation system and designed to continuously move air-methane mixtures from the gob, away from active workings and deliver such mixtures to the mine return aircourses. Bleeder entries should be connected to those areas from which pillars have been wholly or partially extracted at strategic locations in such a way to control airflow through such gob area, to induce drainage of gob gas from all portions of such gob areas and to minimize the hazard from expansion of gob gases due to atmospheric pressure change.
> (2) Bleeder systems shall include any combination of bleeder entries, bleeder entry connections to any area from which pillars are wholly or partially extracted and all associated ventilation control devices. Such systems should extend from active pillar line of such gob to the intersection of that bleeder split with any other split of air, and shall not include active workings."

Issues

The chief issue is whether the violation charged in the Citation actually occurred (I T. 59Ä60). At the hearing UPL abandoned one its original contentions that the 5EB was an "inactive" area (I T. 209) and thus not subject to the quoted provisions of 30 C.F.R. 75.200. Also, although portions of the transcript and briefs are devoted to it, any defense of UPL based on the premise that a mine operator can unilaterally establish bleeder evaluation points without MSHA approval was expressly removed in UPL's supplemental brief (See letter from counsel dated December 2, 1987). This question has other relevance, however.

To establish a violation of the cited regulation (75.200) MSHA must show that roof and/or ribs in 5EB on June 23, 1987, were hazardous, i.e., that they were not "supported or otherwise controlled adequately to protect persons from falls of the roof

or ribs." (Footnote 6) Determination of the primary issue raised calls in part for resolution of the conflict in the opinion testimony offered by UPL's and MSHA's witnesses.

A considerable portion of the record was devoted to the question of whether wooden cribs installed by UPL as secondary roof support in 5EB were adequate. (Footnote 7)

Summary of Record and General Findings

The Cottonwood mine of UPL is a large underground coal mine located approximately 50 miles southwest of Price, Utah. UPL has a payroll of 230 employees at the mine who work in 3 shifts- 2 production and 1 maintenance (I T. 16).

On June 23, 1987, when the Citation was issued, part of the mine was not active and sealed and there were only two active working sections--one section mined coal using a continuous mining machine and the other section mined the 7th East longwall panel using the longwall mining method (I T. 191; Jt.Ex. 2). 5EB was at all material times an active work area where miners normally worked and travelled (I T. 32, 33).

The conditions existent in 5EB when the Citation was issued did not constitute an imminent danger (I T. 61, II T. 18).

The Fifth east Bleeder entry (5EB) is a longlife entry (I T. 167). It runs a distance of approximately 4000 feet from Crosscut No. 5 to Crosscut No. 46. (I T. 22, 23, 112, II T. 67). The purpose of 5EB is to "bleed the gob gasses, black damp or whatever" from the working areas of the mine (I T. 22, 23, 77, 193). At the time the Citation was issued, approximately 1200 cribs had been installed in 5EB (II T. 67).

The area cited in the Citation included the most hazardous area between crosscuts 27 and 30, because miners were being exposed to the hazardous conditions and Respondent had not provided all the support that was needed (I T. 29Ä32, 61, 102, 110, 139Ä140). Between crosscuts 27 and 30 the roof height is approximately 4 1/2 to 5 feet; in most other areas of 5EB the height is higher (I T. 36).

On June 23, 1987, it was apparent Respondent had attempted to put in additional support in the 27Ä30 crosscut area by installing donut cribs- some of which met manufacturer's specification and some of which did not (I T. 61, 62).

Bleeder entries such as 5EB are required to be traveled by a certified person on a weekly basis for the purpose of determining if conditions- involving such as methane, black damp, roof, rib, walkways, timbering--- are hazardous (I T. 24, 25). The im-importance of keeping bleeder entries open or travelable is to insure against the buildup of methane, black damp (an oxygen-deficient area) and gob gasses (I T. 26, 132). Bleeder entries also serve as possible escapeways for miners (I T. 106, 133). Inspector Huggins explained this purpose by analogy to the Wilberg mine disaster:

> A. Well, if the -- you know, alternate routes. I can go back to Wilberg. I hate to bring that up; but I think that if, you know, they were maintained and kept open there at times -- which they were opened and miners were all aware of it, they could have come out that way.
>
> Q. So it's possible if the bleeder entry is allowed to remain open or kept open and it could be used as a possible escapeway by miners of the section in an emergency?
>
> A. Yes. (I T. 26, 27)

5EB was a possible escapeway -- not a designated escapeway (I T. 78, 106, 133). (Footnote 8)

~519

In a memorandum dated June 2, 1987 (Ex. RÄ3) for District 9 SubDistrict Managers and Field Office Supervisors (I T. 166), District Manager John W. Barton addressed the subject of "Roof Support for Longlife Entries":

> "As part of the six month review of roof control plans, all operators are being requested to address long life entries in their roof control plans. It is very important that long life entries be properly supported in order to serve the purpose for which they are designed or intended. Specifically, this means entries such as bleeders, longwall headgates and tailgates, escapeways, main air courses, main haulageways, and travelways be addressed in the plan as long life entries with an explanation of proposed means of primary and necessary supplemental roof support to insure these entries remain open and travelable for their entire life. The intent is to maintain bleeder entries and not allow their condition to deteriorate to a point where safe travel is impossible, thus causing operators to seek approval for the establishment of evaluation points. Escapeways must be maintained and adequately supported and not rerouted as a means to avoid installation of supplemental support. Longwall headgate and tailgate entries as well as main air courses and haulageways must be supported throughout their life to serve the function originally designed or intended.
>
> It is the purpose of this request to impress upon operators the seriousness with which MSHA views protection of long life entries.
>
> It is the responsibility of all inspectors, during normal inspection activities, to determine if roof support in these long life entries is adequate and the requirements of the roof control plan are being met. The District Office must be advised of any instances where compliance with the approved roof control plan fails to maintain adequate long life support." (Footnote 9)
>
> (emphasis supplied)

~520

In a letter dated June 3, 1987 (Exs. CÄ1 and RÄ2), to MSHA District Manager John Barton, UPL's Mine Manager, John Boylen, requested MSHA approval to establish a bleeder evaluation point in 5EB and stated:

> "Roof conditions in the 5th East Bleeder have become hazardous to the extent that we feel it is not safe for the weekly examiner to travel from crosscut 20 to crosscut 38. (Footnote 10) We request approval to establish a bleeder evaluation point at 38 crosscut in 5th East Bleeder. Bleeder effectiveness will be evaluated weekly at crosscut 38 and the bleeder will be physically examined from crosscut 38 to crosscut 45 and from crosscut 5 to crosscut 20.
>
> A revised page 26, Rev. 06Ä03Ä87, is included reflecting addition of 5th East Bleeder evaluation point. Once approved, this page supersedes the former page 26. Figure IV A should be added to the plan also as page 26.1. Your cooperation in this matter is appreciated." (Footnote 11)
>
> (emphasis added)

In response to this letter, MSHA Coal Mine Inspector Robert L. Huggins, visited the mine on June 23, 1987, to evaluate the 5EB. He was accompanied by his supervisor, William E. Ponceroff, Jim Bailey, a company representative, and Don Cologie, a union representative. (I T. 17, 18). Upon completion of his inspection on June 23, 1987, Inspector Huggins issued the subject Citation. The following day, June 24, 1987, Inspector Huggins returned for a closeout conference and advised UPL officials that the area in 5EB between crosscuts 27 and 30 would not have to be resupported since he agreed that evaluation points should be established at each end of this smaller area (I T. 67Ä69). After abatement time was once extended, the conditions charged in the Citation were considered abated on July 20, 1987, after UPL installed 300Ä350

wood posts as supplemental support (I T. 64Ä66, II T. 77). Inspector Huggins was not aware of any UPL opposition to abatement on the basis that the area was too hazardous to attempt abatement (I T. 66). Inspector Huggins described the roof and rib conditions he observed as follows:

"A. In the Fifth East bleeder, we had roof breaking up between the cribs, coming across the entry. We had wire mesh from across the top of the cribs which was starting to sag down with stuff in it. Slabs of ribs had fallen off, pushing the cribs, causing them to belly out. And I think it was the crosscut 15 or 16, I'm not for sure -- but they had a pump switch which was located in the crosscut with no additional supports to this crosscut; cable running up behind the cribs -- energized cable which they had used to energize the pump 25 crosscut of water.

Q. Now, those were the conditions of the roof?

A. Yes. Some of them, yes.

Q. Did you observe the conditions as far as the ribs?

A. Yes. Large slabs of ribs had fallen off. Some of the crosscuts had already fallen in -- the roof of the cribs.

Q. Now, did the entry have any means of roof support?

A. Yes, a double row of cribs. There was some additional support installed, if I remember right, between 27 and 30.

Q. And did you get a chance to observe the condition of the cribs themselves?

A. Yes.

Q. An could you briefly describe the conditions that you found the cribs in?

A. A lot of the cribs were crushed down; a majority of them were, especially on the right side, as we were walking in from -- walking toward the 40's in -- rather in the entry. The right side of the cribs were bellied out, crushed down. What I mean by bellied out, they were bowed in such -- I don't know how you would describe it -- more or less like a pregnant woman. And a lot of the blocks on top, instead of cribbing flush against the top of the block, they had a lot of blocks on top of them, quite a few wedges. On the fiber creek, the donut cribs, the ones that were crushing out had, like, four to six wedges. I didn't count them exactly; just wedged on the top. And then the ones that were staying good, had thicker blocks five to six inches on top of those.

Q. Was there any particular conditions present in the crosscuts of the bleeder entry that you observed?

A. Yes. A lot of the crosscuts had fallen; quite a few were still hanging. You know, bad top in them with pieces hanging around the bolts, each down along both ribs "those ones out there that were starting, too. (I T. 19, 20)

XXX XXX XXX

"Q. Irrespective of the condition of the cribs, could you have issued a violation just on the condition of the roof and ribs itself?

A. Yes.

Q. And explain that, please.

A. The roof itself was cracked out into the walkway over the wire mesh. No support coming between the roof bolts and mass that were in there also. The ribs itself were slammed down into the cribs and parts of it were coming out into the walkway." (I T. 64)."

It is noted here that the problem in crosscut 15Ä16 near the pump switch was not specified in the Citation (I T. 78).

Inspector Huggins felt the most hazardous area in 5EB was between crosscuts 27 and 30 (I T. 31). When asked to explain why the entire bleeder was cited, he gave this explanation:

"There was deep water back in here between 11 and 12, which we did issue a citation on. Some of the cribs back there were starting to roll. And it was later explained to management that the only ones outlined in those areas, the area we're talking about between 20 and 38, was to correct those ones out there that were starting, too." (I T. 31) (Footnote 12)

On June 24, 1987, Gary S. Williams, a union safety committeeman who as a timberman had at one time built and installed cribs in 5EB, observed the entire length of the entry. He described the situation as follows:

"A. Well, on various locations, the roof was cracked and fractured. There was a lot of coal in the cap rock laying in the mesh that was set above the screens. The ribs in a lot of places were butted into the crib line on both sides of the -- on the panel side and on the barrier side.

Q. Did you -- Do you have an opinion as to whether the roof and ribs in the bleeder entry were being adequately supported?

A. No. Other than the cribs being set down the middle of the entry, there was no provision made for any rib control at all.

Q. Do you think the condition that you observed in the entry presented a hazard to anybody traveling into the -- in the area?

A. Yes. There was approximately 300 to 400 feet of extremely bad top, which weekly examiner had to travel under. There was also bad ribs and bad top in and around the pump, in the location of the pump control where the upper fire boss examiner had to turn the pump on." (I T. 101, 102)

(emphasis supplied)

XXX XXX XXX

Q. Okay. Had the cribs, in your opinion, from the time you set the cribs to the time you observed them again on June 24th, deteriorated?

A. Yes. Quite a bit.

Q. And could you explain what you mean by that?

A. Well, there was a lot of cribs that had rolled severely toward the panel side. There was a lot of them that were crushed and broken out. Some just were rolled so bad that there was -- their way -- in my opinion, they were doing anything but just laying there (I T. 103)."

Mr. Williams agreed with Inspector Huggins that the "worst" area was between crosscuts 27 and 30 (I T. 31, 102).

The opinion of MSHA Supervisory Inspector William E. Ponceroff, who accompanied Inspector Huggins on the inspection, generally supported the opinions of Inspector Huggins and Mr. Williams that conditions in 5EB, particularly in the 27Ä30 crosscut area, were hazardous (I T. 117, 119, 123Ä128. 150).

His most specific, and thus probative, description of a hazardous condition in 5EB related to the area around crosscuts 27Ä30:

> Just in general, the cribs were in that specifically 27 to 30 or right around that area that were crushing and similar to one of the photographs here. The ends were splitting. Some of the cribs were not installed so that all of the corners were against the top. There was some cases where they had the crib blocks in but there was wire. (I T. 117Ä118).

In addition he felt that "some" of the so-called "donut" cribs in 5EB had been improperly installed (I T. 118, 150, 160).

Inspector Ponceroff indicated that prior to issuance of the Citation UPL had been advised as to procedures for requesting permission to install bleeder evaluation points (I T. 131Ä132, 148). He explained that the Citation was issued on June 23, 1987, even though UPL had requested such permission (letter from Boylen to Barton dated June 3, 1987) because the area had already become hazardous. Thus, Inspector Ponceroff testified:

"A. The difference here is when we arrived, the area was hazardous. They hadn't taken the proper action to install the supports so that the area was no longer safe to travel through. If they had installed the cribs and additional support, and then the condition continue to worsen, that was the time then to get ahold of us and then-- while it was still safe for a man to walk through there. They could have put posts between the cribs to prevent those ribs from coming out and getting -- posts or donuts or clusters. They could have put donuts or more cribs. They had spaces in cases to put cribs in between those that had rolled severely and they had -- they could -- they had room to put donuts there. They had room to do that and still stagger posts. So they could have --"

(emphasis supplied) (I T. 148)

The cited conditions, including those in the 27Ä30 crosscut area, occurred gradually and would have taken one month to two months to have occurred (I T. 33, 105Ä106, 119, 139, 148, II T. 18).

Lee Smith, MSHA's roof control specialist, testified that after a crib loses its vertical alignment against a bow-out or deform from the roof, it can reach the point where it is no longer supporting the roof and is a hazard-because after it attempts to roll out, it can be projected away from its original location at a high rate of speed. (I T. 175).

He also gave this explanation of the last sentence of the violation described in the Citation:

"The majority of the crosscuts in the entry were not supported with cribs. They were supported all with the initial roof supporting installation, which was, we were told was five foot between the bottom of the ribs and the top of the roof mats. As that roof deteriorated in the crosscuts, and as it began to

weaken and sag, that roof would fall. So when it would fall, with no additional support in the crosscut, it would continue out toward the entry. Even if it did not enter the entry, it would expose roof strata to the weathering affects -- the weathering affects of the high humidity in the air, which would again weaken the area above the very entry that they're trying to support. On the other hand, we went into -- we went around the roof fall and around crosscut seven in by -- toward the fall, and we saw one crosscut in particular where the mine people had installed cribs and it had done its job. It had prevented the roof fall from extending out of the crosscut into the entry. So that's a clear demonstration that had they put cribs in the entry, it may not prevent all of the roof strata from sagging and separating, but it would have added additional support and probably extended the life of that bleeder entry."

(I T. 179) (emphasis added)

Dave D. Lauriski, Managing Director of Health, Safety and Training for UPL's Mining Division, testified that on the evening of June 23, 1987, after the Citation had been issued, he and Mr. Boylen examined the 5EB. He conceded that they noticed some areas between crosscuts 27 and 30 "where the immediate roof had broken loose from the main roof, and was causing a sag in the chain link fence that had been put up" and he added: "but we also noticed a severe deformation to the crib due to convergence in that area." Mr. Lauriski testified that: "We did not really notice any other severe roof conditions, other than in the area of 27 to 30...." (I T. 200Ä202). Mr. Lauriski and Mr. Boylen did not travel the entire 5EB that evening (I T. 202). The following admission in Mr. Lauriski's testimony is also directly relevant:

"Q. You mentioned that there were some conditions with immediate roof fall in certain areas in the area from 27 to 30 crosscut.

A. I did not see a roof fall. I saw where the immediate roof had broken loose from the main sandstone roof and was causing the material to be caught up by the chain link fence, but the chain link fence was in affect, bellying down, and in and of itself was causing a hazard or could have caused a hazard to a miner. Beyond that, the area was under extreme convergence and was becoming very narrow, both in height and width."

(I T. 203Ä204) (emphasis added)

Mr. Lauriski also testified that "Outside of the area 27 to 30 or 31 crosscut, I did not personally see in my opinion, conditions ... from the roof that constituted a danger to the miners because of a poor roof" (I T. 208). Finally, it was conceded that no danger sign had been put up in the area and that "those persons who were authorized" were free to travel in the area (I T. 214).

According to Mr. Lauriski, there was an indication in the weekly examiner's book about a week before June 23, 1987, "that there had been a small fall" in the area of the 27Ä30 crosscuts, and that "there had been some breaking away, the immediate roof into the chain link, and that there was a need for some action." (I T. 222Ä223).

UPL first became aware of roof problems in 5EB in October of 1986, at which time at the behest of Mr. Boylen, Morgan Moon (currently Director of Technical Services of UPL's mining division) was directed to monitor the area by walking it on a weekly basis (II T. 12Ä13). On Moon's recommendation, additional support was installed. Subsequently, according to Boylen, UPL "really became concerned over the area converging together and becoming hazardous to travel for the mine examiner" and the June 3 letter was sent (II T. 13). Mr. Boylen explained why he requested MSHA approval to establish evaluation points even though he didn't think such approval was required (II T. 47Ä48):

Q. When you say spirit of cooperation, did you -- did you think that you were required to send this letter?

A. No. I didn't then and I don't now. I haven't done it in the past.

Q. Well, let's just step back a minute. Why did you think you were not required to send the letter?

A. As I said, I haven't done it before.

Q. When you say "It", what do you mean?

A. I haven't asked for permission to establish evaluation points.

Q. And what did you do instead in terms of setting up bleeder evaluation points?

A. Weekly examiner; a lot of times it will inform us of the problem. And we would have it checked and just move the danger sign out ourselves. (Footnote 13)

Q. And did moving the danger sign and establishing the points, require in your view, approval of MSHA?

A. No, ma'am, it does not.

Q. But Mr. Boylen, in this letter, you say that "We request approval." Why did you say that if you didn't believe that you had to?

~527

A. That would be an oversight on my point. I read the letter and in my opinion, we don't have to ask for permission. But again, with the Wilberg situation and then the way everything went there, we had to ask for a lot of permission over there to do a lot of different things. And I think it was-- the letter was drafted and I overlooked it.

(II T. 15Ä16) (emphasis added)

Mr. Boylen indicated that the hazard he had in mind in the June 3 letter to Barton was "the convergence of the roof with the floor" (Footnote 14) and that there were areas that were but three and half feet high (II T. 17). (Footnote 15) Significantly, he felt the "area" was getting worse week after week and that such became evident beginning in January 1987. He also felt that the degree of the hazard was not "imminent" (II T. 18). He was most concerned about the area between crosscuts 27 and 30, and when he inspected it on the evening of June 23, 1987, after the Citation had been issued, he thought "it would be too hazardous to try to put additional support" in this area (II T. 27).

Mr. Boylen said his position was that if an area becomes hazardous he would shut it down (II T. 25, 47), and that he would learn from the fireboss whether the area was not travelable (II T. 25). He also testified, however, when asked how hazardous the area was for a person walking through it, as follows:

> "I did not consider it eminent [sic]. If it would have been eminent [sic], I would have shut it down immediately." (Footnote 16) (II T. 18).

"Danger" signs had not been erected (I T. 207, 214) in any part of 5EB as of the time the Citation was issued, June 23, 1987. The area between crosscuts 27 and 30 was first dangered off the following morning, June 24, 1987 (II T. 27, 28).

5EB was scheduled to be permanently sealed on or about October 15, 1987 (II T. 17, 103) upon completion of the Seventh East Longwall panel.

By letter dated July 15, 1987 (Court Ex. 2), Mr. Boylen requested inter alia that Mr. Barton approve an evaluation point at crosscuts 30 and 31 for evaluation of the 27Ä30 crosscut area. Such request was approved in a Barton-to-Boylen letter dated July 17, 1987 (Court Ex. 3).

Mine Superintendent Anthony C. Pollastro, testified that at the closeout conference he attempted to find out from MSHA representatives what crib conditions throughout the 5EB would constitute inadequacy:

> And basically asked what criteria they were talking about as far as the failure of the crib or ineffectiveness of a crib. At that time from the questioning in that, I was told that "Any crib that had rolled, needed additional support placed beside it." I asked "What are we talking about, what degree of roll?" And I searched around and finally I said "You mean anything that's out of a vertical plane, as far as a crib, needs additional support?" The answer was Yes. (II T. 74).

Kevin F. Tuttle, UPL's Senior Safety Specialist, in this same connection, testified that at the closeout conference, Inspector Huggins indicated that any time a crib was "bowed" that it was ineffective (II T. 108Ä110).

Pollastro, based on prior experience, disagreed with MSHA's position as stated at the closeout conference (II T. 75, 80) that cribs out of vertical alignment were defective or inadequate. Mr. Pollastro felt that the cribs in 5EB were "far superior to the timbers" that UPL abated the violation with, and that there was no need for additional support. He thus testified:

> As far as additional support or to warrant the citation that was given, I thought was quite ridiculous in that situation there. We had added additional support in the areas that we thought were needed or that the area that was yielding or converging. And some of the other area that they had cited or they talked about, or to cite the whole entry, was, I felt, quite ridiculous. (II T. 80).

Morgan Moon, Manager of Technical Services for UPL, testified that in January 1986 (it is believed he meant 1987), he observed "deterioration" in 5EB, that in the vicinity of crosscut

30 the "deterioration" began to accelerate as the longwall went by, that there were "some roof falls" and "pressure on the cribs", that the entry was in a "convergence mode" and that supplemental support in the form of additional cribs and donut cribs were installed to help stabilize the area (II T. 218, 221). He conceded that somewhere between crosscuts 25 to 32 there were areas where the immediate roof had separated, and small layers of broken rock had come down between the cribs and the wire mesh (II T. 221). Mr. Moon agreed that "roof fall hazard" has much more serious consequences than convergence (II T. 222). With respect to the nature of cribs, Mr. Moon, a mining engineer (Ex. CÄ2) gave this significant testimony:

> When the pressure comes on in the case of a crib, you'll see that crib begin to deform. It may roll some. You may get some differential compaction within crib blocks theirself. And it will -- From appearances, it looks like it's all out of vertical and horizontal alignment and it is. This is not uncommon in cribs and that is the main design of cribs. They are placed there because they're a fairly large structure. They have large load carrying capacities. And they resist ground movement within certain limitations. They do not fail rapidly because they are designed to converge and yield and still maintain a large load carrying capacity. (II T. 223)

Mr. Moon indicated that cribs are used in 5EB because of this ability to compress (decrease in height) and still maintain a "very large load carrying capacity." (II T. 224, 225Ä228).

Mr. Moon was of the opinion that all of the cribs in 5EB except those in the 27Ä30 crosscut area were functioning properly (II T. 229Ä231, 237, 272). He had traveled 5EB from October 1986 to June 1987 (II T. 256). In connection with abatement, he indicated that there "really was no need to place any cribs", and with respect to 5EB areas other than the 27Ä30 crosscut area, he said that since abatement the majority of that area had not taken any weight, the installation of timbers was "purely cosmetic" and that the cribs were functioning properly (II T. 272).

In answer to the question how it can be ascertained when roof is in good condition, Mr. Moon replied:

> You don't see any roof fall material in the walkway. The wire mesh is flush against the roof. The mats are flush against the roof. The bolts are in find shape. I think this is a -- It's normal that people look at a crib, and they assume that the crib problem is caused by roof conditions. This is not the case the majority of the time in our mines. It's due to bottom heave and the pressures applied from the bottom. In fact, the roof is in sound -- sound shape and you don't have a problem with it.

Q. Is that also true of the Fifth East bleeder?

A. That's true with the Fifth East bleeder.
(II T. 246Ä247).

With respect to the effectiveness of cribs which did not contact the roof with all four top corners, Mr. Moon gave this incisive explanation:

> A. The effectiveness of a crib in an eccentrically loaded condition --
>
> Q. What does eccentrically loaded mean?
>
> A. That means the load is not vertically applied or the crib is not in an absolutely vertical condition. Eccentrically loading, or a crib that's tilted, does not appreciably lose any load carrying capacity within the ranges that we see underground. This is just published by the US Bureau of Mines. They've done some testing at their Pittsburg Research Center. And there is a paper out now that will be published very shortly; and they substantiate this with full scale model testing in their mine roof simulators, where they actually displaced the cribs and loaded them and showed there was actually very little load carrying capability lost due to this condition in the cribs or the loading mechanisms. (II T. 251Ä252)

In reference to the charge in the Citation that the crosscuts next to 5EB "have no additional supports" and are "riding into the bleeder entry pushing out the cribs", Mr. Moon testified that leaving the crosscuts unsupported relieves stress on the entry and that there was no reason for anyone to leave the entry travelway to go into the crosscuts (II T. 245Ä246, 249).

When asked about his role in the preparation of the Boylen letter of June 3, Mr. Moon gave this testimony:

The Court: Now, when you say you conferred, tell me -- So you did have something to do with the letter being written?

The Witness: Not the actual letter. They said "Why don't you go take a look at it? Tell us what you think." We walked it. I said "Yes. The convergence is continuing. This area is starting to look a little tough. I don't think there's any eminent (sic) danger of collapsing. The condition seems to be migrating both out-by and in-by. And it probably will continue to do so until we get the panel pulled and the area sealed."

The Court: Explain the out-by and in-by.

The Witness: Out-by refers to going towards --

~531
The Court: No, no, no. You know, I mean --where's your reference point there?

The Witness: From the 27 to 30 crosscut.

The Court: Okay.

The Witness: In-by -- in other words, an area that was starting to exhibit what abnormal convergence or it was a migrating thing; and also out-by -- for a ways, there was an area there that was showing signs of convergence and a deterioration of cribs.

The Court: Okay. So you did report that to Mr. Barton. Did you know he was going to write that letter?

The Witness: Yes. I knew that he had planned on establishing a monitor point. (II T. 269Ä270) (emphasis added)

Dr. J.F.T. Agapito, holding a doctorate in rock mechanics (See Ex. CÄ9) was called as an expert witness by UPL. He is president of J.F.T. Agapito & Associate, Inc., a consulting firm (Ex. CÄ10) in the areas of technical engineering and mining engineering among other fields (II T. 276). (Footnote 17) He indicated expertise in pillar and crib stability (II T. 277, 279). His examination of the Cottonwood mine and preparation for the hearing occurred in July 1987. (II T. 280Ä281, 288).

Based at least partly on a study of crib deformation (lateral displacement where the top and bottom of the tested crib become displaced in relation to each other as much as 12 inches) by the U.S. Bureau of Mines (Ex. CÄ12; II T. 284Ä287) Dr. Agapito reached the important and convincing conclusion that cribs can undergo very large deformations and still retain their strength. He also concluded that deformed cribs in 5EB- which he referred to as cribs which were "unsymetrically loaded" (meaning that each of the four corners was carrying a different load) -- maintained a "very high strength" (II T. 302Ä303, 326).

Dr. Agapito's ultimate conclusion was that the cribs in 5EB were effective to maintain stability for the life of 5EB (II T. 302, 311Ä312, 319, 332, 333, 341Ä343, 363). He described the basis for this conclusion:

> I based that evaluation on actual measurements of the same type of cribs, and the same size of cribs in the same seam, done at the Plateau Mine. That's very relevant because I repeat myself; the wood is the same type of wood, the

> seam is the same type -- is the same seam; and the deformations that we measure are on the same order of the roof and floor deformations that we are measuring at UP & L.
> (II T. 302).

Dr. Agapito's opinion was aided by comparative in-situ measurements taken between cribs at a mine owned by Plateau Mining Company and UPL's Deer Creek Mine which is adjacent to the subject Cottonwood Mine and similar to it in terms of depth, stresses and relationship to the longwall (II T. 294, 295, 314, 328). Measurements of cribs in 5EB were not taken, however, due to insufficient time to do so (II T. 306).

With respect to the third sentence of the charge in the Citation that the crosscuts next to 5EB "have no additional supports" and are "riding over into the bleeder entry pushing out the cribs", Dr. Agapito said he "didn't see anything like that" and that the stresses -- from the crosscuts-- were not riding into the entries. This opinion was based on computer analyses (II T. 345Ä346).

Discussion, Ultimate Findings, and Conclusions

The evidence pertaining to allegedly violative conditions in 5EB divides somewhat into two general segments-- that relating to hazardous conditions in the area of crosscuts 27Ä30, and that relating to the adequacy of cribs in the remaining areas of the 4000Äfoot length of 5EB. (Footnote 18) The question of pressure and stresses from the unsupported crosscuts "pushing out the cribs" in 5EB (charged in the 3d sentence of the alleged violation) seems to relate more to a cause of alleged 5EB crib inadequacy than to constitute an independent charge of violation.

In Secretary v. Canon Coal Company, 9 FMSHRC 667 (1987) the Federal Mine Safety and Health Review Commission set forth a general explanation of the standard involved here and the approach to be followed:

> Section 75.200 which reflects section 302(a) of the Mine Act, 30 U.S.C. 862(a), is a mandatory safety standard of central importance in the crucial regulatory area of roof control in underground coal mines. With respect to the requirement in section 75.200 that roof and ribs "be supported or otherwise controlled adequately," this standard is expressed in general terms so that it is adaptable to myriad roof condition and control situations. See generally KerrÄMcGee Corp., 3 FMSHRC 2496, 2497 (November 1981).

> 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. Cf. OzarkÄMahoning Co., 8 FMSHRC 840, 841Ä42 (May 1983); U.S. Steel Corp., 5 FMSHRC 3, 5 (January 1983); Alabama ByÄProducts 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 842Ä43; U.S. Steel, supra. 5 FMSHRC at 5Ä6."

Proving that reasonably prudent persons can differ, there was strong disagreement between UPL expert witnesses and officials and those of MSHA on the general question of the adequacy of the cribs in 5EB. Any disagreement as to the hazardous nature of the roof and rib conditions in the area of crosscuts 27Ä30 was not sharply etched, and these two questions are discussed separately.

A. The 27Ä30 Crosscut Area.

It is useful to keep in mind that the situation for this area (and for that matter, the other areas of 5EB) on June 23, 1987, when the Citation issued was (a) MSHA approval for the establishment of bleeder evaluation points had not been granted (b) the area had not been dangered off by ropes or by installation of "Danger" signs, and (c) miners were being permitted to work in (travel through) the area.

Although MSHA's evidence was general, UPL's Director of Health, Safety and Training candidly and commendably conceded the existence in the 27Ä30 crosscut area of specific severe roof conditions (set forth in detail above) which he further conceded would constitute a hazard to miners. I also consider, in conjunction therewith, the Boylen letter of June 3 to constitute an admission of hazardous roof conditions in this general area. By all accounts, the 27Ä30 crosscut area was the most severe in 5EB and UPL officials were aware of the deterioration (a "gradual" process) going on in the entry generally for a period of several months (from at least October 1986) prior to to issuance of the Citation. Significantly, UPL's Manager of Technical Services, who monitored the deterioration in 5EB for a period of several months prior to issuance of the Citation, testified:

> Q. Now, after you wrote -- After the letter of June 3rd 1987 was written to the District Manager, was additional supports put in the 27 to 30 crosscut? Did you continue to put in additional supports?
>
> A. Not to my knowledge. It was our opinion that we would discontinue traveling the bleeder and establish a monitoring point.
>
> Q. But I take it a man did travel that area up until -- on a weekly basis up until the time the citation was issued?
>
> A. That's correct, I believe.
>
> Q. But you did -- After the letter, you did stop putting any additional supports in between 27 and 30?
>
> A. To my knowledge, we did, yes.
> (II T. 257Ä258).

Thus, while UPL had hopes of establishing bleeder evaluation points to cover this area, and ultimately intended to close down and permanently seal the 5EB some 4 months from the date the Citation issued, it evidently had not barred miners from this area or dangered it off. It is therefore concluded on the basis of this record that the roof and ribs in 5EB between crosscuts 27 and 30 which were observed by Inspector Huggins on June 23, 1987, had not been adequately supported and this area was hazardous and not adequately controlled when cited (I T. 30, 31, 33Ä36, 41, 64, 67Ä68, 102, 110, 117Ä119, 136, 139, 145, 148, 150, 200, 201, 202Ä204, 207, 208, 211, 212Ä213, 214, 222, II T. 28, 48Ä49, 51, 59Ä60, 86, 221, 257, 366Ä367, Exs. CÄ1, RÄ6). Two persons were exposed to the hazards in this area of 5EB, the person who conducted the weekly examination and the "pumper" who was described by the inspector as the person who "goes in and pumps water out" (I T. 32, 88) approximately one to three times a week.

Accordingly, a violation of 30 C.F.R. 75.200 is found to have occurred as charged in the first sentence of Section 8 of the Citation.

I am unable, however, to conclude that the entire area between crosscuts 20Ä38 (specifically mentioned in the Boylen letter of June 3) was hazardous either from defective cribs or from other unsafe roof/rib conditions because of (1) the lack of probative evidence and (2) my resolution of conflicts in the opinion evidence discussed in various parts of this decision (By way of further illustration, see dialogues at I T. 31Ä32 and 53Ä56).

Finally, it is mentioned that UPL, in addition to some contentions it has now abandoned (noted above), has raised other arguments. One is that:

> ... natural convergence caused by vertical pressures is not covered by Section 75.200, ie.e., convergence in the 5th East bleeder was not a roof control problem and did not create the kind of roof and rib fall hazards addressed by the regulation." (Contestant's brief, pg. 19).

While there was a problem with convergence in 5EB, there was also a problem with inadequate support in the area of crosscuts 27Ä30 as charged by MSHA. The fact that there was a problem with the floor rising to meet the roof, does not alter the fact that there existed the violation charged by MSHA. While the effect, i.e., convergence itself, can be the hazard, convergence can also be a cause-or contributing cause-of violative roof and the rib conditions. I find no merit in this contention of UPL's and it is rejected.

B. Remainder of 5EB---Crib Adequacy

The essence of the second and third sentences of Section 8 of the Citation involves the adequacy of cribs. As pointed out in MSHA's brief, the "major dispute at the hearing concerned the adequacy of the wooden cirbs which were being used as secondary support in the 5th East bleeder entry."

Proving such allegation of "inadequate" support (or inadequate controls) requires evidence as to what type of support or controls a reasonably prudent person would install under the circumstances. Quinland Coals, Inc., 9 FMSHRC 1614 (1987); U.S. Steel, supra. This "reasonably prudent person" test mandates an objective, not subjective, analysis of all the surrounding circumstances and factors. I take it that one facet of this analytical approach is that even though it may have been reasonable for the issuing Inspector to believe a violative hazard existed from eyeballing a troublesome situation in the mine, that if further testing, analysis, informational input and informed judgment establishes that such was not a hazard the initial determination must be set aside. The adequacy of particular roof support must be measured against what the reasonably prudent person would have provided in order to afford the protection intended by the standard. Southern Ohio Coal Company v. Secretary, supra.

Here, as fairly pointed out in UPL's brief, every mining engineer (all of whom were UPL witnesses) who testified at the hearing was of the opinion that the cribs throughout 5EB were effective to support the entry. In addition, Mr. Lauriski, while candidly conceding the hazardous roof conditions in the 27Ä30 crosscut area, was of the opinion that there were no dangerous conditions outside that area. There was evidence presented indicating that the issuing inspector felt that cribs were inadequate because they were out of vertical alignment (deformed). UPL firmly and convincingly rebutted this proposition through witnesses who evinced a greater familiarity with 5EB conditions

and crib behavior than MSHA's as well as the well-documented testimony of its expert, Dr. Agapito. His conclusions were based on empirical testing of cribs identical to those at the subject mine under mining conditions more adverse than at the subject mine, and also on tests conducted by the Bureau of Mines. I find such opinions of a higher quality and entitled to greater weight than opposing views based solely on visual examination and diminished in other ways noted herein. UPL's evidence that the cribs in 5EB were not inadequate due to deformation (and compression), being the more persuasive, is accepted.

MSHA's opinion evidence as to crib adequacy generally (and as to any single crib) was not supported by measurements or any type of testing. Although such evidence from MSHA inspectors is generally and in the abstract entitled to considerable weight, when challenged by better supported, higher quality opinion evidence, it is subject to rejection. MSHA's evidence was exceedingly vague and general. No specific crib (or cribs) was pin-pointed or described in such a way that opinion evidence could be directed to it or them. Nor did MSHA show the number of cribs out of the approximately 1200 cribs in the entry, that could actually be said to be defective, ineffective, or hazardous. Where descriptions of conditions were relatively vivid, the locations of such were usually not ascertainable, and vice versa. Scrutiny of the record thus does not produce substantial, reliable or probative evidence that locations other than the 27Ä30 crosscut area were in violation. The brief and general summary of its witnesses' testimony in MSHA's brief (pgs. 5 and 8) is a fairly accurate representation, and perhaps fallout from, the testimonial imprecision of their accounts. Thus, the references are to "many of the cribs", "in various locations" "others", "cribs" "in the crosscut areas" and "areas".

Since the evidence of UPL's witnesses successfully rebutted that of MSHA's, to the extent that generalities can be dealt with, it is concluded that it was not established by the preponderance of the reliable, probative evidence that other than in the 27Ä30 corsscut area, the cribs in 5EB, or any single crib, deformed or otherwise, at the time the Citation was issued, did not maintain sufficient load-carrying capacities sufficient to adequately support the entry.

Remaining Issues

Three remaining matters (raised by UPL in this matter and litigated) remain to be discussed, UPL's contention that it has the right to unilaterally establish bleeder evaluation points without MSHA approval, the "greater hazard" defense, and vagueness of the charges.

(1) Evaluation Points.

Although in its supplemental brief, UPL sought to remove the "unilateral right to establish evaluation points" issue, it nevertheless made the argument in its initial brief that its intent to and attempt to establish evaluation points was part of its effort to take remedial measures to correct the violative conditions and thus any violation should be excused under the rationale of Colorado Westmoreland, Inc., 4 FMSHRC 194 (1982) (UPL Brief, pgs. 25, 26). This contention was not removed in its supplemental brief. The question was extensively litigated and I have previously concluded that the regulation seems clearly to contemplate MSHA approval for the establishment of evaluation points (See Fn. 4). Upon consideration of this question, I conclude that Colorado Westmoreland, supra, is inapplicable to the facts of this case, since, contrary to the situation there, UPL was dilatory in seeking to establish evaluation points.(Footnote 19) The position of MSHA which is well stated in MSHA's brief, is here adopted:

> Besides contesting the actual conditions stated in the citation, UP & L views this case as a vehicle to limit the role of MSHA's District Managers in approving mine ventilation and roof plans. UP & L contends that 30 C.F.R. 75.316Ä2(f)(3) permits an operator at his option to elect to have a bleeder evaluation point established in lieu of maintaining a bleeder entry in travelable condition. Thus, UP & L would merely notify MSHA that it is establishing an evaluation point. By taking the language of 30 C.F.R. 75.316Ä2(f)(3) totally out of its intended context as part of the approval criteria, UP & L seeks to distort the regulatory scheme. As indicated in the first sentence of section 75.316Ä2, "this section set out the criteria which District Managers will be guided in approving a ventilation system and dust control plan on a mine by mine basis. As criteria to be used as guidelines by the District Manager in the plan approval process, the regulation cannot supercede the mandatory language of 30 C.F.R. 75.200 which requires mine operators to support all active areas where men

> are required to work or travel. Only after the District Manager exercises his approval function and approves a specific bleeder evaluation point as an addition or amendment to an existing ventilation plan is the mine operator permited [sic] to examine for hazardous conditions from that point. Taken to its logical conclusion, UP & L's reading of the regulation could remove every bleeder entry in their mines for being traveled by mine examiners. It would condone and encourage an operator's neglectful maintenance of bleeder entries. This result was not the intent of 30 C.F.R. 75.316Ä2(f). The criteria assumes that an operator has undertaken full and constant efforts to maintain roof and rib conditions in its bleeder entry. Only after those vigorous efforts have failed and rehabilitation is likely to be unsuccessful should an operator seek permission to establish a bleeder evaluation system. In such a situation, District Managers have authority to approve the request. Here, the District Manager properly denied the request for all but the area between crosscuts 27Ä30.
>
> Furthermore, it appears that UP & L's June 3, 1987 letter addressed to MSHA's District Manager, requesting approval to establish a bleeder evaluation point at Crosscut 38 undermines their legal position on this issue. The letter is the best evidence of UP & L's clear intention to seek MSHA's approval to revise its present plan, and not to merely inform MSHA that it had taken unilateral action. UP & L continued to require the weekly mine examiner to travel entirely the bleeder entry to examine for hazardous conditions."

UPL's assertion of the Colorado Westmoreland defense is found to lack merit and is denied.

(2) "Greater Hazard" Defense.

As noted hereinabove, UPL, in its Notice of Contest (and by letter of August 14, 1987) alleged that should it be found that certain cribs in 5EB were not providing adequate support, the hazard of achieving abatement-- by setting additional posts or other means-- would be greater than leaving the area undisturbed.

I conclude that UPL has abandoned this defense since it was not raised or argued in its post-hearing brief, and also since it was not mentioned as an issue at the hearing (I T. 59Ä60). It is further noted (1) that UPL's representatives did not raise the question when it discussed with MSHA officials how to proceed to abate the Citation (I T. 66), (2) that during the closeout conference it was made clear that the area between 27Ä30 crosscuts would not be required to be supported since conditions had become too hazardous there (I T. 67), and (3) that UPL apparently had no trouble in its abatement efforts (II T. 75Ä79).

~539
In any event I am unable to find in this record, evidence which meets the three-prong test for establishing this defense, to wit:

> (1) the hazards of compliance are greater than non-compliance;
> (2) alternative means of protecting miners are unavailable; and
> (3) a modification proceeding under section 101(c) of the Mine Act would not have been appropriate. Penn Allegh Coal Co. Inc., 3 FMSHRC 1392 (June 1981). See also Sewell Coal Co., 5 FMSHRC 2026 (December 1983).

For these various reasons, any such defense is found to lack merit and is rejected.

(3) Vagueness.

In its Notice of Contest, UPL initially, and I think justifiably, raised the contention that the Citation was too vague to sufficiently inform UPL of the charges. The problem with general allegations and testimony carried through MSHA's entire case and has been noted and discussed throughout this decision. In the final analysis, it has had much to do with the conclusion that the charges in the last two sentences of Section 8 of the Citation were not established.

ORDER

Section 8 of Citation No. 3043248, consisting of three sentences wherein the description of the alleged violation is set forth, is modified:

> (1) so that the first sentence thereof reads as follows: "The travelway in the 5th East bleeder between crosscuts 27 and 30 is not adequately supported to protect persons from falls of roof and ribs"; and
>
> (2) to strike the second and third sentences thereof.
>
> As modified, Citation No. 3043248 is affirmed.

Michael A. Lasher, Jr.
Administrative Law Judge

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
Footnote starts here:-

~Footnote_one

1 The hearing was held during a 2Äday period, August 27, 28, 1987. There are separate transcripts for each day- both beginning with page one. Accordingly, transcript citations will be prefaced with "I" and "II", respectively, in this matter: "I T. __" and "II T. __".

~Footnote_two

2 Herein "5EB".

~Footnote_three

3 This seemingly would constitute an admission that an 1800 foot portion of 5EB was unsafe. However, UPL convincingly explained at the hearing that part of the area was only a "buffer" zone for the particular area that was particularly hazardous (II T. 19Ä22, 61, 101Ä102) and MSHA's evidence does not otherwise support a finding for the entire 1800 foot area (that between crosscuts 20 and 38).

~Footnote_four

4 I find no basis in this regulation to conclude, as UPL has urged (I T. 206Ä209) that a mine operator may unilaterally close down a bleeder entry and put up a bleeder evaluation point without MSHA approval.

~Footnote_five

5 MSHA's interpretation of this regulation is that the entry is required to be traveled on a weekly basis by an examiner until such time as the MSHA District Manager approves some other "means", i.e., the establishment of bleeder evaluation points (I T. 130, 135Ä137, 155, 157).

~Footnote_six

6 In a recent decision, Southern Ohio Coal Company v. Secretary, 10 FMSHRC 138, 141 (February 10, 1988), the Commission pointed out the dual nature of Section 75.200: "Section 75.200 requires both compliance with a roof control plan approved by the Secretary and that the roof be supported or otherwise controlled adequately. An operator's failure to comply with either requirement violates the standard." (emphasis added) The instant matter was tried and argued on the basis of a violation of the Section's proscription against inadequate roof support/control -- not on the basis of an infraction of Respondent's roof control plan (I T. 58, 59).

~Footnote_seven

7 Cribs are a type of roof support used to supplement minimum roof control methods; they are built of 8" x 8" x 36" wood blocks cross-stacked one on top of another similar to Lincoln log construction and they extend from floor to roof. At the Cottonwood mine they are employed in all tailgate entries, longwall panels and bleeder systems around pillared areas and in areas on mine haulageways or mine return airways where long life must be achieved. Their purpose is to maintain roof integrity and keep such areas open for travel and as aircourses (I T. 197Ä198). Cribs are depicted in the record in Exs. CÄ3 through CÄ8, CÄ11, and Joint Ex. 3.

~Footnote_eight

8 UPL's Managing Director of Health, Safety and Training, Dave D. Lauriski, testified that 5EB was not a "viable" alternate route of travel from the 7th East longwall face because it was a longer route to the surface, it was remote, it was not designated and marked for travel, and accordingly, miners were not trained to use it as a travelway (I T. 196Ä197, 222). He conceded, however, that such a bleeder has value as an "additional" travelway (I T. 219), even though he felt 5EB was not a "viable" alternative (I T. 222).

~Footnote_nine

9 Lee H. Smith, MSHA District 9 Roof Control Supervisor, who wrote the memorandum for Barton, explained its purpose:

"It was felt that after Wilberg, that entries that have a longlife, possibly and probably for the life of my-- such as main air courses, gate entries, including -- and also bleeders, main haulage ways and other travelways, reassess the roof control in order to extend their life. So that those entries could serve the purpose for which they're designed was intended, or that that could be used as an alternate route of travel." (I T. 167)

~Footnote_ten

10 The distance between crosscuts 20 and 38 is approximately 1800 feet (I T. 27, 38).

~Footnote_eleven

11 This letter constitutes an admission. See Fn. 3. At the hearing, Mr. Boylen denied being aware of the Barton "Longlife Entry" memo (Ex. RÄ3), when he forwarded this June 3 letter to Barton (II T. 55Ä56). Mr. Boylen said he was prompted to write the letter when two subordinates, his longwall Superintendent, and his Safety Director (Randy Tatton) expressed concern about the entry on May 29, 1987 (II T. 56).

~Footnote_twelve

12 Despite effort to obtain such at the hearing, Inspector Huggins did not, or was unable to, specify the areas that much in his general descriptions of roof and rib conditions applied to-other than testimony relating to the area between crosscuts 27 and 30 (I T. 30Ä31, 41Ä42, 50Ä53, 55Ä56, 63Ä64, 69, 79Ä81). This was generally true of MSHA's witnesses. Further, with respect to the charges in the last two sentences of Section 8 of the Citation, no attempt was made by MSHA to determine the load-carrying capacity of the cribs in 5EB (I T. 86).

~Footnote_thirteen

13 Prior to June 23, 1987, when the Citation was issued, no such danger sign in 5EB had been put up, however.

~Footnote_fourteen

14 It should be noted, however, that in his June 3 letter, Mr. Boylen actually stated that "Roof conditions in the 5th East Bleeder have become hazardous, etc." In his testimony, Mr. Boylen also indicated that there was "more of convergence problem with the ground" than with the roof (II T. 49).

~Footnote_fifteen

15 Although in this early portion of his testimony, Mr. Boylen considered the "hazard" to be the convergence of the floor-roof distance to 3 1/2 feet, he subsequently testified that such a "squeeze" was not an unusual situation for a bleeder entry (II T. 58).

~Footnote_sixteen

16 It goes without saying that for roof and rib conditions to infract Section 75.200, such do not have to be so hazardous as to constitute an imminent danger. While Mr. Boylen was probably speaking in the context of the convergence problem at this juncture, nevertheless, it is also a fair reading of the record, and I so find in connection with UPL's raising of the Colorado Westmoreland defense, infra, that the authority he mentioned to shut the area down, would not have been exercised unless a considerable hazard had developed (II T. 15, 18, 19, 23, 25, 27, 28, 34, 47Ä49, 51Ä53, 56, 58, 60).

~Footnote_seventeen

17 3 of UPL's expert witnesses were mining engineers, Moon, Pollastro, and Agapito.

~Footnote_eighteen

18 In view of the flaws in some of the evidence in terms of specificity, clear articulation, and supportive measuring and testing (particularly on the MSHA side), this decision should be seen as pertinent only to the matter at hand and not particularly authoritative in other matters.

~Footnote_nineteen

19 The record makes some case for the proposition that UPL may have been failing to install additional adequate support, or delaying such, because the entry would ultimately be closed by convergence or permanent sealing (I T. 105Ä106, 136Ä137, 179; II T. 27, 45Ä47, 49, 53, 58, 59Ä60, 78, 98Ä99, 101, 104Ä105, 257, 270, 366). See fn. 16. It was conceded that Inspector Ponceroff had advised UPL's personnel "to anticipate" the problems when he instructed them on the procedures for requesting approval to establish evaluation points (II T. 98, 101).