

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVENUE N. W., SUITE 520N
WASHINGTON, D.C. 20004-1710
Telephone No.: 202-434-9933
Telecopier No.: 202-434-9949

November 6, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2012-575
Petitioner	:	A.C. No. 15-19447-277203-01
	:	
v.	:	
	:	
ICG KNOTT COUNTY LLC,	:	Mine: Kathleen
Respondent	:	

DECISION

Appearances: Brian D. Mauk, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner
John M. Williams, Esq. Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, KY, for Respondent

This case involves a section 104(a) citation related to a roof fall at the Respondent's Kathleen Mine. The roof fall occurred between some roof bolts, seriously injuring a roof bolter operator, Mr. Jared Sargeant. That fall resulted in the miner's foot being amputated the following day. The case does not involve a violation of the roof control plan, rather it is a citation alleging a violation of section 75.202(a) and its provision requiring that "[t]he 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 bursts." A hearing was held on May 30, 2013 in Pikeville, Kentucky.¹ For the reasons which follow, the Court finds that the Secretary did not establish that the Respondent violated the cited standard. Accordingly, the case is DISMISSED.

¹ The transcript inadvertently included a transcript for an unrelated matter brought before the Circuit Court of Loudoun County, Virginia. (Case No. 77544, dated June 7, 2013) That matter, 27 transcript pages in length, plus a seven page word index, was not connected in any way with this, nor any other Mine Act proceeding. Accordingly, the Court removed the immaterial pages and returned them to the court reporting service.

Findings of Fact

Claudius Ray Johnson, a coal mine inspector for MSHA since 2006, testified for the Secretary.² On September 20, 2008, Inspector Johnson received word that there had been a roof fall at the Respondent ICG Knott County, LLC's Kathleen Mine and that there had been a resulting injury to a miner from that event. The event had occurred on September 19th and Inspector Johnson went to the mine the following day. MSHA roof control specialist Rick Runyon also joined Inspector Johnson at the mine. Upon arriving at the mine site, the mine's Stewart Bailey, advised Johnson that MSHA was not called earlier because they believed the injury to the miner, roof bolter operator Jarrod Sergeant, was not life-threatening. Tr. 19. Instead, the mine made a "courtesy call" to MSHA the following day, upon learning that the miner had a leg amputation from the event. Tr. 20.

Johnson and others then proceeded to the scene of the accident, examining the location where the rock had fallen, causing the serious injury to the miner. The roof fall was in the No. 3 heading, which was an active section. The essence of the incident can be rather simply stated: a large rock fell from the roof and hit the miner in the leg. Tr. 24. The fall occurred about 8 to 10 feet in by the last open crosscut. Tr. 21. As the rock from the fall had been moved before the Inspector's arrival, MSHA could only measure the cavity remaining in the roof. Nevertheless, the cavity informed the Inspector that the rock which fell was 48 inches wide, 33 inches long and 10 3/4 deep. Tr. 22. The mining height in the area of the fall was 55 inches (4 feet 7 inches).

The Inspector described the general area of the rock fall as containing several areas that were "sloughing out [i.e. loose rock hanging from the mine roof which needed to be pulled and removed] and a kettle bottom that hadn't been strapped." Tr. 24, 26. Citations were issued by Inspector Runyon for those conditions. Tr. 24. In terms of the proximity of the sloughing roof and the kettle bottom to the rock fall, the Inspector stated that these were in the No. 5 and No. 6 entries, which were 60 to 80 feet away, whereas the roof fall itself was in the No. 3 entry.³ Tr. 27. While these other matters were in different entries, Inspector Johnson still considered them to be important in his evaluation of the accident scene, as he considered them to be "in the same area in relationship to [one another]." Tr. 27. One of those other conditions was in by the last open crosscut; the other was not. His fellow Inspector, Mr. Runyon, also considered these other conditions to be relevant to the cited roof fall assessment.

² Inspector Johnson has his foreman papers and worked in the mining industry for 20 years prior to joining MSHA. Tr. 15.

³ The Inspector stated that the No. 5 entry would have been some 80 to 150 feet from the roof fall. As he could not remember the centers between the entries, the Inspector could not be more specific about the proximity of these other conditions to the roof fall location, which of course was the matter that prompted his investigation. Tr. 27.

Additional detail about the site of the rock fall was provided. The entries were 18 ½ feet wide. The rock that fell was near the right rib and it fell out between two rows of roof bolts. Tr. 32. The roof bolts were on centers of slightly less than 4 feet. Other support was in the area. These were straps and some of the bolts had a “pie pan” installed. That device covers a greater area than the 8 x 8 plate that is installed with a roof bolt. In fact, one pie pan was “right beside where the rock fell.” Tr. 33. The straps and pie plates were not required under the roof control plan. Tr. 33. In fact, right next to where the rock fell, there was a pie pan and some straps around three sides of it. Tr. 34 and Ex. P 2, a drawing of cited condition at p. 18 of the Inspector’s notes. The word “strap” appears 3 times in the drawing.

Inspector Johnson also interviewed the accident victim, Mr. Sergeant. Ex. P 3. That interview occurred about a month after the event. The injured miner informed that on that day he was performing roof bolting in the No. 3 entry, at a location out of the air movement in the last open crosscut. At the time of the accident, he was on his knees when he then heard the roof starting to “work,” that is, it was making noise. Though he tried to get to safety, Mr. Sargeant was unable to leap out of the area fast enough, because of the low mining height, and the rock hit his leg. Tr. 40. In the amputation which ensued, the miner lost his leg from about 6 to 8 inches below his knee. Tr. 38.

On November 8, 2011, Inspector Johnson, having completed his investigation,⁴ returned to the mine and issued Citation No. 8261958, the citation which is the subject of this litigation. Tr. 16, 44, Gov. Ex. P 4. Tr. 16, Exhibits P1 and P 2. As stated, the citation invoked section 75.202(a), which provision requires that roof and ribs be supported or otherwise controlled from such falls. The Inspector believed that the mine had not fully protected the miners from a fall of roof and ribs. He also marked the negligence as “moderate” on the basis that the operator knew or should have known of the condition “because it was obvious in other areas of the mine[.]” Tr. 47. He believed that the operator “should have kn[own] they had a problem.” The moderate negligence designation was viewed, in effect, as a concession by the Inspector. That is, it was considered to be a mitigating factor, because the mine was following its roof control plan. The Inspector also marked the citation as “significant and substantial.” Tr. 48. However, a roof control plan represents the minimum requirement.

In sum, as expressed by the Inspector, “With what we [saw] during our visit the first day, with the citations that [were] issued for the other conditions, and one of them being in the area close to [the location of the roof fall] [he] felt they should have known it.” Tr. 47. Inspector Johnson’s construed the mine’s installation of some straps and the pie pan right in the area of the fall as indicative that the mine knew there were problems at that area. Tr. 48.

⁴ The Inspector’s investigation also included speaking to some miners on the section. Their remarks were reflected in his notes and are part of the record.

Following the accident, MSHA requested that the mine's roof control plan be revised to require that the mine *not* drill holes through kettle bottoms and that they *would* strap them. The Plan was revised to require those steps. Tr. 49. MSHA considers drilling through kettle bottoms to be an unsafe practice. When encountering these, MSHA instead requires strapping or some other method placed over them. Tr. 51. Despite the additional procedures for the mine's roof control plan, it is significant to note that the Inspector stated that the rock that fell *had not* been drilled through. Tr. 52.

Upon cross-examination, the Inspector agreed that a roof bolter's responsibilities include being a front line person to look at the conditions of the roof. Tr. 54. While conceding that role, the Inspector added that he did not know if the injured miner was the one that bolted the area where the rock fell out. The Inspector conceded that a piece of mine roof can come out under circumstances where one cannot tell if that will happen; that not every rock which falls out is a kettle bottom; and that this rock fell out between the bolts. Accordingly, the most the Inspector could say with confidence was that a rock had fallen out, but not whether it was a kettlebottom.⁵ Tr. 55. The Inspector's reaffirmed his view that, because there were straps installed, and a pie pan was right beside the rock, those actions were signs of recognition that there was a problem in the area. Tr. 55-56. However, he admitted those steps could also be viewed as indicating that people were being attentive to the roof conditions and taking responsible steps, by adding support such as strapping, where they saw problems.⁶ Tr. 56.

As to the citations issued at the time of the investigation by fellow inspector Runyon, Inspector Johnson agreed those were two or three entries away from the location of the rock fall. Tr. 57. Importantly, Johnson agreed that those other violations were not considered to be contributory to the rock fall incident. Tr. 58. Inspector Runyon is a roof control specialist whereas Inspector Johnson does not have that expertise. In fact, Johnson conceded that Runyon was involved in the investigation because of that expertise. Tr. 59. Also, Inspector Johnson did not issue any citations to the mine examiners, such as pre-shift or on-shift examiners, in this instance. Tr. 60. He noted that there was an exam done that day and that the examiners did not note any roof problem. Further, there were paint marks in that area, indicating that someone did

⁵ The Inspector retreated from his earlier statement that the rock which fell was a kettle bottom. The most he could state was that this mine has a history of kettle bottoms. Tr. 57-58. Accordingly, the Inspector could not state whether the rock that fell could be identified beyond that it was a rock and thus he could not characterize it as a kettle bottom or a slickenside rock: "[t]here was a piece of rock that fell." Tr. 62. In fact, he candidly admitted that he didn't know what the term "slickenside" actually meant. Further, even a kettle bottom might not be visible, as there can be times when it is under a layer of rock. *Id.*

⁶ The Inspector also agreed that this mine has a history of adding strapping or other supplemental support when they find a need to do so. Tr. 58.

examine that area that day.⁷ The paint mark was a directional centerline, which is made to help keep the entries straight. Tr. 60-61.

When the Court asked if MSHA was, in effect, engaging in “Monday morning quarterbacking,” about the rock fall and that the mine operator really couldn’t have figured out that there was something that needed attention, the Inspector first noted that MSHA was at a disadvantage in assessing whether the mine had foreknowledge because the rock had been removed and thus it was impossible to assess the obviousness of the condition before the fall. Tr. 64. He then added that, with all the citations his fellow Inspector, Mr. Runyon, had issued for roof issues and the amount of strapping installed, and still needed, it was his conclusion that not enough had been done to address the area where the rock fell. Tr. 65. Still, Johnson agreed that none of the statements he took from miners, other than from the injured miner, suggested that the citation he issued was warranted. Tr. 67.

In terms of the strapping that was present, the Inspector noted that there was some “to the outer edges” of the location of the rock fall, but “nothing right against it.” Tr. 70. Clarifying earlier testimony, the Inspector stated that the rock that fell out was outby the face a short distance, on the order of 7 feet “inby the corner of the last open crosscut, starting into the head.” Tr. 72. When asked if, when working outby the area of the rock fall, there were other areas that needed support, the Inspector advised there were not. Tr. 72. Consistent with that conclusion, there were no other roof citations issued for the number 3 entry. Tr. 74.

The Parties’ Contentions

The Secretary contends that several factors establish that a reasonably prudent mine operator would have recognized the cited hazardous condition. In this regard it contends “[b]oth CMI [coal mine inspector] Johnson and Inspector Runyon observed obvious and extensive adverse roof conditions throughout the travelway leading to the accident site [and] [t]hey also observed adverse conditions when they arrived on the active section.” Sec. Br. at 5. From that, the Secretary contends that “[i]t is reasonable to believe that these hazards were apparent to the operator, placing it on notice that protective measures were needed to alleviate hazards from adverse roof conditions.” *Id.* The Secretary also looks to the fact that the Respondent had installed some additional roof support in the area of the accident site as “demonstrating that the operator was aware of deteriorating roof conditions.” Last, the Secretary notes that Inspector Johnson’s notes record that the accident victim, Mr. Sergeant, told him that he had installed roof bolts in various places on the morning of the accident. The Secretary adds that such bolt installation in various places is “known as ‘spot bolting’ [and that] this is done to alleviate hazardous roof conditions.” However neither the term “spot bolting,” nor its purpose, is part of

⁷ As his first response to a question posed on cross-exam was imprecise, Respondent’s attorney, asked again whether the condition was one which should have been noted by the pre-shift or on-shift exam. That is, whether the condition was apparent, if one had looked at the roof before the rock fell. Inspector Johnson responded that he concluded it was not apparent by such exams. Tr. 61.

the testimony in the record, nor does the Secretary ask for, or point to, a basis for taking administrative or official notice of such as facts. There are other problems with this evidentiary reference. The accident occurred in the active working section #3 entry. The Inspector's notes of the Mr. Sergeant's statement to him record that on the day of the accident, his foreman told him to spot bolt at the # 1 entry.⁸ Further, the spot bolting reference is immediately followed by the comment that "CMI Johnson correctly summed up [that the reason] the operator's conduct was a violation, [was] "[t]hey weren't putting enough into it to protect the miner." *Id.* The Court would note that while the "spot bolting" and the claim that the mine was not "putting enough into it" to protect the miner were juxtaposed, the two were not tied together in the Inspector's testimony at all. As noted, the Inspector said nothing in his testimony about spot bolting, nor that it is a practice used to alleviate hazardous roof.

The Respondent contends the Citation should be vacated, as the Secretary failed to establish that a reasonably prudent mine operator would have provided additional roof support. R's Br. at 4. Citing *Cannon Coal*, 9 FMSHRC 667 (April 1987),⁹ Respondent notes the Commission's holding that liability under the cited standard's requirement for adequate roof support is "measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard would have provided in order to meet the protection intended by the standard." *Id.* at *668.

Cannon, as the Respondent notes, went on to "emphasize that the reasonably prudent person test contemplates an objective – not subjective – analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue." *Id.* Referring to the administrative law judge's examination of the evidence presented, the Commission then noted "that the Secretary had failed to produce evidence that objective signs existed prior to the roof fall that would have alerted a reasonably prudent person to install additional roof support beyond the support that actually had been provided by the operator." *Id.*

⁸ As the Inspector did not testify about this part of his notes, it is possible that those notes reflect that the miner was told to spot bolt in the # 7 entry. Left with reading the inspector's handwritten notes, and with no testimony to decipher what was written, the Court cannot be sure whether the Inspector's recorded a "1" or a "7" for the entry. Importantly, what is clear is that the notes do not record spot bolting being done that day in the # 3 entry, the area of the accident.

⁹ *Cannon Coal* dealt with the predecessor standard, 30 C.F.R. §75.200, to the provision cited here, 30 C.F.R. §75.202, but the critical language is shared in both that the roof and ribs are to be supported or otherwise controlled to protect miners from falls. Now listed as the "Scope," Section 75.200 used to provide: "Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs." The superceding, present, standard, 30 C.F.R. §75.202, now provides: "(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 bursts."

It is the Respondent's contention, and the Court's conclusion, that the Secretary failed to satisfy the *Cannon* standard. In essence, the Respondent maintains that the evidence falls short of establishing that a reasonably prudent mine operator would have provided additional support. Certainly, Respondent observes, the fact that there was a rock fall and that the fall injured a miner does not establish a violation. Nor, it contends, does the fact that there were roof control citations issued for other areas in the mine establish that *the cited fall* was the result of a failure to provide the protection a reasonably prudent mine operator would have taken. In this regard it notes that those cited areas were in different entries, and some 150 to 200 feet from the fall cited here. Further, those other areas, it was conceded, did not contribute to the occurrence of the cited condition. Anticipating the Secretary's assertion, Respondent argues that the fact it had installed strapping in the area of the fall can not be turned against it to show that more support was needed. Instead, it shows that the operator did take action where it perceived the need for additional support. R's Br. at 7.

In its Response Brief, the Respondent asserts that the record does not support a claim that there was a hazardous roof condition which was "apparent to the operator." It notes that the Inspector did not allege preshift exam deficiencies because it was not known if the condition was apparent. As for the Secretary's claim of obvious and extensive adverse roof, Respondent notes that those problems were not in the area where the rock fell. Focusing upon the requirement for objective proof, Respondent notes that there was no evidence that the area where the rock fell needed additional support. It argues that the idea that the Secretary need only identify *other unconnected* problem locations in a mine to establish a violation runs contrary to *Cannon Coal's* teaching. R's Reply at 2. Nor, it adds, should the mine's salutary safety actions, by installing strapping and pie pans in the same area, be used as a cudgel against it. *Id.* at 2-3. Finally, Respondent comments upon the Secretary's post hearing brief remark that the injured miner spot bolted the area of the rock fall. It notes that no mention of this was made during the hearing and the note itself does not establish that such bolting was done to alleviate hazardous conditions. *Id.* at 3. Had that been the case, the Secretary had the option to call the injured miner to testify about the conditions.

Discussion¹⁰

The parties and the Court are in agreement that *Cannon Coal* is the Commission authority to turn to in determining whether a violation of 30 C.F.R. 75.202(a) has been established. To begin, based on this record, the Court does *not* view the other citations, issued at the time of the matter in dispute here, as tending to show that the reasonably prudent person would have taken additional steps for the distinct condition cited in Citation No. 8261958. Those other cited conditions were insufficiently related, in proximity, to the Citation in issue and as such they do not inform about the condition at the site of the roof fall. Applying the objective test required under *Cannon*, and absent a showing that the roof conditions were endemic throughout the

¹⁰ The reader will note that discussion and findings by the Court are not limited to this section of the decision.

working section, the Court must focus on the conditions at, or very near to, the roof fall. Thus, the Court does not agree that the cited condition was in the same area as the other areas cited. As in *Cannon Coal*, the Court here finds here too, that “the Secretary failed to produce evidence that objective signs existed prior to the roof fall that would have alerted a reasonably prudent person to install additional roof support beyond the support that actually had been provided.” *Cannon Coal* at *668.

In terms of the location where the rock fell, again, based on this record, the conditions observed do not support the Secretary’s claim. No claim was made that the roof control plan was not being followed. While true that following the roof control plan is not the end of the inquiry, here it was conceded that pie pans and straps were also used, though not required by the plan. As noted, one such pan was right beside where the rock fell. In addition, straps were present around three sides of the area where the rock fell. It is true that the Inspector “felt,” that is, he believed, that the mine operator had not done enough to control the roof, such a subjective basis does not square with the requirements under *Cannon Coal*.

While, post-accident, the mine revised its roof control plan so that it would not drill holes in kettle bottoms, but instead would strap them, the Inspector was unable to state that the rock which fell was a kettle bottom. Beyond that, revisions to roof control plans, by themselves, cannot be used to establish that a hazardous condition, resulting in the issuance of a citation, was present prior to that change in the plan. So too, as noted, no preshift or onshift citations were issued in connection with this rock fall. Those exams did not note any roof problem and there were paint marks in the area, indicating that the exams were made.

Thus, on the record before the Court, it is concluded that this was an extremely unfortunate accident which occurred and for which the Court has genuine sympathy for the serious injury received by Mr. Jared Sergeant. However, this decision must be made on the basis of the evidence adduced. That evidence, in turn, must rely on objective factors in determining whether the mine operator failed to meet the standard required under *Cannon Coal*. Applying that evidence, the Court finds that this serious accident was unpredictable and that the Respondent, acting as a reasonably prudent mine operator, was not put on notice that additional support was indicated.

Accordingly, the matter is DISMISSED.

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

Distribution: (E-mail and Certified Mail)

Brian D. Mauk, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, Tennessee 37219-2440

John M. Williams, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513