CCASE:
MSHA V. PEABODY COAL
DDATE:
19921118
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 92-42
	:	A.C. No. 15-08357-03687
v.	:	Docket No. KENT 92-56
	:	A.C. No. 15-14074-03597
PEABODY COAL COMPANY, Respondent	:	Docket No. KENT 92-65
	:	A.C. No. 15-14074-03598
	:	Martwick UG Mine

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
David R. Joest, Esq., Peabody Coal Company, Henderson, Kentucky, for the Respondent.

Before: Judge Barbour:

STATEMENT OF THE CASE

These civil penalty cases were initiated by the Secretary of Labor ("Secretary") against Peabody Coal Company ("Peabody") pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815 and 820. In Docket No. KENT 92-42 the Secretary charges Peabody with two violations of mandatory safety standards for underground coal mines found at Part 75, Volume 30 of the Code of Federal Regulations. In Docket No. KENT 92-56 the Secretary charges Peabody with one such violation. In Docket No. KENT 92-65 the Secretary charges Peabody with two Part 75 violations and with one violation of the mandatory notification and reporting standards found at Part 50, Volume 30 of the Code of Federal Regulations.

The violations in Docket No. KENT 92-42 are alleged to have occurred at Peabody's Camp No. 11 Mine. The other violations are alleged to have occurred at Peabody's Martwick Mine. Peabody timely answered the Secretary's penalty proposals and the cases were consolidated for hearing. At the hearing the parties presented their positions through the testimony of witnesses and through documentary evidence. Following the trial both counsels submitted helpful briefs, which I have fully considered in reaching this decision.

SETTLEMENT AGREEMENTS
DOCKET NO. KENT 92-42

The parties agreed to settle one of the violations at issue in Docket No. KENT 92-42. Citation No. 3548678 was issued pursuant to Section 104(a) of the Act, 30 U.S. C. 814(a), and alleges a violation of 30 C.F.R. 75.316, a mandatory safety standard requiring an operator to adopt and comply with a ventilation system and methane and dust control plan approved by the Secretary. The citation states that Peabody was not complying with its approved plan in that curtains controlling ventilation were not installed and maintained in a reasonably airtight condition. The parties agreed the evidence would show that the curtains were properly installed. They also agreed, however, that the inspector was right in finding the curtains were not properly maintained following installation. The parties further agreed that the violation was not a significant and substantial contribution to a mine safety hazard (a "S&S" violation), that an injury was unlikely to occur as a result of the violation and that Peabody exhibited moderate negligence in regard to the violation. A $20 civil penalty was proposed for the violation, which the parties stated would be appropriate.

DOCKET NO KENT 92-56

The parties agreed to settle the sole violation at issue in Docket No. KENT 92-56. Section 104(a) Citation No. 3551054 alleges a violation of 30 C.F.R. 75.507, a mandatory safety standard requiring, except where permissible power connection units are used, that all power connection points outby the last open crosscut be located in intake air. The citation states that a battery charging station containing four energized chargers was located in return air, five crosscuts outby the face. Given the fact that Peabody's evidence would show that it had built a tent-like structure around the charging station to separate the station for return air, the parties agreed that an injury was unlikely to occur as a result of the violation and that the violation was non-S&S. They further agreed that at the time the violation was cited, Peabody was in the process of changing the ventilation routing in the vicinity of the violation and that the violation was due to Peabody's moderate negligence. They also agreed that a civil penalty of $227 would be appropriate.

DOCKET NO. KENT 92-65

The parties agreed to settle two of the three violations alleged in Docket No. KENT 92-65. Section 104(a) Citation No. 3416929 alleges a violation of 30 C.F.R. 75.1710-1, a mandatory safety standard requiring installation and use of canopies and cabs on all self-propelled electric face equipment. The citation states that the inspector observed a roof bolting machine

operator who was tramming a roof bolting machine but who was not under a canopy. The parties agreed that the violation was due to the operator's negligence. However, because the roof bolting machine operator was tramming the machine under fully supported roof which showed no signs of fault, they believed there was but a remote possibility of an accident. Therefore, they agreed that the violation was non-S&S. The parties also agreed that a civil penalty of $192 would be appropriate.

Section 104(a) Citation No. 3548448 alleges a violation of 30 C.F.R. 75.1107-16(b), a mandatory safety standard pertaining to the proper testing and maintenance of fire suppression devices. The citation states that the fire suppression system on a scoop was inoperative because of a torn hose. The parties agreed that the violation was the result of the operator's negligence but that it was non-S&S. They asserted that in the event of a fire an alternative fire suppression hose attached to the scoop could easily have been detached and used as fire fighting equipment. The parties further agreed that a civil penalty of $126 would be appropriate.

SETTLEMENT APPROVAL

In light of the facts as stated by the parties, as well as the other relevant statutory penalty criteria set forth in the parties joint motions to approve the settlements, I conclude the proposed settlements are in the public interest and should be approved. I will incorporate the terms of the settlements into my ORDER at the end of this Decision.

CONTESTED VIOLATIONS

There remained for trial one alleged violation in Docket No. KENT 92-42 and one alleged violation in KENT 92-65.

KENT 92-42

Mine Act Section	Citation No.	Date	30 C.F.R.
Section 104(a)	3551088	07/18/91	75.202

STIPULATIONS

Prior to the hearing the parties submitted for inclusion in record the following stipulations:

1. The Mine Safety and Health Review Commission and its administrative law judges have jurisdiction to entertain the instant case and to enter a decision in the same.

2. Peabody Coal Company and its Camp No. 11 Mine are subject to the Federal Mine Safety and Health Act of 1977.

3. The controlling entity, Peabody Coal Company, produced eighty four million six hundred eighty nine thousand nine hundred and two (84,689,902) tons of coal during the calendar year 1991.

4. Camp No. 11 Mine of Peabody Coal Company produced fifty thousand seven hundred and thirty nine (50,739) tons of coal.

5. The violation history for the subject mine is 15 assessed violations during the course of 96 inspection days.

Parties' Joint Stipulation of Fact 1-2.

DISCUSSION

The citation at issue arose out of an inspection of the No. 2 Unit at Peabody's Camp No. 11 Mine by personnel of the Mine Safety and Health Administration ("MSHA"). The unit, which had only recently turned off of the main entry, was being mined with a continuous mining machine. MSHA Inspector Harold Gamlin, who had begun a regular quarterly inspection of the mine in early July 1991, became concerned about the condition of the roof on the unit. Gamlin's concern lead him to consult with MSHA roof control specialist Larry Cunningham, among others. Cunningham was sent to the mine with Gamlin and others and issued the subject Section 104(a) citation alleging that Peabody violated 30 C.F.R. 75.202 by failing to control the roof to protect persons from hazards relating to falls of the roof.(Footnote 1) Subsequently, the Secretary proposed a civil penalty of $174 for the violation. Peabody answered that the violation as charged had not in fact occurred.

The citation states:

> The operator has failed to control the roof to protect persons from the hazards related

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130 C.F.R. 75.202 states:

(a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock burst.

(b) No person shall work or travel under unsupported roof unless in accordance with this subpart.

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> to falls of the roof. This mine has had 11 roof falls since May 6, 1991. The falls are centrally located on the mine map and are in a valley which is posing poor roof conditions The operator is trying different steps to control the roof such as decreasing the width of the entries on No. 2 unit from 20' to 18' and decreasing the wide opening to 24' and not 28'[,] five roof bolts are being installed in a row instead of four. Time is allowed for abatement to further evaluate these steps taken by the operator.

G. Exh. 5.

In addition to alleging a violation of Section 75.202 Cunningham also found that the violation was S&S, that injuries resulting in lost workdays and restricted duty were reasonably likely to occur and that the violation was due to Peabody's moderate negligence. The sole issue at trial was whether the violation occurred.

THE SECRETARY'S WITNESSES

MSHA Inspector Gamlin testified that he began a regular quarterly inspection of the mine on July 3, 1991. On that date the mine had one operating unit developing the main entry and work was beginning on starting a second unit, the No. 2 Unit. This unit was turning off the main entry.

Inspector Gamlin stated that prior to inspecting the mine he examined MSHA records pertaining thereto and noticed reports of roof falls in the main entry. He described the roof in the main entry as looking "very fragile" on the first day of his inspection. Tr. 78. He further stated that when he inspected the No. 2 Unit, the roof there also looked "very fragile." Tr. 78.

Gamlin stated that on July 17, 1992, during an inspection of the No. 2 Unit, he found that some of the entries on the unit exceeded the 20 feet width allowed under the roof control plan, and he issued a citation for a violation of Section 75.220, the mandatory safety standard requiring mine operators to adopt and follow a roof control plan approved by the Secretary. Tr. 79-80 (Footnote 2)

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2The citation states:

> The roof control plan was not being followed in the No. 2 Unit . . . The South East Nos. 4 and 6, No. 2 Unit was driven in excess of 21 feet approximately 70 feet outby the working face inby the second open crosscut. The roof control plan states the entries shall be driven 20 feet in width. A roof fall had occurred in No. 7 entry at engineer spad 1 + 40 third open crosscut outby working

Gamlin testified that his concern about the roof conditions led him to speak about controlling the roof with mine officials, including Douglas Rowlans, the mine superintendent, and Paul Sparks, the mine safety manager. Gamlin believed better control could be obtained by using 4-foot, fully-grouted roof bolts, rather than the 6-foot, point anchor bolts then in use. According to Gamlin, Rowlans explained that his supervisors would not allow him to use fully-grouted roof bolts. Tr. 81-82 (Footnote 3) Gamlin further testified that on July 17 he called William Dupree, an MSHA supervisor and roof control specialist, and they discussed the roof conditions that Gamlin had observed. Tr. 85. The conversation lead to a subsequent mine visit by Gamlin, Cunningham and Dupree. At the mine, Gamlin spoke with Rowlans and Sparks, as well as with David Fuson, a mine foreman, and told them that because of his concern about the roof he had felt the need to ask the MSHA roof control specialists to assist him.
Tr. 90-91.

The MSHA personnel then went underground, accompanied by Peabody representatives. During their time underground, Gamlin, who was observing the pattern of the roof bolts, measured two places on the unit where roof bolts were spaced 10 feet apart rather than five feet as required by the roof control plan. Gamlin therefore cited Peabody for another violation of Section 75.220.(Footnote 4)

Gamlin testified that on July 18, he did not observe any practices over and above those required by the roof control plan that were being used by Peabody to try to better control the roof (Tr. 92) and that he, Cunningham and Dupree discussed with Rowlan, Sparks and Fuson, the additional steps that the MSHA personnel believed Peabody should be implementing. These steps

2(...continued)
face.

G. Exh. 3.

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3Sparks, testified the decision to forego the use of the fully-grouted bolts was made by one of Rowlan's bosses who believed the 6-foot, point anchor bolts were the best bolts on the market and who wanted to continue them in use.
Tr. 214-216.

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4The citation states:

The roof control plan was not being followed on the No. 2 Unit . . . in that a pin in the crosscut between entry No. 4 and 5 when measured was 10 feet apart and one pin in the last open crosscut of No. 4 entry when measured was 10 feet apart.

G. Exh. 4

included the need to narrow the width of the entries to 18 feet, to add additional roof bolts to the bolting pattern, and the possible use of truss roof bolts in some instances.
Tr. 91-92, 95-96, 100-101. (As Gamlin recalled, the Peabody personnel agreed to narrow the entries. Gamlin could not recall whether there was any agreement about roof bolt spacing.
Tr. 107.) Gamlin believed that all of these things should have been done by Peabody before July 18 -- indeed, in his opinion they should have been done when the No. 2 Unit was first
turned -- because Peabody knew that it had encountered adverse roof conditions prior to starting the No. 2 Unit and that procedures required by the roof control plan were ineffective in controlling these conditions. Tr. 120.

Cunningham, a MSHA roof control specialist, stated that Gamlin had called him on Friday, July 12 and said that he needed Cunningham's assistance with roof control problems at the mine. On the following Monday, July 15, Cunningham discussed Gamlin's request with his supervisor, Dupree, and told Gamlin that he and Dupree would come to the mine later in the week. On July 18, Cunningham and Dupree met Gamlin at the mine. Cunningham stated the MSHA personnel went underground and formed an inspection party with the Peabody representatives, including among others, Rowlans, Sparks and Larry Stanley, a Peabody foreman.

Cunningham described the conditions that he found on the unit. Cunningham stated that he noticed an area where a roof fall had occurred. Although the fall had been cleaned up, the brows were not properly supported in that loose rock remained around the brows. He also recalled seeing an overcast area, approximately 100 feet in length, where the entry width of 22 to 23 feet exceeded the 20 feet width allowed by the approved roof control plan. He stated that in addition to these areas,
he believed that there were two locations where Inspector Gamlin found the spacing of the roof bolts to be too wide and where improper grouting was used when installing the bolts.
Tr. 129-130. Cunningham went on to describe the "adverse roof conditions" that, in his opinion, were causing the roof control difficulties.

> The . . . shale roof was causing a lot of problems with . . . bolting that they were using . . . It was not consistent using header bolts on the roof to try to alleviate some of the shale rock falling out between the bolts. And also . . . there was some timbers that was scattered in the areas that would have served a whole lot better purpose if they had been set properly, but they was just lying on the ground.

Tr. 130-131.

Cunningham stated his belief that Section 75.220 requires an operator to develop and follow a roof control plan suitable to the mine but that the roof control plan is a minimum plan and that roof conditions may require an operator to take protective roof control measures additional to those mandated by the plan. Cunningham noted that Section 75.202 requires an operator at all times to control the roof, face and ribs of areas where miners are required to work or travel. Tr. 132-133. Because there had been eleven reported roof falls in two months and three reported roof fall injuries on the unit, as well as because he had observed "loose shale falling out between bolts . . . wide places being mined, and . . . bolt spaces being too wide", he believed Peabody was not protecting persons working on the unit from the hazards of roof falls. Tr. 132. (Cunningham stated that he had with him copies of the accident reports when he went to the mine on July 18 and in addition that he was told at the mine by a union safety committeeman about the roof fall injuries that had occurred on the No. 2 Unit. Tr. 172-173.) Cunningham therefore cited Peabody for a violation of Section 75.202.

Although he wrote on the citation form, "The operator is trying different steps to control the roof such as decreasing the width of the entries on the No. 2 Unit from 20' to 18' and decreasing the wide opening to 24' and not 28'. Five roof bolts are being installed in a row instead of four" (G. Exh. 5), Cunningham was adamant that these steps were not being implemented at the time he issued the citation but rather were what Peabody agreed to do after the section had been inspected by the inspection party. He stated that he included the statement on the citation form in order to justify giving Peabody a week to abate the alleged violation. Tr. 135-136, See also Tr. 156. Cunningham maintained that the additional roof control procedures he described were agreed to as the result of discussions between himself, Dupree, Gamlin, Paul Sparks, the safety director, Jimmy Howard, the section foreman, Doug Rowlans, the mine superintendent, and Larry Stanley, the mine foreman. Tr. 135-136. Cunningham asserted that on July 18 he observed nothing to indicate Peabody had undertaken anything beyond the requirements of the roof control plan to control the roof. Tr. 145, 162. On July 18 he measured the width of the entries six or seven times and he found no entries that measured 18 feet or narrower. Further, he measured the spacing of some of the roof bolts. He found no instances in which the roof bolt pattern consisted of five bolts across rather than four. Had he found that the entries had been narrowed to 18 feet and the bolting pattern had been tightened, he would have had no reason to issue the citation. Tr. 291-293.

Cunningham testified that Rowlans told him that the unit was being mined in a "bowl" (by this Cunningham understood Rowlans to mean "an area where the surface is indented and therefore you would have less overburden in the area underground where they were mining" Tr. 144) and that once out of the "bowl" Rowlans expected the roof conditions to improve. Id.

With regard to Peabody's negligence in allowing the violation of Section 75.202 to exist, Cunningham believed Peabody to be guilty of moderate negligence rather than high negligence. Cunningham believed that with the number of roof falls that had occurred, Peabody should have been aware it needed to do more to protect its miners from the dangers of the roof (Tr. 166) and that "the company had the means there to correct the conditions." Tr. 143.

William Dupree, a MSHA roof control supervisor, testified that Rowlans told him the company had hired two geologists to evaluate the subject roof conditions and that they had told Rowlans that the area in which the poor roof occurred was an old washout. After reviewing a mine map (G. Exh. 10), Dupree testified that the No. 2 Unit was encompassed by this washout or "bowl." Tr. 198, See also G. Exh. 10 (areas marked by Dupree in blue and green). With regard to whether any precautions over and above those required by the roof control plan had been taken by Peabody prior to July 18, Dupree testified that although one of the roof fall reports telephoned to MSHA on June 12, 1991, indicated that the company had "Called in 2 Roof Specialists, Narrowed Entry Width - Tightened Bolt Pattern" (G. Exh. 7 at 4), on July 18 he did not see any evidence the width of the entries had been narrowed to less than the 20 feet required by the roof control plan. Tr. 204-205. When asked how wide the entries were, Dupree stated, "I helped Cunningham measure some [of the entries]. Some of them were 22 to 23 feet wide and that would be 3 or 2 feet more than what the plan called for under normal circumstances." Tr. 205. He also stated his understanding that Gamlin had measured two areas where the roof bolts were as much as 10 feet apart. Tr. 205-206.

PEABODY'S WITNESSES

Safety Manager Paul Sparks confirmed that prior to July 1991, the mine had experienced an unusually large number of roof falls in the southwest main entries, although, at that time, the roof falls were concentrated in an area outby the No. 2 Unit.

4(...continued)

4The terms "washout" and "bowl" were used to described the same general area. See Tr. 198, 202. The Dictionary of Mining Mineral and Related Terms defines "washout", inter alia, as "[b]arren, thin, or jumbled areas in coal seams." U.S. Department of the Interior, DMMRT (1968) 1217.

Tr. 213; See Exh. 10 (area circled in green). He testified that this increase in the number of roof falls was first noticed in May. Tr. 243. Sparks stated that he had at least one conversation with Inspector Gamlin -- a conversation at which Mine Superintendent Rowlan was present -- about the possibility of using a different kind of roof bolt (a 5-foot, fully-grouted bolt) to better control the roof. Sparks had agreed with Gamlin that a 5-foot, fully-grouted bolt would probably improve control because it would keep air and moisture for getting into the roof. However, according to Sparks, Rowlans was not able to approve a trial use of fully-grouted roof bolts because Rowlans' boss insisted on use of 6-foot, point anchor bolts. Sparks stated that under most circumstances, the point anchor bolt was regarded as the best roof bolt on the market. Tr. 214-215.

Sparks also stated that mine management knew that there was a problem controlling the roof because of the "bowl" effect, and he maintained that management was trying different things to solve the problem. Tr. 216. Referring to a reported roof fall that had occurred on June 12 (G. Exh. 8 at 4), Sparks explained that as a result of the fall, it was recommended that, in addition to adding extra roof support (roof bolts or timbers) to the area in which the fall had occurred, Peabody arranged to have geologists examine the area and advise mine management as to what was causing the roof to fall. Tr. 217, 245-246. The geologists came in mid-June and Sparks explained:

> The geologist ran compaction tests on the area as far as the immediate roof above the main roof. And we found it took to water exceptionally more that what you really want it to . . . This roof was really susceptible to water and it would expand once the moisture got to it, and once it expands, it has no other choice but to fall.

Tr. 218. To help alleviate the problem, Sparks further explained, the geologists suggested the roof bolt holes be sealed to prevent moisture-laden air from seeping into the roof and that the best way to accomplish this was to use fully-grouted roof bolts. Peabody decided to install fully-grouted bolts approximately one month after July 18. Tr. 221, 227-228. Once installed the fully-grouted bolts resulted in, "a whole lot less falls mainly because [they] did keep the air and water out."
Tr. 237.

According to Sparks, Peabody also installed truss bolts and timbers along the main and submain belt entries. Sparks stated that this was being done during July in some areas. Tr. 221-222. The trussing and timbering was in addition to the requirements of the roof control plan. Tr. 223.

Sparks also stated that around the third week of June, Rowlans told the foremen of the No. 1 Unit that until mining advanced out from under the bad top they were to narrow entries to 18 feet and they were to cut the entries 24 feet wide when the continuous mining machine turned a crosscut. Tr. 256. Sparks added that Rowlans had told the No. 2 Unit face foreman and section foreman essentially the same thing the last week in June or the first week in July. Tr. 224-225. In addition, the foremen were told to put extra bolts in the roof and truss it, if the roof required such measures. Tr. 224. Nonetheless, Sparks admitted that three separate roof fall injuries had occurred after the instructions were given (one on July 9 and two on July 11), all of which injuries he had reported to MSHA. Tr. 263, G. Exh. 9.

Sparks testified that on July 18, while at the mine with the inspection party, Rowlans told MSHA roof control specialist Cunningham and MSHA roof control supervisor Dupree the things Peabody had done to try to better control the roof. "We talked to them about the geologists and what they had found as far as the moisture and the roof . . . different things of that type." Tr. 230. As for the implementation of roof control procedures, Sparks stated that some of the entries had been narrowed, but that some had places that were "a little wide." Tr. 231, See also Tr. 257. Also, Sparks was uncertain whether there had been any truss bolting on the No. 2 Unit. Tr. 234. As Sparks explained, on July 18, the unit had only been in production approximately one week and the miners who worked on the unit had been laid off from the mine for three, four or five years. Sparks explained, "We were getting back to more or less a learning process which . . . it just takes you a little while to get the feel of it again, especially as far as the miner or roof bolter or anything." Tr. 231.

With regard to Cunningham's statement on the citation form "that Peabody is trying different steps to control the roof," (G. Exh. 5), Sparks maintained that it accurately reflected what MSHA understood Peabody was doing. "[I]t's written exactly the way it was. That's the reason they gave us further time to evaluate them." Tr. 236, See also Tr. 273. Sparks stated that Inspector Cunningham was told about the steps Peabody had undertaken before he went to the mine on July 18. Tr. 258. In addition, Sparks stated that when Cunningham issued the citation he had told Cunningham that the specified remedial steps already were taking place. Tr. 265.

Eugene Howard, face foreman on the No. 2 Unit, recalled that at some point around the time of the miners' vacation he was told to narrow the entries and corners and to tighten the roof bolting

pattern. Tr. 278.(Footnote 5) He stated that the No. 2 Unit had begun production on July 8. Tr. 279. Howard also testified that he had instructed his crew with regard to these roof control procedures, but admitted that there were times when entries were cut too wide and roof bolts were not properly spaced. Tr. 284-285. "Nobody's perfect," he stated. Tr. 285. He was of the opinion that roof control procedures improved on the No. 2 Unit as his crew gained more experience. Id. Howard agreed with Sparks that the citation, as written by Inspector Cunningham, contained procedures that Peabody had already put into effect. Tr. 287.

THE VIOLATION

Section 75.202 states in pertinent part:

> (a) The roof face and ribs of area where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of roof, face or ribs and coal or rock bursts.(Footnote 6)

Issues of liability for violations of this standard, and more particularly, for violations of the standard's requirement that the roof and ribs be supported or otherwise controlled adequately, are resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized that the subject roof or ribs were not adequately supported or otherwise controlled. Canon Coal Co., 9 FMSHRC 667, 668 (April 1987); Quinland Coals, Inc., 9 FMSHRC 1614, 1617-18 (September 1987); See Southern Ohio Coal Co., 10 FMSHRC 138, 141 (February 1988). Put another way, were the roof and ribs adequately supported and, if not, were there any objective signs extant prior to July 18 that would or should have alerted a reasonable prudent person to the danger of the inadequately supported roof in the cited area of the mine? Because I find that the answer to the first question is "No" and that the answer to the second is "Yes", I conclude the Secretary has established the existence of the violation.

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5Howard testified the miners' vacation was the last week of June or first week of July. Tr. 225.

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6There are two subsections of Section 75.202. Subsection (b) prohibits persons from working or traveling under unsupported roof. The subject citation does not specify which subsection was allegedly violated. However, as Counsel for Peabody notes, no evidence was offered concerning work or travel under unsupported roof. Peabody Br. 10. Clearly, the alleged violation pertains to Section 75.202(a).

Inspector Cunningham cited Peabody for "failing to control the roof to protect persons from hazards related to falls of the roof." G. Exh. 5. On July 18, the date he issued the subject citation, mining was taking place in the No. 2 Unit, and, as his testimony indicated and as Paul Sparks essentially agreed
(Tr. 212-214, 216), the area being mined was well within the "bowl," the area of faulty roof that was subject to more than ordinary instability and chance of fall.

Peabody argues that it was not given fair notice of the requirements of the standard. See Peabody Br. 10-12. However, given the unambiguous mandate of the standard that the roof,
face and ribs of areas where persons work or travel be supported to protect those persons from hazards related to roof falls and the backdrop against which the citation was issued -- a backdrop of prior reported roof falls, reported minor injuries due to those falls and a geographic area marked by unusually unstable roof -- I cannot find that a reasonably prudent person familiar with mining industry and the goal of the standard to protect miners from roof fall injuries would have failed to recognized the hazardous nature of the roof and the resulting requirement to consistently implement steps to provide adequate roof support. Indeed, and as Peabody's witnesses attest, Peabody itself fully recognized by mid-June the hazard to miners presented by the increasing number of roof falls in the "bowl" area and decided to seek the opinion of experts about the problem. Tr. 221. This lead to a recommendation that fully-grouts roof bolts be used, a recommendation that Peabody did not adopt until approximately mid-August. Id.

Further, I credit Paul Sparks testimony that Rowlans was aware of the hazardous nature of the roof and told the foremen to narrow the entries to 18 feet and, where crosscuts were turned, to take 24 feet rather than 28 feet of coal. Tr. 225.
I also credit his testimony that Rowlans told the foreman to tighten the bolting pattern. Tr. 256.(Footnote 7) Further, I credit his testimony that the supervisors on the No. 2 Unit were told to install truss bolts as needed. Tr. 234. Howard, a foreman on the No. 2 Unit confirmed that Rowlans instructed him regarding the steps to take to better control the roof and "always" asked him if he were following these instructions. Tr. 288. I therefore conclude that Peabody recognized the hazardous nature of the roof on the No. 2 Unit and the resulting requirement to consistently implement steps to provide adequate roof support.

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7These instructions were given to the foremen of the No. 1 Unit and No.2 Unit. While the subject citation pertains to the No. 2 Unit, the roof conditions were essentially the same on both units. Sparks agreed that both units referred to the same general area of the mine, Tr. 254, and as already noted, the roof conditions caused by the "bowl" prevailed for both units.

Peabody's problem with compliance lay not in recognizing the hazard but in remedying it. The day before the subject violation was issued Gamlin testified that he cited Peabody for instances where the width of the entries and the bolting pattern did not conform to the requirements of the roof control plan. Peabody did not contest these citations. Thus, Peabody was not consistently complying with its plan, let alone with the additional measures that were necessary for adequate roof control when mining in the "bowl" area.

When the subject citation was issued mining was continuing in the"bowl" area, and Cunningham testified that he found loose shale falling out between bolts, wide places being mined and bolt spacing that was too wide and in excess of the approved roof control plan. Tr. 131-132. I credit this testimony. Further, Cunningham's testimony was essentially unrefuted that he tried to find recently cut entries that were 18 feet across and intersections that were cut less than the plan required and that he could not remember finding any. Cunningham's testimony is given added credence by the statements of Howard, Peabody's foreman on the No. 2 Unit, who candidly described his problems getting the No. 2 Unit crew to comply with Rowlans instructions regarding the roof control measures that they were to carry out. Tr. 284-285. In addition to Cunningham's testimony, I note Dupree's statement that on June 18, he helped Cunningham measure the entries and that some exceeded the width allowed by the plan. Thus, there is ample evidence to establish that Peabody consistently failed to implement those extra-plan measures, such as further narrowing the entries and tightening the roof bolting pattern, that all agreed were necessary given the prevailing roof conditions.

I conclude, therefore, the Secretary has established that on July 18, 1991 and as alleged in Citation No. 3551088 Peabody violated Section 75.202.

GRAVITY AND NEGLIGENCE

The sole issue contested by Peabody is the existence of the violation. Inspector Cunningham testified that he believed Peabody's failure to control the roof on the No. 2 Unit so as to protect persons from the dangers of roof falls subjected miners on the unit to injuries from falling loose roof, injuries that could range from minor to fatal. Tr. 171. Having found that the violation existed, I fully credit the inspector's opinion and conclude that it was a very serious violation.(Footnote 8)

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8As previously noted, the inspector also designated the violation as S&S. Peabody does not dispute this finding.

Peabody's own witnesses testified that for a considerable time before it was cited Peabody was well aware of the potentially hazardous roof conditions in the subject area. Moreover, Foreman Howard knew he had a "rusty" crew under his command on the No. 2 Unit, knowledge that warranted increased diligence to insure compliance, diligence the violation belies. I find therefore that Peabody negligently failed to control the roof to protect persons on the No. 2 Unit from the hazard of roof falls.

CIVIL PENALTY

The Secretary proposed a civil penalty of $74, which I consider inadequate in view of the very serious nature of the violation, Peabody's negligence and Peabody's stipulated large size. Rather, I conclude that a civil penalty of $500 is appropriate, and in so doing I take into account Peabody's stipulated history of prior violations and rapid, good faith abatement of the subject violation. While both are commendable, they do not compensate for the gravity of the violation and Peabody's negligence. Roof control is, after all, of singular importance in protecting the safety of underground coal miners.

KENT 92-65

Mine Act Section	Citation No.	Date	30 C.F.R.
Section 104(a)	3416937	08/07/91	50.10

STIPULATIONS

At the hearing the parties stipulated as follows:

1. The Martwick Mine, annually produces onemillion five hundred ninety thousand (1,590,000) tonsof coal;

2. The Martwick Mine has an effect on interstate commerce, as that term is used in the Mine Act;

3. The Commission has jurisdiction to hear and decide the case;

4. During the 24 months immediately prior to the subject violation there were 195 assessed violationsduring the course of 388 inspection days.

See Tr. 5.

DISCUSSION

The citation at issue arose out of an inspection of the Martwick Mine conducted by MSHA Inspector Lendell Noffsinger on August 7, 1991. During the course of the inspection, Noffsinger determined that Peabody had failed to report a roof fall as required by 30 C.F.R. 50.10.(Footnote 9) He further determined that an injury was unlikely to result from the violation and that if an injury did occur it would not result in lost workdays. He also concluded that the violation was not S&S and that Peabody was moderately negligent in failing to report the roof fall. Subsequently, the Secretary proposed a $20 civil penalty for the alleged violation.

The citation states in relevant part:

> A roof fall has occurred in the No. 1 intake on the No. 1 Unit . . . two crosscuts inby spad No. 4918. The fall occurred either on June 4 or June 5, 1991, timbers were set on the 2nd shift June 5, 1991. The fall was not immediately reported to MSHA.

G. Exh. 1(Footnote 10) Peabody's position is that the violation did not in fact occur. The sole issue is whether the roof fall took place in an area where miners are normally required to work or travel and thus whether the roof fall was reportable.

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9 30 C.F.R. 50.10 states in part:

> If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine.

30 C.F.R. 50.2(h)(8) defines an "accident" as:

> An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use.

30 C.F.R. 75.2 defines "Active workings" as:

> [A]ny place in a coal mine where miners are normally required to work or travel.

_____

10Noffsinger testified that he erred in writing June 4 and June 5, 1991, that he had meant to write August 4 and August 5, 1991. Tr. 11-12, 25.

THE TESTIMONY
THE SECRETARY'S WITNESS

Noffsinger stated that during the course of the August 7 inspection of the Martwick Mine he was asked by a miner whether Peabody had reported a recent roof fall. When Noffsinger responded "No," Noffsinger was asked to look at the area where the fall had occurred. Noffsinger viewed the area and, because the roof fall had not been reported, issued the subject citation. Tr. 12.

Noffsinger stated that he observed the area of the roof fall with Bob Gray, an MSHA trainee who accompanied Noffsinger on the inspection. On the floor of the area he saw roof bolts and fallen roof. He also saw a few 9-foot roof bolts that remained in the roof but the roof had fallen out from around these bolts. Tr. 13, 27. Noffsinger stated that the area around the fall had been timbered in accordance with usual practice to keep the fall area from spreading. Tr. 21-22, 23-29.

Noffsinger gave varying reasons why he believed the roof fall should have been reported. He stated an unplanned roof fall at or above the anchor zone of the roof bolts and in active workings had to be reported, and he recited the regulatory definition of active workings -- any place in a coal mine where miners are normally required to work or travel. Tr. 13, 20. Noffsinger agreed that the timbers were installed after the roof fall and that such timbering around falls is a one-time activity, but Noffsinger testified that he based his determination that the fall had occurred in "active workings" on the fact that the timbers had been set. Tr. 31.

Noffsinger also stated if the timbering had not taken place, he still would have considered the roof fall to have occurred in active workings and thus to be reportable. He explained that the entry in which the fall had occurred was ventilated by intake air and that he had spoken with his supervisor, Joe Parks, and with MSHA roof control supervisor, Bill Dupree, before visiting the area of the fall and they had indicated that where there are two entries ventilated by intake air, miners would normally travel in one of the entries. Tr. 36. Thus, he believed the cited area to have constituted "active workings," he stated, "because they [meaning his two supervisors] said it was active workings."
Tr. 37.

Noffsinger also stated that he understood the definition of "active workings" to mean that an area constitutes "active workings if any work is ever done in an area or anyone ever travels through the area". Tr. 32.

Finally Noffsinger stated that for him not to have considered the area where the fall occurred to be active workings, the area would have had to be an abandoned area and to have been sealed off so that people could not physically get to it. Tr. 41.

PEABODY'S WITNESS

Steven Little, Safety Supervisor at the Martwick Mine, testified on Peabody's behalf. Little identified Peabody's Exhibit R-1 as a map that essentially depicts the panel where the roof fall had occurred. As described by Little, at the time of the fall there were five entries on the panel. Men and materials reached the face area via the supply entry. Coal was mined at the faces, taken to the dumping point, transferred to a belt and removed from the mine via the belt entry. The supply and belt entries were immediately adjacent to one another and contained neutral air. When facing inby there was a timbered return entry to the immediate left of the supply entry. The return air in this entry was kept separate from the neutral air of the supply entry by permanent concrete block stoppings. When facing inby and to the immediate right of the belt entry there was a timbered entry that served as an escapeway. The intake air in this entry was kept separate from the neutral air of the belt entry by permanent concrete block stoppings. When facing inby and to the immediate right of the intake escapeway was another timbered intake entry. There were no stoppings separating these two intake entries. Tr. 48-52, 61-62, See Exh. R-1. Little maintained the intake escapeway was required to be examined on a weekly basis but that the adjacent intake entry -- the entry in which the roof fall occurred -- was not required to be examined on a periodic basis and, in fact, was never required to be examined. Tr. 54-55.

Little acknowledged that once a roof fall occurs an operator is required to support the area, if necessary, by setting timbers and that once timbers have been set miners do not normally return to work on them. Tr. 56. He indicated that miners working on an unit would normally work and travel in the area where coal was mined, an area away from the fall area, and that no other employees at the Martwick Mine would ordinarily and on a routine basis travel through the entry where the rock fall had occurred.
Tr. 58, See Exh. R-1.

During cross-examination, Little stated that in all likelihood on August 5, the section foreman found the roof fall and that to do so he would have had to be at least adjacent to the fall, but Little would not say that the foreman had gone into the area where the fall occurred. Little acknowledge that the regulations in Part 75 require the weekly examination of an intake air course, but because the regulations require that at least one entry of each intake air course be examined and

maintained Peabody had always examined the intake entry adjacent to the one in which the fall occurred. Tr. 62-63. When asked whether the intake entry where the fall occurred is ever traveled, Little responded "No." When pressed with "Never?", Little stated, "I can't say absolutely never, but it's not regularly or normally traveled." Tr. 63. Little acknowledged that following the fall no barricades were erected or signs posted to prevent travel in the area where the fall had occurred, but he maintained that any travel there would have been inadvertent. Tr. 69. Taylor explained, "There's no way we can continuously and constantly be with all the employees in the mine to be sure that no one ever steps over there, but as a general practice of mining, [the fall area is] not normally or ordinarily traveled or worked in." Id.

Finally, Little stated his opinion that the area where the fall had occurred was not a "working face", "working place", "working section" nor an "abandoned area", as those terms are defined in 30 C.F.R. 75.2. Tr. 63-65.

THE VIOLATION

The Secretary bears the burden of proving that the alleged violation existed. In order to determine whether the Secretary has met that burden, it is appropriate to first analyze the wording of the pertinent regulations at issue, for it is this language that imposes the mandatory requirements with which an operator must comply. Here, the applicable language is unambiguous. Section 50.10 requires an operator to immediately contact the MSHA District or Subdistrict office "[i]f an accident occurs." As has been previously noted, the meaning of "accident" is defined in pertinent part as "[a]n unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use." There is no dispute that the roof fall occurring on August 4 or August 5, 1991, was "at or above the anchorage zone where roof bolts [were] in use" and that Peabody did not "immediately contact the MSHA District or Subdistrict Office" when the fall occurred. The question is whether the fall occurred in "active workings"?

Section 75.2(g)(4) of the regulations, consistent with Section 318(g)(4) of the Act, 30 U.S.C. 878 (a)(4), defines "active workings" as "any place in a coal mine where miners are normally required to work or travel." Boiled down to its simplest terms, the question is whether the Secretary proved that miners are "normally required to work or travel" where the roof fall occurred? I conclude that she did not.

The Secretary chose to prove the violation solely trough the testimony of Inspector Noffsinger. It is clear to me that he was confused as to why he found a violation of Section 50.20. Initially, he stated that he had issued the citation because

Peabody personnel had set timbers around the fall area. Tr. 31. He explained this line of reasoning by indicating that if any work is ever done in an area or if anyone ever travels through an area, the area constitutes active workings. The problem with this interpretation of "active workings" is that Section 75.2(g)(4) does not state that "active workings" are any place where miners are ever required to work or travel, but rather that "active workings" are where miners are normally required to work or travel. By modifying the requirement for work or travel with the adverb "normally," the Secretary in promulgating the regulation signaled that "active workings" are those places where miners are required constantly or periodically or with a certain degree of frequency to work or travel. The record in this case simply will not support a finding that miners constantly, periodically or with any degree of frequency worked or traveled in the area where the fall occurred. Indeed, the evidence is quite to the contrary.

Inspector Noffsinger testified that timbering around falls is usually a one-time activity. Tr. 31. Safety Director Little agreed, stating that once such timbers are set miners do not return to work on them. Tr. 56. Moreover, Little's testimony that miners working on the No. 1 Unit would usually work and travel where coal was mined -- an area some distance for the entry in which the roof fell -- and that no other Peabody employees would ordinarily or on a routine basis pass through the roof fall area was essentially undisputed, as was Little's opinion that weekly examinations were not required for the entry where the fall occurred and that the entry was never examined or traveled on a regular basis. Tr. 62-63. Further, although Little acknowledged that it was likely the section foreman had found the fall, Little's statement that he could not say the foreman went into the subject entry when he found it does not prove normal work or travel or provide a basis from which normal work or travel can be inferred.(Footnote 11)

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11The Secretary argues that in order to ascertain that a roof fall occurred the section foreman would have to have traveled in the area of the fall, but Little's supposition that the foreman could have been in the entry adjacent to the fall rather than in the entry in which it occurred seems more reasonable. It is hard to imagine the foreman putting himself purposefully under an area of roof that had fallen and whose edges had not yet been supported. Of course, as the Secretary notes, the foreman did not testify, and although the Secretary requests that I be aware that the foreman "was conveniently absent from the hearing" (Sec. Br. 8), I can hardly draw an inference adverse to Peabody from his absence since the Secretary herself did not initiate pre-trial discovery regarding the foreman nor seek to compel his testimony. Perhaps it bears repeating that it is the Secretary's burden to prove the alleged violation, not the operator's.

The Secretary argues that Little's opinion that the area was not a "working face," "working place," "working section" or "abandoned area" leaves active workings as the only way to define the area. Sec. Br. 6. As Peabody's counsel notes, the problem with this argument is that it assumes that such definitions are intended to encompass the entire mine. Peabody Br. 7. They are not. Rather, I agree with Peabody's counsel that definitions are provided for those terms that are used in the mandatory safety standards and which require definition. The definitions are not intended to provide an exhaustive classification of all areas of the mine, which leads back to the issue at hand -- whether, on the basis of this record, the Secretary proved that the roof fall occurred where miners normally are required to work or travel? For the reasons stated above, I find that she did not.(Footnote 12)

ORDER

In light of my approval of the proposed settlements and my conclusions regarding the contested violations, I enter the following order:

KENT 92-42

Peabody is ordered to pay a civil penalty of $20 for the violation of Section 75.316 cited in Citation No. 3548678. Peabody also is ordered to pay a civil penalty of $500 for the violation of Section 75.202 cited in Citation No. 3551088.

KENT 92-56

Peabody is ordered to pay a civil penalty of $227 for the violation of Section 75.507 cited in Citation No. 3551054. The Secretary is ordered to modify Citation No. 3551054 by deleting the inspector's S&S finding.

KENT 92-65

Peabody is ordered to pay a civil penalty of $192 for the violation of Section 75.1710-1 cited in Citation No. 3416929, and the Secretary is ordered to modify the citation by deleting the inspector's S&S finding. Peabody is also ordered to pay a civil penalty of $126 for the violation of Section 75.1107-16(b) cited

_____

12The Secretary also asserts that pursuant to 30 C.F.R. 75.402 and 30 C.F.R. 75.403 Peabody employees would have had to travel into the entry where the fall occurred to ascertain the incombustible content of rock dust that regulations require to be applied and maintained. Sec. Br. 7. Regardless of its hypothetical merits, this argument has no support in the record. Not one word of testimony or documentary evidence was offered regarding it.

Citation No. 3548484, and the Secretary is ordered to modify the citation by deleting the inspector's S&S finding. Finally, the Secretary is ordered to vacate Citation No. 3416937.

Peabody shall pay the civil penalties and the Secretary shall modify and vacate the referenced citations within thirty (30) days of the date of this Decision and, upon receipt of payment, these matters are dismissed.

David F. Barbour
Administrative Law Judge
(703) 756-5232

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