FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 5, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. KENT 2013-307
	:	A.C. No. 15-19132-308412A
PAUL D. BENTLEY, Respondent, employed by BLEDSOE COAL CORPORATION	:	Abner Branch Rider

ORDER GRANTING MOTION FOR SUMMARY DECISION[1]

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner;
Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, Lexington, Kentucky for Respondent Bentley
Marco M. Rajkovich, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky for Respondent Bledsoe Coal

Before: Judge Moran

Introduction. This matter arose in the wake of a fatality, which occurred when a miner was fatally crushed by a very large rock,[2] which slid out from a rib. An investigation ensued, with MSHA issuing citations and orders, separately, to Bledsoe Coal and to Mr. Paul Bentley, the mine's first shift foreman. Mr. Bentley, like Bledsoe itself, was issued a section 104(d)(1) citation and a (d)(1) order, which initially alleged that he "knowingly authorized, ordered, or

[1] Counsel for Mr. Bentley and Counsel for the Secretary have filed a joint motion to sever. At the time of the hearing, this docket had been consolidated with docket KENT 2011-481, because the citations and orders issued arose out of the same events. Subsequently, post-hearing, and at the Court's suggestion, the Joint Motion to Sever the two dockets was filed and that Motion is hereby GRANTED. The severance allows the Court to issue its decision without waiting to issue its decision in KENT 2011-481, which matter may yet settle.

[2] The rock was estimated to weigh 9.3 tons. Tr. 247.

carried out violations of the 30 C.F.R. §75.202(a) and 30 C.F.R. § 75.362(a)(1).[3] The former standard requires the roof, face and ribs to be supported or otherwise controlled to protect persons from falls, while the latter requires an on-shift exam of working areas to check for hazardous conditions. A hearing was held in this matter commencing on May 14, 2013. At the close of the government's case, Counsel for Respondent Bentley moved to have the 110(c) charges against his client dismissed. Having heard that evidence, the Court concluded that the charges against Mr. Bentley had not been proven and it so informed the parties of this conclusion during a conference call on July 10, 2013. This Order memorializes that determination. Accordingly, for the reasons that follow, the 110(c) actions against Mr. Bentley in this proceeding are hereby **DISMISSED**.

Section 110(c) actions

Section 110(c) of the Mine Act provides: "Whenever a corporate operator violates a mandatory health or safety standard … , any director, officer, or agent of such corporation who knowingly authorized, ordered or carried out such violation, … shall be subject to … civil penalties." 30 U.S.C. § 820(c). The Commission has stated that "[t]he proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), aff'd on other grounds, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983); accord *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove that an individual knew or had reason to know of the violative condition, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). A knowing violation thus occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. The Commission has explained that "'[a] person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.'"Id. (citation omitted). In addition, section 110(c) liability is generally predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1245 (Aug. 1992). *Sec. v. Matney, employed by Knox Creek Coal Corp*., 34 FMSHRC 777, at * 783, 2012 WL 1799023 (April 2012).

Findings of Fact

As noted, on January 22, 2010 Mr. Travis Brock, a continuous miner operator, was fatally injured when a large rock, described as a "slickenside," slid out from a pillar, crushing him.

[3] A few days before the hearing, the government moved to add a third charge against Mr. Bentley, adding the claim that he performed an inadequate preshift exam on January 22, 2013.

MSHA Inspector Charles Ramsey was the lead investigator for the fatality investigation. The investigation began on the day of the fatal accident. With Ramsey at the mine that day were MSHA Assistant District Manager Jim Langley, MSHA Supervisor Ron Burns, John Boylen, MSHA roof control specialist. On the following day, MSHA's Dr. Sandlin Phillipson joined the MSHA investigation. More than five months after the investigation began, MSHA issued the citation and order which are the subject of the action against Mr. Bentley. As stated in the Introduction, above, those are Citation No. 8355746, a section 104(d)(1) alleging a violation of 30 C.F.R. §75.202(a) and Order No. 8355777, alleging a violation of 30 C.F.R. §75.362(a)(1).[4] At the hearing, the government moved to add, in its action against Mr. Bentley, Order No. 8355747, citing 30 C.F.R. §75.360(b), and alleging that Mr. Bentley was also culpable under section 110(c) for an inadequate preshift exam.

Though not one of the violations against Mr. Bentley, by way of pertinent background information, Citation No. 8355745, a section 104(a) citation was issued to Bledsoe Coal alone, alleging an inadequate roof control plan, per 30 C.F.R. § 75.220(a)(1). Inspector Ramsey stated that he issued that citation because of the slickenside[5] which fatally injured miner Brock, as well as for the numerous loose ribs he found on the section. All of the citations and orders issued in connection with the fatality involved the 001 MMU (mechanized mining unit), located at the mine's 8 Mains. The Inspector stated that where there is a change in mining conditions, there is an obligation to have the roof control plan address those changes. No one disputes that duty exists. In the area of the fatality, the coal seam became very small,[6] as little as 6 inches, and then it quickly became very high. Tr. 59. Such seam changes can lead to hazardous rib conditions; other times such hazardous conditions may not develop.

Inspector Ramsey then turned to Citation No. 8355746, the section 104(d)(1) citation alleging inadequate support of the ribs, and for which both Bledsoe Coal and Mr. Bentley were each cited. That citation asserted loose coal/rock ribs at: "#32 Crosscut on the sides and inby corners of the coal pillar blocks in the #3 and #4 Headings, (2) at #33 Crosscut in the #3 Belt Heading where the upper inby corners of the left and right ribs were separated from the coal pillar and top approximately ½ inch and in the # 4 Heading where loose coal was separating from the rib line, and (3) at the # 34 Crosscut in the #3 Belt Heading, where the right side inby corner of the coal pillar cracked and separated from the pillar and a part of the rib measuring 3.3 feet to

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[4] The same citation and order were also issued to Bledsoe Coal. They form, along with a section 104(a) citation, No. 8355745, invoking 30 C.F.R. §75.220(a)(1) and a section 104(d)(1) order, citing 30 C.F.R. §75.360(b), the matters in the separate action against Bledsoe Coal in Docket No. KENT 2011-481.

[5] The term "slickenside" was variously described by witnesses. Ramsey defined it as a condition where two planes meet; a coal plane meeting a rock plane. Tr. 59. Later, he added that it refers to situations where there is a sharp increase in the coal seam, which can cause a side to slide out. Tr. 167.

[6] This was great narrowing of the seam was also described as a "washout" and a "squeeze."

6.8 feet thick x 5.5 feet long x 9 feet wide and slid out of the rib line and struck the continuous miner operator fatally injuring him. In the #3 Heading at the # 34 Crosscut, *the 2nd shift foreman's dates, times, and initials* ["DTIs"] ***were on the exact location of the loose area of the rib that detached from the rib and slid out***, fatally injuring the continuous miner operator. Upon examination of the pre-shift book dates, back to January 7, 2010, foremen were writing the following statement in the "Remarks" section, "Use caution around ribs and watch for draw rock." No written explanation was given as to any measures taken to protect miners against the hazardous rib conditions.[7] The operator has engaged in aggravated conduct constituting more than ordinary negligence in that management did not take measures to ensure safe working conditions around ribs. This violation is an unwarrantable failure to comply with a mandatory standard."[8] (GX 9, emphasis added), (GX 21, drawing marking loose ribs, including location of fatal rib roll.) Thus, to be clear, and because the Court considers it to be important, the dates, times and initials ("DTIs") were right next to the location where the slickenside fell out. The Inspector conceded that one would not put DTIs next to a rock that is about to fall. Tr. 207. As to whether the foreman, Mr. Bentley, should have seen the slickenside, Inspector Ramsey stated that he simply did not know. Tr. 207. Although Inspector Ramsey expressed his view that the various rib problems he noted, six in total,[9] had existed for days, this was based solely upon his mining experience as he had no other information, such as rock dusting, to support that opinion. Tr. 83, 149.

Bledsoe Coal, was also issued a section 104(d)(1) order, asserting an inadequate pre-shift exam occurred on January 22, 2010 for the 001 MMU at 8 Mains. Order No. 8355747. GX 10. As alluded to, though not part of the original, two, charges against Mr. Bentley, shortly before the

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[7] John Caldwell, section foreman, later testified that the notation in the exam book to "use caution around ribs and watch for draw rock," was included because the mine had some troubles outby and had been wrapping ribs. However, he maintained this problem was outby the track entry, and outby the working section. Tr. 575. In contrast, another witness for the Respondent, Kevin Jump, had a different interpretation of that phrase as he expressed that its use was more than a simple warning and informed that the mine is "going through some changes." Tr. 662. With regard to the parties conflicting claims as to the import of the preshift report warnings to watch out for bad roof, the Court, upon hearing the various testimonial views, concludes that it was a general safety warning and not, as MSHA has implied, a tacit admission that the mine knew there were serious roof and rib problems.

[8] It is worth remembering that statements and conclusions in any citation or order are assertions. When challenged, as here, it is up to the Court to make the findings of fact and conclusions of law regarding the content of such documents issued by MSHA's authorized representatives.

[9] While GX 21 lists other areas of alleged rib sloughing, Inspector Ramsey personally observed only the areas noted in his citation. Tr. 93. The other areas of rib sloughing indicated on GX 21 were found by MSHA's Dr. Phillipson.

hearing, the government moved to add that Order as another 110(c) charge against him.[10] In large measure, that Order repeats the assertions made in Citation No. 8355746, next above, but it then adds the following: " (2) the entry width of the sheared corner of the rib in the #3 Left and #3 Right at #33 Crosscut measured 30 feet. The maximum allowable entry width of the sheared area in the approved roof control plan is 28.1 feet; (3) in various areas in the #2, #3, and #4 Headings, T-5 dome channel straps were installed over cracks and draw rock in the roof with a regular 6 x 6 flat roof bolt plate, which is not in accordance with the manufacturers recommendations; and (4) an area along the left rib in the #2 entry at #33 Crosscut, that measured 7 feet x 12 feet, was not completely bolted.[11] The operator has engaged in aggravated conduct constituting more than ordinary negligence in that upon inspection of the pre-shift exam book, none of these hazardous conditions were recorded in the 001 MMU exam book. This violation is an unwarrantable failure to comply with a mandatory standard."

The preshift was performed prior to the start of the day shift on January 22, 2010, the day of the fatal accident. The onshift, that is the exam on the day of the accident, would have been done about an hour before the fatal rib roll. That onshift was done by Respondent Bentley, as the 001 section day shift foreman. As with the preshift shortcomings alleged by Inspector Ramsey, the absence of problems being noted in the onshift was construed as a failure to note those conditions. However, the Court would note again that these admitted absences can be construed differently, as the absence of such notations also can be asserted to show that the conditions were not present.[12]

Inspector Ramsey agreed that, as he was not present when the fatal rib fall occurred, he

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[10] Some 4 ½ months after the fatal rib roll, upon completing its investigation, MSHA issued the citations and orders associated with this matter against Mr. Bentley and, in KENT 2011-481, against Bledsoe Coal. However, the motion to add the charge of an inadequate pre-shift against Mr. Bentley did not occur until nearly three years later, shortly before the hearing. On the second day of the hearing the Court ruled that the motion to add the preshift violation to the charges against Mr. Bentley was granted. The effect of the motion, procedurally, was to graft the preshift allegations onto the onshift charges. In granting the motion, the Court noted that proof was still needed to sustain that charge against Mr. Bentley. Tr. 303. It is noteworthy that Inspector Ramsey never alluded to any alleged preshift inadequacies in his deposition. Instead the preshift charge against Mr. Bentley was not added until years later. Ultimately, by this Order, the Court has concluded that the government failed to meet its burden for any of the three charges it has brought against Mr. Bentley.

[11] The Inspector stated that at least 3 more bolts were needed in this area; however that incomplete bolting did not contribute to the fatality. Tr. 222. To put this in perspective, there were more than a thousand bolts from crosscuts 31 to 34. Tr. 267.

[12] A separate basis for the Inspector's conclusion that the conditions noted had existed for some prior period of time and had not just arisen, was the remark in the preshift and onshift reports to "use caution around the ribs and watch for draw rock." Tr. 132-133, 136. This issue is potentially of more import for the charges against Bledsoe, than for those against Mr. Bentley.

could not state whether anyone could have seen if the rib was going to fall, nor could he state whether it was cracked before it fell, nor if it was "easily recognizable" before it fell. Tr. 167. Speaking specifically to Mr. Bentley and whether he knew there was a slickenside present before it fell, the Inspector acknowledged he did not know; the rib could have been cracked but it also might not have been. Tr. 169. Further, he admitted that with regard to the crosscut 33 sloughing, that condition had no connection with the rib fatality. Nor did he find any sloughing in entries 1, 2 or 5. Ramsey also conceded that he could not state with certainty that rib bolting or even rib wrapping[13] would have prevented the fatality.[14] Tr. 197.

With regard to the section 104(d)(1) order, which alleged an inadequate preshift exam, and which order, as noted, was issued to Mr. Bentley and separately to Bledsoe Coal, that Order, No. 8355777, stated: ". . . adequate on-shift examinations were not performed on January 21 and 22, 2010, on the 001MMU. The following deficiencies were noted: (1) the 2nd shift on-shift report for January 21, 2010, did not identify a hazardous rib condition in the #3 Belt Heading, (2) the 3rd shift on-shift report for January 22, 2010, did not identify a hazardous rib condition in the #3 Belt Heading, and (3) the 1st shift on-shift report recorded on January 22, 2010, which was performed approximately 1 hour prior to the fatal accident, did not identify any hazardous roof condition. All three on-shift examiners recorded "None Observed" in the on-shift record for the #3 Belt Heading. Mine management directed that the offset in the mine floor be trimmed in the #3 Left Crosscut." GX 15. As noted, the absence of noted problems, is capable of two very different interpretations. One, darker, is that all three of the on-shift examiners saw, but did not record, the problems. The other outlook is that the problems were not then present. Normally, conflicting views of such results are resolved by credibility determinations or inconsistencies in testimony. Here, in the Court's view, the inconsistencies were all from the government's witnesses, who did not all see the same alleged rib problems, and who had differing interpretations as to whether they required immediate attention or not.

Inspector Ramsey acknowledged that the inadequate on-shift allegation was not arrived at until a month after the other three citations had been drafted. Tr. 226. Here, the on-shift exam would start about four breaks back from the face; in this instance, that was about 240 feet. While Inspector Ramsey took photographs during his investigation, he did not take a picture of the asserted ½ inch crack he saw in the No. 3 and No. 4 belt entry. Tr. 239. GX 21, and blue marking on that exhibit. Nor did the Inspector take a photograph of the loose ribs he observed. GX 21, pink marking. Tr. 240. Why no photos were taken in those instances was not explained. Further, and of significance, the Inspector agreed that a crack in a rib is not necessarily indicative of a hazard. Tr. 240-241. Later, Inspector Boylen, in his testimony, would confirm that rather

[13] Further, the pillar where the fatal rib roll occurred was not yet formed when the fall occurred. A rib wrap is not an option until a pillar is fully formed. Tr. 177-178.

[14] Complicating the matter further, Inspector Ramsey agreed that it was possible that the rib slide might not have occurred if the rib corners had been permitted to be trimmed, as Bledsoe had requested for years. Tr. 198.

significant statement: a crack, by itself, does not mean that there is a bad rib. Tr. 355, 384. Boylen added that a ½ inch crack at the top of a rib does not inform him that there is a problem; to determine that, one must see it firsthand. Tr. 384. Further, Inspector Boylen informed that even a good rib may slough off. Tr. 355. In terms of the fatality, Inspector Ramsey agreed that it would be unlikely that the victim would have placed himself under the rib which fell out if there had been an obvious crack present. Most significantly, Inspector Ramsey then conceded that it was "probable" that the rock simply came loose in one moment with no advance warning. Tr. 251. Referring to the other alleged troublesome areas, as circled in blue and pink on GX 21, Inspector Ramsey agreed that MSHA's Dr. Phillipson noted some troublesome areas that he did not identify. Thus, even Ramsey had to admit that he missed some areas that Dr. Phillipson believed were present. Tr. 251-253. This lack of consensus, of identification of alleged problems, and even of the location of rib problems, undercuts the 110(c) charges. If the lead Investigator could miss areas, while in the process of looking for such problems, the idea that Mr. Bentley should have done a better job during his onshift exam, not to mention the claim that he knew or had reason to know of such conditions, is untenable.

As an overarching consideration in these charges against Mr. Bentley, the Court considered it to be important that when it asked Inspector Ramsey to sum up the basis for his conclusion that the cracks did not develop immediately before the accident but rather developed over a period of time, he stated: "Well, in all honesty, I can't say really either way because I didn't see the condition before the rock fell out. There may have been no cracks and yet there may have been some that could have been visible. I honestly can't say either way because I didn't see the piece before it fell." Tr. 276-277.

Such an admission by MSHA's lead Investigator cannot suffice to support the section 110(c) charges against Mr. Bentley. The Inspector maintained that part of his conclusion for the inadequate onshift assertion against Mr. Bentley was also based on the other loose ribs and conditions he observed in the area and not solely because of the slickenside fatality. Tr. 278. When challenged by Counsel for Mr. Bentley about this claim, the Inspector maintained that his inadequate onshift order was not based solely on the slickenside even while contending that he simply "forgot" to list the other conditions. This "oversight" was not corrected until about three years later, when the Secretary moved to amend its citation in 8355746 to add additional alleged troublesome conditions.

MSHA's John Boylen, a roof control specialist and coal mine inspector with long private and public mining experience, also testified. Inspector Boylen was assisting Inspector Ramsey with his investigation and he had input into the allegations included in the citations and orders issued. Tr. 311. In terms of the "squeeze" or, as it was also described, "a washout of the roof," which occurred not long before the accident, Mr. Boylen stated that while one must be observant of such conditions when encountered, sometimes problems will occur but other times no problems will result. Inspector Boylen's primary concern and focus pertained to the mine's

overall rib control in the area.[15] Tr. 314. In this regard, he marked on GX 20 those areas of concern to him. It is fair to state that Inspector Boylen was dismayed over the omissions in the citations and orders of several areas that he believed needed attention. Such problem rib areas, which he described as "needing attention," would have been included had he been the one issuing those citations and orders. He did not become aware of those alleged shortcomings until shortly before the hearing began. Tr. 319. This problem had consequences for the government's proof. For example, where Mr. Boylen marked an as "crushed," a term he uses as synonymous for "sloughing," he could not provide further detail because he assumed someone would be issuing additional citations for such areas, but that never happened. Tr. 321. Accordingly, Inspector Boylen would have issued additional citations, or at least added the other problem areas in the citations and orders, and citing section 75.202(a), with the gravity listed as moderate and as "S&S." Again, no such additional detail, or citations, were issued. Therefore, while these areas were identified during his testimony, including claims that several ribs needed "attention" and some that had already "rolled out," additional citations were not issued for the problems he perceived. As the Court has taken note of, neither Mr. Bentley nor Bledsoe can be held to account for alleged problematic rib areas not identified within the four corners of any citation or order.

Regarding MSHA's claim that there was an inadequate preshift exam performed, Inspector Boylen stated that it was "more than likely" that he would have issued such a claim. Tr. 340. In the Court's view, and as he was there at the same time as Inspector Ramsey, this affirmation falls short, as it was less than a full endorsement of that charge. Importantly, Inspector Boylen affirmed that the rib conditions that concerned him did not relate to the fatality. Tr. 352. Further, he stated that he did not know how things looked, in the location of the slickenside, just prior to the accident. In an admission that the Court views as supporting Mr. Bentley's defense, Inspector Boylen stated that in the area "where it slid out right adjacent to [the slickenside], it was solid." Tr. 352. In fact, both sides of the slickenside were solid. So too, Boylen agreed that one would not put dates, times and initials right next to a bad rib. Tr. 353.

Inspector Boylen also agreed that things can change quickly in a mine and that a ½ inch gap can happen in short order. Tr. 356-357. Further, although he, like Inspector Ramsey, could not know what Mr. Bentley saw during his preshift, it was still his belief that Mr. Bentley *did not* see it. Further, Inspector Boylen did not know if the condition was even present and therefore

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[15] This contention carried its own problems; rib sloughing could be argued to be a problem for which MSHA played a role. Although this is an aspect of more significance for any civil penalties which may be issued in the proceedings against Bledsoe Coal itself, Inspector Boylen informed that the pillar corners in this area were laid out on 60 degree angles and that such sharp angles are more prone to fall and accordingly it is not unusual to see corners slough off. Bledsoe had requested permission to cut its sharp angled corners but MSHA, at that time at least, denied that request. Bledsoe's general manager, David Osborne, later testified that it had asked MSHA to allow its roof control plan to be modified to permit removal of the sharp corners from the pillars. Tr. 680. *But it was not until after the fatality*, that this request was approved. Tr. 354.

capable of being seen before it occurred. Tr. 370. As he saw no evidence of small material coming off in that location, he inferred in his testimony that there were no warnings to heed. In addition, and in the Court's view of significance, Inspector Boylen did not feel that Mr. Bentley was a poor mine foreman. Tr. 382.

Dr. Sandin Phillipson, an MSHA geologist, also testified for the government. He was at the mine the day after the fatal event and GX 8 was created by him. That Exhibit reflects his observations and findings of the accident and nearby area. GX 24 is Dr. Phillipson's field notes associated with this investigation. Consistent with Inspector Boylen's opinion, Dr. Phillipson agreed that the average miner or foreman would not have been able to recognize the slickenside nor able to process and interpret the geometry and therefore not able to realize that there was a potential for the failure which occurred. Tr. 438. The doctor also told the MSHA investigative team that there was no pillar stability problem in the area. His concern was with the acute angled corners of the pillars, a subject which has been discussed earlier. Though expressing that concern, he acknowledged that such angular crosscuts are a by-product of the continuous haulage system.

It is also of note that, while Dr. Phillipson saw cracks in ribs, he could not tell if they were simply skin cracks or whether they went all the way through the pillar. Tr. 441. Further, rib sloughing is not usually an indicator of pillar stability, as it is more of a skin condition. Even after his investigation was completed, the doctor made no recommendation for changes in the mine's pillar design. Tr. 447. Of particular significance for the charges made against Mr. Bentley, Dr. Phillipson saw no sloughing or flaking at all coming off the ribs in the fatal rib roll zone.[16] Tr. 447. It is also worth noting that Dr. Phillipson expressed that, even if the mine had been installing rib bolts with the so called "pizza pan" or "spider plate," those types of rib bolting would not have prevented the fatal accident here. Tr. 454.

Dr. Phillipson distinguished the accident scene area from other locations that gave him concern, with the latter, in his estimation being areas where an average miner could recognize of sloughing. As with MSHA's other witnesses, the doctor expressed that it was "definitely reasonable" to conclude that the slickenside came out rapidly and not with several movements that would have provided some warning that it would occur. Tr. 477. It is also noted that of the 12 or so areas that Dr. Phillipson marked on his map, representing instances of rib sloughing, he described them as having *the potential* to become a hazard. This is important because he did not conclude that they constituted things that needed to be attended to immediately.[17]

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[16] In contrast, Dr. Phillipson did see "problems," that is, evidence of sloughing on the pillar corners and the ribs beginning around crosscut 16 and through the No. 4 entry up to crosscut 33.

[17] Dr. Phillipson had only one exception to his remark that the sloughing he observed did not need immediate attention. The lone area needing attention right away, in his view, was "the corner bounded by the red line with the 40." For that one location, he believed attention was needed sooner, rather than later. Tr. 479-480.

At the conclusion of the government's case, Counsel for Respondent Bentley made a motion to dismiss[18] on the grounds that a knowing violation had not been established. As Mr. Bentley's Attorney expressed it " . . . nobody has pointed to issues that a mine foreman would have seen, would have known, would have grasped the danger and hazard and then knowingly just refused to rectify or address those issues." Tr. 528.

A ruling was deferred and the case continued with testimony from witnesses called by the Respondents. John Caldwell, the mine's section foreman and production foreman, was at the mine the night before the accident. Mr. Caldwell did the onshift exam of the area the day before the accident and he stated that he did not see any hazards, nor loose ribs, nor missing bolts. Tr. 540. Later that night, Mr. Caldwell, not Mr. Bentley, also performed the last preshift before the fatal accident occurred. When the Court inquired about whether there were problems earlier that week, Mr. Caldwell advised that there were such problems where things would start to "break away," but he maintained that these would not develop until weeks or months had passed. Tr. 596. However, when these did occur, the mine would wrap such problematic crosscuts.

Kevin Jump, third shift mine foreman, was also called by Respondent Bledsoe. Essentially, Mr. Jump's testimony was that, while he did note some hazards on the shift he worked, he did not see any loose ribs, nor missing bolts. Tr. 620-622.

Last, Mr. Paul Bentley testified. It is accurate to state that Mr. Bentley was profoundly shaken by the fatal accident. At the time of the accident he was the section foreman, but presently he is a preshift foreman. In this new role, he preshifts outby the working section. When he arrived at the mine on the day of the fatal accident, at a time before 7 a.m., he looked at the preshift report from the individual who performed that task, finding that no hazards were there noted. Mr. Bentley's shift lasted from 7 a.m. to 3 p.m. on that day. During the time of his shift, he was not required to examine outby crosscut 33. He did not find any hazards during his onshift exam on the day of the accident. Tr. 757. The Court expressly found Mr. Bentley to be a credible witness.

Discussion

At the conclusion of MSHA's case, Respondents moved for dismissal, referring to 29 C.F.R. §2700.67, entitled "Summary decision of the Judge." This Order deals with the Motion for dismissal for Mr. Bentley. Essentially, as just noted, Counsel maintained that the government failed to meet its burden of proof to establish the 110(c) violations[19] in that no witness for the

[18] Counsel for Bledsoe Coal also made a motion for dismissal at the conclusion of the government's case. That motion was denied.

[19] Mr. Bentley's Counsel emphasized that "knowingly" is the key word in matters 110(c). Placing the charges in context, Counsel Shelton noted that initially the onshift charge, per Order No. 8355777, covered only the location of the fatal accident. Then the Secretary amended that Order to add

government "pointed to issues that a mine foreman would have seen, would have known, would have grasped the danger and hazard and then knowingly just refused to rectify or address those issues." Tr. 528. For the reasons which follow, the Court agrees that the Secretary failed to meet its burden of proof in the charges against Mr. Bentley.

Though the label used to convey the intent behind the motion varies, sometimes being referred to as a "directed verdict," and other times as seeking "summary decision," the purpose remains constant, with a Respondent essentially contending that the government is not entitled to prevail as a matter of law. As noted in *Clifford Meek v. Essroc Corporation,* "If during a trial without a jury a party has been fully heard with respect to an issue ..., the court may enter judgment as a matter of law against that party on any claim." 15 FMSHRC 606, (April 1993)[20]

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the other areas listed in Citation No. 355746, the insufficiently supported ribs charge. Still later, the Secretary moved to add the areas listed in the preshift charge issued to Bledsoe, then adding those areas against Mr. Bentley too.

[20] It is clear that the Court can decide a matter after hearing the evidence without waiting for post-hearing briefs. A few examples follow. In *Sec. v. Drummond Company, Inc.,* 14 FMSHRC 2039, (Dec. 1992, ALJ) the Court granted Drummond's motion, seeking "a directed verdict arguing that based on the Secretary's case alone, it was clear that the violation charged was fully abated at the time the Section 104(b) order was issued and that the Secretary was without authority under that section to require it to take the additional specified action beyond what was necessary to remedy and correct the violative condition cited." The motion was granted in a bench decision. In *Secretary v. Consolidation Coal* , 11 FMSHRC 311 (March 1989), "[a]t the conclusion of the Secretary's case-in-chief, Consol moved for a directed verdict on the grounds that the Secretary's evidence did not support a violation of the cited standard. The Motion for Directed Verdict (See Fed. R. Civ. P.41(b) applicable hereto by virtue of Commission Rule 1(b), 29 C.F.R. 2700.1(b)) was granted at hearing . . ." The judge found that "the matter that [was] before [him] and clearly from the undisputed evidence presented by the government there [was] no violation of the cited standard, the standard with which [there had been] evidence throughout the government's case and upon which the operator has been conducting its cross-examination . . . there has been no violation of that standard based on the evidence presented." That being the case, the motion for directed verdict was granted. In *Secretary v. Cyprus Emerald Resources*, 10 FMSHRC 1417 (October 1988), at the conclusion of the Secretary's case-in-chief, Emerald filed a motion for directed verdict and a motion for summary decision. "The Motion for Directed Verdict (See FED.R.CIV.P.41(b) applicable hereto by virtue of Commission Rule 1(b), 29 C.F.R. 2700.1(b) was granted at hearing and that decision appears as follows with only non-substantive corrections . . ." In *Jim Walter Resources, Inc. v. Secretary*, 34 FMSHRC 1386, (June 2012), at the conclusion of the Secretary's case, the Respondent made a motion for summary decision, arguing that the Secretary failed to establish a prima facie case that it violated Section 77.400(d). After listening to oral arguments, the motion was granted in an oral decision. In *Eastern Associated Coal v. Secretary*, 22 FMSHRC 1020, (August 2000), "[a]t the conclusion of the Secretary's case, Eastern made a motion for a summary decision. After listening to arguments from both counsel a decision was made granting the motion." Finally, in *Aluminum Company of America v. Secretary*, 15 FMSHRC 1821 (September 1993), the Commission noted that at " the conclusion of the Secretary's case, the judge entered a decision from the bench granting Alcoa's motion to dismiss. The judge subsequently issued a written decision confirming his bench decision. While the judge credited the testimony of the Secretary's witnesses, including expert

As noted at the outset of this decision, the Secretary must prove that an individual knew or had reason to know of the violative condition, not that the individual knowingly violated the law. Such a violation occurs when an individual in a position to protect employee safety and health, fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition. Since the government's own witnesses refuted the claim that Mr. Bentley had such knowledge or reason to know of the existence of the slickenside, which condition was the initial basis for its claims against him, that left the other rib problems in the area as the basis for its claim against him. However, between its three witnesses, Inspector Ramsey, Inspector Boylen and Dr. Phillipson[21] and their divergent views of which ribs needed attention,[22] when coupled with the testimony of Mr. Bentley and other witnesses for the Respondent, it is clear that the government failed to meet its burden of proof for any of the three charges brought against Respondent Bentley.

The addition of the preshift violations, added to show that the conditions existed prior to the onshift examination conducted by Mr. Bentley, is a classic bootstrap argument. It fails in two ways. First, as Mr. Bentley did not do the preshift exam for January 22nd, it is an attempt to show that, because the government alleges that the rib issues asserted to exist at the time of the onshift exam are also asserted to have existed during the preshift which preceded it, Mr. Bentley had to have seen those conditions alleged in the preshift when he did his onshift. The attempt to pin those preshift conditions on Mr. Bentley, apart from the fact that he did not do that preshift, require that the conditions were indeed present at the time of the preshift. Without implicitly ruling on that preshift charge in the action against Bledsoe Coal in the associated case, KENT 2011-481, the Court notes that the standard of proof is different for a section 110(c) matter than in a matter under sections 105 and 110 of the Mine Act, 30 U.S.C. §§ 815 an 820. The evidence presented by the Secretary at the hearing was insufficient to establish section 110(c) liability for either the preshift or onshift charges against Mr. Bentley.

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testimony as to the hazardous nature of mercury . . ., he held that the Mine Act gives the Secretary the authority to issue a section 103(k) order only if there has been an accident, as that term is defined by section 3(k) of the 1824 Mine Act. . . . The judge concluded that the Secretary did not prove that the mercury contamination detected in the R-300 area was the result of an accident and, accordingly, he vacated the section 103(k) order."

[21] As Counsel for Mr. Bentley correctly characterized the testimony of Dr. Phillipson, while there were some problems that he perceived with the ribs, they did not need to be corrected immediately. That being the case, they were outside of the preshift and onshift responsibilities of a mine foreman. Tr. 528-529.

[22] There were other instances of MSHA's right hand not being sure about what its left was doing. For example, while Inspector Ramsey found a problem with the rib at the left inby corner of Belt entry 3 at crosscut 32, Inspector Boylen, while admitting he was in the same area, did not detect such a problem. Tr. 376.

Not only did the government witnesses have non-uniform assessments of the presence and/or conditions of various ribs in the section, with regard to the slickenside fatality rock slide, the government witnesses could not express whether those conditions were detectable for Mr. Bentley when he did his onshift report. There was also agreement that it would be very unlikely that one would then place DTI's right next to such a claimed obvious hazard. That being the case, it could hardly be claimed that they were visible earlier to Mr. Bentley, as implied by the inadequate preshift charge, for which charge the government points to the absence of noted problems to show that problems were present. As noted earlier, the fact that all three on-shift examiners recorded "None Observed" in the #3 Belt Heading for January 22, 2010, can also be interpreted to mean that no hazardous ribs were found and not simply that hazards were ignored or overlooked. As also has been noted, but which bears reemphasis, apart from the location of the fatal rib fall, MSHA accident investigators themselves did not see nor assess each of the other rib issues uniformly. The point is that, at least on this record, it is possible to conclude that different individuals, including Bledsoe employees, could look at the ribs cited and legitimately reach different conclusions about the sloughage and whether, if detected, they were in need of immediate attention or not. Further, while the Court found Inspector Boylen to be a knowledgeable and credible witness, the government can hardly establish its case against Mr. Bentley based on rib conditions detected by Inspector Boylen but not included by the lead investigator in the charges made against Mr. Bentley or Bledsoe itself for that matter. The government must be limited to the charges of roof control problems to those it identified in its citations and orders. That other areas, according to Inspector Boylen, should have been cited is not the concern of either of the Respondents or the Court. In terms of Mr. Bentley's potential 110(c) culpability, which is the subject of this Order, it is clear that the evidence falls far short of establishing that he had knowledge or reason to know of the violative condition, much less that he engaged in aggravated conduct constituting more than ordinary negligence.

Accordingly, for the foregoing reasons, all charges against Mr. Bentley are hereby **DISMISSED.**

SO ORDERED.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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