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SOL (MSHA) V. SHANNOPIN MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 SKYLINE, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. PENN 91-1398 A.C. No. 36-00907-03763
v.	
SHANNOPIN MINING COMPANY, RESPONDENT	Shannopin Mine

DECISION

Appearances: Theresa C. Timlin, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
Joseph A. Yuhas, Esq., Shannopin Mining Company, Barnesboro, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for four alleged violations of certain mandatory safety standards found in Parts 75 and 77, Title 30, Code of Federal Regulations. The respondent filed an answer contesting the alleged violations, and a hearing was held in Washington, Pennsylvania. Three of the violations were settled, and testimony and evidence was received with respect to the remaining violation. The parties filed posthearing briefs, and I have considered their respective arguments in my adjudication of this matter.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. 30 C.F.R. 75.1725(a).

4. Commission Rules, 29 C.F.R. 2700.1 et seq.

Issues

The issues presented are (1) whether the cited conditions or practices constitute a violation of the cited standard; (2) whether the alleged violation was significant and substantial (S&S); and (3) the appropriate civil penalty to be assessed for the violation taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

Stipulations

The parties stipulated to the following (Tr. 6; Exhibit (ALJ-1):

1. The Shannopin Mine is owned and operated by the respondent and it is subject to the jurisdiction of the Act.

2. The presiding judge has jurisdiction in this proceeding.

3. The citation and termination in this case were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the respondent at the date and place stated therein and may be admitted into evidence for the purpose of establishing that they were issued.

4. The parties stipulated to the authenticity of their exhibits but not to the relevance or the truth of the matters asserted therein.

5. The alleged violation was abated in a timely fashion.

6. The respondent's history of assessed violations for the two year period prior to the issuance of the subject citation was 764.

7. The imposition of the proposed civil penalty will have no affect on the respondent's ability to remain in business.

8. The respondent's annual coal production is approximately 1,246,799 tons.

Discussion

The parties decided to settle three of the contested citations and they filed a motion pursuant to Commission Rule 30, 29 C.F.R. 2700.30(c), seeking approval of their proposed settlements. Testimony and evidence was received with respect to the following citation which the parties were unable to resolve by settlement (Exhibit P-A).

Section 104(a) "S&S" Citation No. 3702139, issued on May 24, 1991, by MSHA Inspector Ronald E. Hixson cites an alleged

violation of mandatory safety standard 30 C.F.R. 75.1725(a), and the cited condition or practice is described as follows:

> Shuttle car serial No. 6024 located in the 2 West section was not being maintained in safe operating condition. The canopy was bent forward and there were 2 broken welds where the standards were previously attached to the shuttle car. The shuttle car was immediately removed from service. There were 4 citations issued under 75.1725(a) during the inspection period 10/2/90 to 2/5/91.

Petitioner's Testimony and Evidence

MSHA Inspector Ronald E. Hixson testified as to his experience and training and he confirmed that he conducted a mine inspection on May 24, 1991, and that he issued the contested citation after finding that the cited shuttle car canopy was damaged. Mr. Hixson stated that the canopy appeared to be striking the mine roof or some other object in the mine, and he observed two broken welds on the inside standards or legs that support the canopy and the canopy was leaning in a forward position. He believed that there was a danger for anyone to operate the car in that condition. The car was available for operation and it was not locked out or tagged. If a piece of equipment is not safe, it should be locked and tagged out, or as a minimum, tagged out. The car was located in the working section and he had requested the section foreman to have someone tram the car down the intake escapeway so that he could examine it for permissibility. The power was off when Mr. Hixson examined the machine (Tr. 7-13).

Mr. Hixson identified a copy of his inspection notes, including a sketch of the canopy, and he confirmed that it was supported by four legs, or standards, one in each corner. He stated that the two broken welds were located on the two legs closest to the inside of the car and that the canopy was leaning in a forward direction towards the front of the car. The standards were approximately 24 to 30 inches long, and they are welded to the frame of the car to provide support for the canopy. The broken welds were approximately "a couple of inches off" the bottom of the standards. He found nothing wrong with the welds at the base of the standards and at the canopy roof. If the welds were intact the canopy would be "in a straight up and down position". However, with the broken and damaged welds, the canopy was pushed forward. He took no measurements and did not know the degree of lean of the canopy, but "it was clearly visible to the naked eye" (Tr. 13-18).

Mr. Hixson confirmed that he cited a violation of section 75.1725 (a), but could have cited a violation of

section 75.1710. However, he decided that section 75.1725(a) was more appropriate because he was concerned about someone operating the machine and he wanted to take it out of service. He believed that the broken welds rendered the machine unsafe because the canopy was obviously striking something very hard and he feared that the canopy might fall into the operator's compartment and injure the operator. He was also concerned that the canopy would not withstand the pressure that it was designed and certified to take in the event of a roof fall. The fact that the mine has a lot of reportable roof falls which have occurred above the roof support anchorage zone added to his concern that the canopy was not in a safe condition. He identified copies of MSHA Form 7000-1, submitted by the respondent during the period March 14, 1991 to March 11, 1992, reporting roof falls in the 1, 2, and 3 West sections of the mine, and he identified the areas where the falls occurred on a mine map used in the course of the hearing (Tr. 19-24; Exhibit P-D).

Mr. Hixson stated that he based his "significant and substantial" hazard finding on the following (Tr. 25-26):

> A. I've got a canopy that's damaged through striking something very hard. I've got a situation where a canopy could fall on somebody and hurt them, of which it has happened in the past.
>
> I've got a situation where I've got a canopy that is supposed to withstand so many pounds of pressure in a vertical position, and now I have one leaning in, not totally horizontal, but it's leaning forward and the standards are not straight up and down. And I have no idea to know now whether it can withstand the pressures that the certified engineer certified it will withstand.

Mr. Hixson stated that his "S&S" hazard finding was also influenced by the fact that he did not know who might be operating the shuttle car at any given time. Although an operator who was aware of the fact that the damaged canopy was striking the roof might avoid that particular route of travel, someone assigned to drive that machine who was not aware of the tramming route of travel or that the canopy was striking the roof might take a hazardous route causing enough additional damage which might result in the collapse of the canopy. If the damaged canopy collapsed and fell on the machine operator, it was reasonably likely that he would be injured. In the event of a roof fall, and the canopy did not hold the roof material, the operator could be killed (Tr. 26-27). Mr. Hixson was aware of past incidents where a canopy has collapsed and injured an operator, but not at the respondent's mine (Tr. 28-29; Exhibit P-E).

Mr. Hixson confirmed that he found a moderate degree of negligence and that he based this finding on the fact that the canopy was going to be repaired on an idle shift or over the weekend (Tr. 29). However, he also believed that the canopy was unsafe and that it should have been repaired immediately. A new canopy was installed and the citation was terminated (Tr. 30).

On cross-examination, Mr. Hixson confirmed that he opted to cite a violation of section 75.1725 rather than 75.1710, because he believed that the shuttle car was unsafe to operate and that it would have endangered anyone who operated the car if he had not taken it out of service. He did not believed that citing section 75.1725 was contrary to the MSHA policy manual instructions that section 75.1725 is only to be cited if no other regulation applies. He did not believe that section 75.1710, was applicable because the canopy, as originally installed, was proper, and that section does not address canopy maintenance (Tr. 31-32).

Mr. Hixson confirmed that he did not issue an imminent danger order because he observed no one under the canopy and the car was parked in the cross cut. In support of his "reasonably likely and fatal" injury gravity finding, Mr. Hixson explained that since the damaged canopy was striking something very hard, he believed that it could happen again and that further damage could cause it to topple in on the operator. Further, with the two broken welds and the canopy leaning, he did not know whether it would withstand or hold the weight as it was originally certified by an engineer. Although he believed that he was qualified to determine if the canopy was unsafe at the time he observed it, he was not qualified at that time to determine whether or not it would withstand 1800 pounds (Tr. 32-33).

Mr. Hixson confirmed that he made no measurements, and he estimated that the roof of the canopy would be three to five inches above the head of the operator, but that this would depend on the particular operator. The average mining height in the 2 West section averaged six to seven feet and he had no trouble walking anywhere in the section (Tr. 32-33).

Mr. Hixson explained his understanding of the meaning of "reasonably likely to occur" as follows: ". . . the continued presence of the situation, it's reasonably likely that it could occur. . . that if I continue to let it run that there's the possibility that somebody could be hurt" (Tr. 33). He further explained that the 2 West section was a relatively new section, and that the large number of falls in the 1, 2, and 3 West sections led him to believe that "If you plot the falls across there, the likelihood of a fall occurring is reasonably likely to occur in that area. That's a large number of falls for an area of that size" (Tr. 34).

Mr. Hixson agreed that a person walking next to the shuttle car and the miner helper are not required to have a canopy over their heads, but that section 75.1710, requires that face haulage equipment have a canopy for the operator. He pointed out, however, that most fall problems occur inby the last open crosscut where equipment operators spend most of their day at the edge of unsupported roof and that the regulations were written to provide them with as much protection as possible since they are disturbing the roof and causing most of the vibration (Tr. 35-36).

Mr. Hixson conceded that he had no way of testing the canopy underground as an engineer would to determine whether it was sufficient to hold its certified load. He stated that the canopy is designed to hold a vertical load rather than a horizontal load, and he believed that the broken welds on two of the canopy legs affected the integrity of the canopy. If the welds were intact, the legs would have been straight up and down, and they would not have been damaged even if the canopy struck the roof. He stated that the canopy was leaning forward, and although he could not state where the legs were bent, he believed that "something had to be bent" since the canopy was tilting forward (Tr. 38).

Mr. Hixson confirmed that he assumed that the canopy involved in the accident at another mine operation (Exhibit P-E) was a substantial canopy. He agreed that a new canopy which is perfectly intact could fall on someone. He did not know whether the two shuttle cars were similar, but believed that the mining conditions were likely similar (Tr. 41). He confirmed that one "canopy save" occurred at the Shannopin Mine when a miner operator was covered up and had to be dug out, but he was not aware of any rock falls on shuttle car canopies, and would only know about such an incident if it is a reportable fall or someone is entrapped (Tr. 42).

Mr. Hixson stated that he detected no problems with the welds on the legs of the canopy where they attached to the shuttle car. The welds were covered with paint and he had no idea what was under the paint. He did not know whether the damaged canopy would sustain any kind of load and stated that "possibly one more hit and it could come down" (Tr. 43). However, he believed that the canopy would have deflected smaller pieces of rock that might cause injuries (Tr. 43-44). He confirmed that after observing the broken welds and the canopy leaning, he concluded that it would not do the job that it was engineered to do. He also confirmed that he did not grab and try to shake the two legs with the broken welds, and that the welds were completely broken and not simply cracked. Based on the condition of the canopy, he concluded that "it had to be striking something on the mine roof or some other piece of equipment fairly hard". He was not certain whether the welds were part of

the canopy installation or the support, but confirmed that the welds hold the standards in an upright position. The purpose of the canopy is to protect the operator from rock falls or falling materials (Tr. 45-50). Mr. Hixson confirmed that he did not determine how long the damaged canopy condition had existed and that he did not seek out the person who operated the car on the prior shift (Tr. 52).

Respondent's Testimony and Evidence

Joseph K. Caldwell, respondent's safety director, testified that he was very familiar with the roof conditions at the mine. He confirmed that roof falls have occurred "in a certain way", and that 90 percent of the falls have occurred when everyone on the section has moved 10 to 15 rooms inby. Several weeks might pass before the roof deteriorates, sags, and then eventually falls out. He described the overall roof conditions as "good, decent" (Tr. 53-54).

Mr. Caldwell agreed with the inspector's description of the overall construction of the canopy. It was his understanding that the base of the canopy legs were substantially welded, and that approximately 18 inches up the legs the welds were broken on the braces. He stated that the canopy legs fit inside the standards and that the broken welds were on the standards (Tr. 54-56).

On cross-examination, Mr. Caldwell confirmed that he did not accompany the inspector during his inspection on May 24, 1991, was not present when he examined the shuttle car and the canopy, and that he did not examine the car or the canopy that day (Tr. 59-60). A new canopy was immediately installed to abate the citation, but Mr. Caldwell did not inspect the damaged canopy after it was replaced. He agreed that a canopy with two support legs or standards in a bent condition could present a problem. However, based on his knowledge of a canopy that is substantially constructed, and the fact that everything else was basically intact, he did not believe it was unsafe (Tr. 61-62). He stated that there are bolts that fasten the legs to the canopy and that "there is a certain degree of play in the bolt where it's attached to the standard" and that it "could appear to be bent looking" (Tr. 64).

Inspector Hixson was recalled, and he confirmed that he did not measure to determine how far forward the two standards with the broken welds were bent but that "it was obvious to the eye whenever I first glanced at it that it was damaged . . . and that's when I discovered that the welds were broken" (Tr. 64-65). He agreed that a canopy does have "some inherent play" and that

there is a slight tilt. In such a situation he would not cite it. However, if he "feels that it's been damaged by being struck or that there's a problem, then I'm going to look a lot closer" (Tr. 64).

Mr. Hixson was of the opinion that the intent of section 75.1725 is to insure that the equipment is safe for anyone who operates it, but it does not require that equipment be maintained exactly as it was when it was placed in operation underground. He was not aware of any canopy testing conducted underground, or any MSHA studies concerning damaged canopies, or canopies with broken welds. His understanding of section 75.1710, is that it requires an engineer to subject a canopy ready for use to certain load pressures stated in the regulation (Tr. 69).

MSHA's Arguments

With regard to the application of the canopy regulations found at 30 C.F.R. 75.1710 and 75.1710-1, MSHA takes the position that these regulations address only the conditions under which canopies are required, and the initial configuration required so that a canopy may be certified as "substantially constructed". MSHA states that the parties are in agreement that canopies are required in the respondent's mine and that the canopy installed on the cited shuttle car was initially certified as substantially constructed.

MSHA asserts that no cases have construed section 75.1710 and 75.1710-1 to impose a requirement that operators maintain cabs or canopies, and that in general, the case law discussing violations of 75.1710 or 75.1710-1 have addressed whether canopies are required either in a particular mine, Eastover Mining Co., 4 FMSHRC 1207 (July 1982); or on a particular piece of equipment, Peabody Coal Co., 11 FMSHRC 4 (January 1989); Sewell Coal Co., 5 FMSHRC 2026 (December 1983); or whether operating a piece of equipment without a canopy is a significant and substantial violation, Youghiogheny & Ohio Coal Co., 10 FMSHRC 603 (May 1988).

MSHA confirms that its 1990 Program Policy Manual, Volume V, Part 75, pg. 158, instructs that section 75.1725(a) "in no way affects enforcement of other mandatory safety standards and should be used only where such condition is not covered by any other regulation". MSHA concludes that since the cited condition is not covered by any other regulation the inspector appropriately cited a violation of section 75.1725(a), and that the issue presented in this case is whether or not the shuttle car canopy, "which had sustained extensive damage", was in a safe operating condition.

MSHA acknowledges that in order to establish a violation of section 75.1725(a), it must establish the equipment's use or availability for use. (Explosive Technologies International, Inc., 14 FMSHRC 59, 64-65 (January 1992). However, MSHA asserts that a violation can occur even if the equipment is not in actual use at the time the citation is issued, Explosive Technologies International, Inc., 14 FMSHRC at 65, citing Mountain Parkway Stone, Inc., 12 FMSHRC 960, 962-963 (May 1990). In the instant case, MSHA relies on the inspector's testimony that the shuttle car was located on a working section and was available for operation as it was not locked out or tagged out and that the car operator trammed it down the intake escapeway so that the inspector could inspect it.

Citing Peabody Coal Company, 1 FMSHRC 1494, 1495 (October 1979), MSHA asserts that section 75.1725(a) required the respondent to maintain the shuttle car canopy in safe operating condition and to remove the unsafe canopy or car from service. MSHA concludes that derogation of either duty constitutes a violation of the cited section. Citing Consolidation Coal Company, 11 FMSHRC 2279, 2282 (November 1989), quoting Webster's Third New International Dictionary, 1986 Edition, MSHA points omit that "safe" has been defined as "free from damage, danger or injury, secure . . . " MSHA asserts that section 75.1725(a) is a recognized broad safety standard aimed at preventing hazardous conditions as well as correcting them, that it is not necessary for the hazard to fully materialize before remedial action is required, and that if unsafe equipment is operated, a violation exists whether or not the operator knew of the unsafe condition. Secretary v. Alabama By-Products, 4 FMSHRC 2128, 2131 (December 1982); Peabody Coal Company, supra at 1 FMSHRC 1495; Peabody Coal Company, 2 FMSHRC 1683, 1684 (June 1980).

Relying on the Commission's decision in the Alabama By-Products case, supra, at 4 FMSHRC 2129, MSHA points out that the standard for determining whether machinery is in "safe operating condition" is "whether a reasonably prudent person familiar with the factual circumstances surrounding the alleged hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation". MSHA also cites Secretary v. Ideal Cement Co., 13 FMSHRC 1346, 1348 (September 1991), a case in which the "reasonably prudent person" test was applied to an alleged violation of 30 C.F.R. 56.9002, requiring that equipment defects affecting safety be corrected before equipment is used.

MSHA maintains that the respondent violated section 75.1725(a) by its failure to maintain the canopy in a safe operating condition. MSHA concludes that the inspector was correct in his conclusion that a violation existed based upon the results of his investigation. In support of this conclusion,

MSHA relies on the testimony of the inspector that the canopy was leaning forward, its legs were bent, and that the welds which held the inner legs upright were completely broken. MSHA points out that the respondent presented no testimony disputing the inspector's factual testimony regarding the condition of the canopy at the time of the issuance of the citation, but instead, presented only the testimony of Safety Director Joseph Caldwell, who did not view the canopy either before or after the issuance of the citation.

Although Mr. Caldwell was of the opinion that the broken welds were not on the canopy legs but on the standards attached to the shuttle car, which the canopy legs fit inside of, MSHA asserts that if these "standards" (which Mr. Caldwell suggests were not a part of the canopy but were attached to the shuttle car) were bent, simply putting a new canopy on would not solve the problem because the canopy would still be leaning forward. Alternatively, if the canopy legs were bent, as the inspector testified, and the welds held the legs to the frame of the shuttle car, MSHA concludes that placing a new canopy with straight legs on the shuttle car and rewelding the legs, would alleviate the problem. MSHA asserts that there is no dispute that the violation was abated by replacing the old canopy with a new one and no attempt was made to correct the problem by simply repairing the broken welds. MSHA points out that Mr. Caldwell admitted that the damage to the canopy involved the "integrity of the structure" which the respondent's maintenance employees will not attempt to repair (Tr. 63).

MSHA believes that it is clear that given the factual circumstances surrounding the damaged canopy, including the history of roof falls peculiar to the mine, a reasonably prudent person should have recognized the danger of allowing a shuttle car with a visibly leaning canopy to continue to operate. In support of this conclusion, MSHA asserts that the inspector recognized two possible hazards in allowing the shuttle car to continue in use. One hazard was that the canopy would not be able to protect the shuttle car operator in the event of a roof fall. The inspector testified that the canopy is designed to hold a vertical load, and when it is leaning, and the legs are bent, he believed that it was questionable that the canopy would be able to withstand the pressures it is designed and certified to take.

MSHA further points out that the inspector was aware that the mine had a significant history of roof falls, particularly in the West sections of the mine, where the shuttle car was operating. MSHA concludes that a reasonably prudent person, familiar with the significant history of roof falls in the Mine, should have recognized that the visibly leaning canopy with broken welds where the canopy legs should have been attached to the frame of the shuttle car was unsafe and presented a hazard that warranted

corrective action. MSHA further concludes that the condition of the canopy itself presented a hazard, in that the canopy was likely to collapse in on the operator of the shuttle car. MSHA believes that this was not a situation where the canopy shuttle car had scratches or minor dents from striking the roof or deflecting falling objects, but rather, the shuttle car had become damaged by striking something particularly hard and that hitting the mine roof would cause further damage to the shuttle car, which could be enough to cause it to collapse.

Finally, MSHA asserts that it is clear that a reasonably prudent person, familiar with the fact that a canopy on a shuttle car is obviously leaning; that the ability of the canopy to withstand the amount of pressure which it is certified to withstand in the event of a roof fall is seriously compromised by its leaning position; that although canopies are designed to withstand some damage from bumping the mine roof, the extent or degree of this canopy's decline, as well as the bent legs on this canopy, indicated that the canopy had stricken something hard, most likely area(s) of the roof; that operators of face equipment such as shuttle cars are more frequently exposed to unstable roof and roof falls; and that there was a significant history of roof falls in the West section of Shannopin Mine; would recognize a hazard warranting immediate corrective action.

Respondent's Arguments

The respondent asserts that MSHA has failed to prove that the condition of the cited canopy in question caused the shuttle car to be in an unsafe operating condition, and that it has no proof to support the alleged violative conditions described in the citation. In support of its argument, the respondent maintains that MSHA's case rests primarily, if not solely, on the inspector's visual examination that the canopy was leaning and two welds were broken. The respondent relies on the frequent admissions by the inspector (Tr. 26, 32, 37), that he did not know whether the canopy would withstand the pressures it was required to withstand, and it concludes that these admissions alone support a conclusion that MSHA has failed to prove the shuttle car was in an unsafe operating condition.

The respondent states that a close look at the evidence in this case shows that the inspector's allegations in the citation have no reasonable foundation. In support of its conclusion, the respondent points out that the canopy legs fit into additional legs or standards which were welded onto the shuttle car, and that these additional legs or standards were intact and there were no defects where the legs of the canopy were attached to the canopy itself (Tr. 17, 43, 55, Gov't Exh. B). Conceding that there were two broken welds on the inner two legs of the canopy, the respondent points out that the welds on the outer legs were intact and that the inspector was not aware of the purpose of the

broken welds and admitted that the tilt on the canopy posed no problem (Tr. 15, 17, 65). Respondent further asserts that the canopy could not have been tilted to any great degree because the two outside welds were intact indicating that there was very little tilt to the canopy.

The respondent points out that Mr. Caldwell and the inspector confirmed that there is some "play" in the canopy where the leg fits into the standard (Tr. 64-65). Respondent asserts that the canopy legs, placed in the standards, provided the required support for the legs. Respondent suggests that the welds were apparently only an attempt to eliminate some of the play or looseness where the legs fit into the standards, even though the play itself did not present a hazard (Tr. 64, 65). Respondent also suggests that the welds may have been applied to prohibit adjustment of the canopy, given the fact that it had been scraping the roof at some time in the past. Respondent asserts that the evidence indicates that the welds were not even necessary to maintain the canopy, and it submits that a complete absence of all four welds where the canopy legs entered the standards would have no significant impact on the integrity of the canopy. The respondent further concludes that the evidence fails to show that the inspector's basis for issuing the citation, the tilt in the canopy and the two broke welds, rendered the equipment unsafe.

The respondent argues further that the fact that the inspector did not issue a citation alleging a violation of 30 C.F.R. 75.1710, which requires the shuttle car to be provided with a substantially constructed canopy, indicates that the shuttle car was provided with a substantially constructed canopy. In support of this argument, the respondent cites MSHA's policy manual under section 75.1725, which states that "This section in no way affects enforcement of other mandatory safety standards and should only be used where such condition is not covered by any other regulation". The respondent concludes that since the essence of the alleged violation is that the canopy was not substantially constructed, the inspector, according to the MSHA manual, should have cited section 75.1710 rather than the "catch all" section 75.1725(a). The respondent further concludes that the inspector's explanation that section 75.1725(a) is the appropriate standard is contradictory and unsupportive of his position, and since he stated that section 75.1710 did not apply, this indicates that the canopy was substantially constructed. Finally, since the inspector indicated that section 75.1710 does not address maintenance, and that maintenance of the canopy was adequate at the time (Tr. 31), respondent concludes that the inspector was concerned that the canopy may be unsafe at a future time, hardly a basis for issuing a citation for the present condition.

Findings and Conclusions

Fact of Violation. Citation No. 3702139.

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 75.1725(a), which states as follows:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

In construing an identical mandatory safety standard applicable to surface coal mines (30 C.F.R. 77.404(a)), the Commission in Peabody Coal Company, 1 FMSHRC 1494, 1495 (October 1979), held that the regulation imposes two duties upon an operator: (1) to maintain machinery and equipment in safe operating condition, and (2) to remove unsafe equipment from service. The Commission concluded that derogation of either duty constitutes a violation.

In Alabama-By-Products Corporation, 4 FMSHRC 2128, 2129 (December 1982), the Commission upheld a violation of section 75.1725(a), and stated as follows:

> [I]n deciding whether machinery or equipment is in safe or unsafe operating condition, we conclude that the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

Section 75.1710 authorizes the Secretary to require substantially constructed canopies on shuttle cars in order to protect the car operator from roof falls and from rib and face rolls. Section 75.1710-1 requires shuttle cars to be equipped with "substantially constructed" canopies located and installed in such a manner to protect the car operator from roof, face, and rib falls or rolls. Pursuant to section 75.1710-1(d), a canopy is considered to be "substantially constructed" if a registered engineer certifies that the canopy has the minimum structural capacity "to support elastically: (1) A dead weight load of 18,000 pounds, or (2) 15 p.s.i. distributed uniformly over the plan view are of the structure, whichever is lesser".

MSHA's policy manual interpretation of section 75.1725, cites examples of equipment defects which "could indicate that such machinery and equipment is not maintained in safe operating

condition", and it states that a violation of section 75.1725 "would exist if such defects render the equipment or machinery unsafe to operate" (Emphasis added).

The parties are in agreement that canopies are required for shuttle cars operating in the respondent's mine and that the canopy in question was initially certified as substantially constructed when it was installed on the shuttle car in question. MSHA's position is that sections 75.1710 and 75.1710-1 only address the mining conditions under which canopies may be required, and the initial configuration required of a canopy before it may be certified as "substantially constructed". MSHA believes that these regulations impose no obligation or requirement on a mine operator to maintain the canopy in a "substantially constructed" condition after it is initially certified and installed on a shuttle car.

I take note of the fact that MSHA's canopy safety standards do not include any requirements that canopies be maintained in a "substantially constructed" condition so as to continually meet the minimum structural criteria found in section 75.1710(d). In short, once a canopy is certified as capable of withstanding certain structural pressures to which it may be exposed in the event of a roof fall, there is no specific canopy standard to insure that a canopy which has been subjected to "wear and tear" in the actual mining environment has not been rendered less than "substantially constructed" after the passage of time. In the absence of such a canopy standard, an inspector necessarily must rely on a general "catch all" subjective standard such as section 75.1725(a), to determine whether or not an otherwise seemingly "substantially constructed" canopy is nonetheless in "unsafe condition" requiring its immediate removal from service. The inspector must also rely on a policy instruction which contains no guidance as to how one may make and support a determination that a particular piece of equipment is unsafe solely because of the presence of a damaged part.

The record in this case suggests that the inspector was rather unsure as to which regulatory standard to cite (Tr. 67-68). On direct examination, he testified that he had violations of both section 75.1710 and section 75.1725(a), but opted to cite section 75.1725(a), because he wanted to take the shuttle car out of service (Tr. 18). Although his inspection notes (Exhibit G-B), reflect that the canopy "was not being maintained safe", he testified that he considered the maintenance of the canopy as "adequate at the time", and that section 75.1710 did not apply (Tr. 30-31). I find the inspector's belief that an adequately maintained canopy is at the same time unsafe to be rather contradictory.

The respondent's arguments that the inspector should have cited section 75.1710, rather than section 75.1725(a), and that

his failure to cite section 75.1710, or to follow MSHA's manual instructions supports its contention that the canopy was substantially constructed and that the citation should be vacated on these grounds ARE REJECTED. In upholding a violation of section 75.1725(a), the Commission in Alabama By-Products Corporation, 4 FMSHRC 2128, 2132 (December 1982), held that MSHA's policy manual instructions are not officially promulgated rules binding upon the Commission and that the failure of the inspector to follow such instructions did not invalidate the citation.

The respondent's further suggestion that an inspector's concern that a canopy may be unsafe at some future time may not support a citation for its present condition is not persuasive and it is likewise REJECTED. In upholding a Commission Judge's decision affirming a violation of section 75.1725(a), the U.S. Tenth Circuit in Mid-Continent Coal and Colke Company v. FMSHRC and Secretary of Labor, September 24, 1981, 2 BNA MSHC 1450, observed that "It is clear that Congress intended the Mine Act to both remedy existing dangerous conditions and prevent dangerous situations from developing". See also: Alabama By-Products Corporation, 4 FMSHRC 2128, 2131 holding that ". . . . upon observing the defective equipment in issue, it was not necessary for the inspector to wait until the feared hazard fully materialized before directing remedial action".

The respondent in this case is charged with an alleged violation of section 75.1725(a), and the fact that the inspector opted to cite that regulatory standard, rather than another one is irrelevant. The selection of an appropriate standard to cite is within the discretion of the inspector, and he assumes the risk and possibility that he may not prevail when called upon to prove an alleged violation at trial. In the case at hand, the issue is whether or not the condition of the canopy, as observed by the inspector, rendered it unsafe for immediate and continued use within the meaning of section 75.1725(a), and whether there is a preponderance of credible probative evidence to support the inspector's belief that a tilted canopy with two broken welds was ipso facto unsafe. The burden of proof lies with MSHA, and "the fact of unsafeness, rather than the reason for the unsafeness, is relevant", Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8, 14 (January 1981), affirmed by the Sixth Circuit at 689 F.2d 632 (1982), Cert. denied, No. 82-1433, May 16, 1983. A lack of reliable and substantial evidence of an actual equipment defect affecting safety justifies the dismissal of a citation, B.K.S. Mining Co., Inc., 2 FMSHRC 998 (April 1980), final Commission order June 9, 1980. Both of these cases concerned alleged violations of 30 C.F.R. 77.404(a), a surface mining standard containing language identical to section 75.1725(a).

In this case, the inspector primarily relied on two factors in concluding that the canopy was unsafe, namely, the tilt in the

canopy and the two broken welds. MSHA maintains that the ability of the canopy to withstand the amount of pressure which it is certified to withstand in the event of a roof fall is seriously compromised by its leaning position. However, on the evidence presented in this case, I cannot conclude that the tilt or lean observed by the inspector proves that the canopy was in an unsafe condition requiring its immediate removal from service. The inspector did not speak with anyone who may have operated the shuttle car while coal was being produced, nor did he ascertain when the car was last inspected or how long the condition in question may have existed. Further, although the inspector testified that he had taken a college class in "strengths and materials" and a physics class, that he "knew the equipment", and that a canopy is designed to hold a vertical load rather than a horizontal load (Tr. 37), there is no evidence that he had any particular engineering expertise.

The inspector candidly admitted that he had no idea whether the canopy would withstand the weight that it was certified to hold in the event of a roof fall and that he was not qualified to determine whether or not the canopy could "withstand the 1800 pounds or not" (Tr. 26, 32-33). (I take note that section 75.1710-1(d) requires a certified canopy weight load capacity of 18,000 pounds). Further, the inspector acknowledged that he took no measurements, and did not know the degree of lean of the canopy (Tr. 64). He also agreed that a canopy does have "some inherent play" and slight tilt, and that in such a situation, he would not cite it unless he "feels that it's been damaged by being struck or that there's a problem" (Tr. 65). He confirmed that he did not grab the support posts where the welds were located and attempt to shake them, and he indicated that even if he had done so, the canopy posts do have some "play" in them (Tr. 45). He could not say whether or not the support posts would have moved freely if he attempted to shake them with his hands, and he found no need to make this "hand test" (Tr. 46).

Contrary to MSHA's assertions that the canopy legs were bent, and that two of the welds which held the inner legs upright were completely broken, the citation, as written, fails to describe any bent legs or standards, nor does it state that the broken welds were located where the legs or standards attached directly to the canopy or the shuttle car. The citation states that the 2 broken welds were located where the standards were previously attached to the shuttle car. Although the inspector's notes include a notation that "the standards were bent forward", the diagram of the canopy made by the inspector does not depict any bent legs, and when he was asked to locate the bent legs on the diagram, he could not do so (Tr. 38). When asked whether or not the legs were bent, the inspector replied that "the legs were bent"; "the legs were leaning, the canopy itself was leaning forward"; "something had to be bent, for the canopy to be tilting forward" (Tr. 38). The inspector initially believed that the

canopy legs and standards were one and the same (Tr. 14), whereas the more credible and unrebutted testimony of Mr. Caldwell reflects that the canopy legs actually fit into the standards which were welded onto the shuttle car frame (Tr. 55-57).

Although it is true that Mr. Caldwell was not with the inspector during his inspection because he was not at the mine, and he did not view the canopy when it was cited or shortly thereafter when it was taken out of service, Mr. Caldwell nonetheless based his testimony on his knowledge of the shuttle cars and canopies, his observation of similar canopies before and after the citation, and the inspector's drawing of the cited canopy in question (Tr. 56-57). He also testified that he had previously seen the same canopy many times, and as late as "a couple of days" prior to the inspection in question (Tr. 60). It was Mr. Caldwell's understanding that the broken welds were on a piece of bracing material approximately 18 inches from the base of the standard, but that the base of the canopy legs were substantially welded (Tr. 54-55). I taken note of the fact that Mr. Caldwell has been employed by the respondent for 17 years, and his mining experience includes work as a safety inspector, section foreman, and the operation of shuttle cars, roof bolters, and continuous mining machines, and I find him to be a credible witness.

The inspector testified that the broken welds he observed were not at the point where the legs are welded directly to the canopy top and serve to support it, or at the base of the standards (Tr. 16). This testimony lends some credence to Mr. Caldwell's belief that the two broken welds may have been at one of the brace locations, rather than on the legs themselves. The inspector also testified that he found nothing wrong with any of the welds at the roof of the canopy where the legs are attached to support the canopy, or at the base of the supporting standards which were securely welded to the frame of the shuttle car and which served to support or house the canopy legs (Tr. 17, 43). He believed that the canopy would deflect smaller pieces or rock that might cause injuries (Tr. 17, 43).

MSHA's assertion that the cited canopy "had substantial extensive damage" is not supported by the evidence. The fact that the canopy top showed evidence that it was probably scraping the mine roof, standing alone, does not support a finding of "extensive damage", and the inspector acknowledged that it was not unusual to see evidence of roof scrapes on a canopy top (Tr. 48-49). At most, the evidence reflects the presence of two broken weld spots at a location up from the base of the two front canopy legs which were located inside of the four standards which were securely welded to the shuttle car frame. Under these circumstances, and after careful review and consideration of all of the testimony and evidence presented in this case, I cannot conclude that MSHA has proved that the cited canopy was unsafe,

or that the condition of the canopy, as observed by the inspector, rendered it unsafe and requiring its immediate removal from service. In short, I cannot conclude that MSHA's evidence that the canopy was unsafe, a conclusion which in the final analysis is based on the inspector's observation of a forward tilt in a canopy which has inherent "play", and two broken weld spots up the side of two of the canopy legs which are otherwise substantially welded to the base of the canopy, and which are inside support standards which are securely welded to the frame of the shuttle car, would lead a reasonably prudent person familiar with those circumstances to conclude that the canopy was unsafe and should have been immediately removed from service. In the absence of such proof, I conclude and find that a violation of section 75.1725(a), has not been established and that the contested citation should be vacated.

As noted earlier, the parties agreed to settle the three remaining contested citations in this proceeding, and the petitioner filed a motion pursuant to Commission Rule 30, 29 C.F.R. 2700.30, seeking approval of the proposed settlement. The citations, initial assessments, and the proposed settlement amounts are as follows:

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
3702086	5/13/91	77.1102	$227	$168
3702038	5/16/91	77.1102	$227	$50
3702134	5/16/91	75.220(a)(1)	$350	$227

In support of the proposed settlement dispositions of the three citations in question, the petitioner has submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act. The petitioner also submitted a full discussion and disclosure regarding the facts and circumstances surrounding the issuance of the citations, and a reasonable justification for the reduction of the original proposed civil penalty assessments. After careful review and consideration of the arguments in support of the motion to approve the proposed settlement, I conclude and find that the proposed settlement is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. 2700.30, the motion IS GRANTED, and the settlement IS APPROVED.

ORDER

IT IS ORDERED THAT:

1) The contested section 104(a) "S&S" Citation No. 3702139, May 24, 1991, citing an alleged violation of mandatory safety standard 30 C.F.R. 75.1725(a), IS VACATED, and the petitioner's proposed civil penalty assessment is DENIED AND DISMISSED.

2) The respondent shall pay civil penalty assessments in the settlement amounts shown above in satisfaction of the violations in question. Payment is to be made to MSHA within thirty (30) days of this decision and order, and upon receipt of payment, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge