

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 19 2014

CAM MINING, LLC,
Petitioner

v.

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent

CONTEST PROCEEDINGS

Docket No. KENT 2013-196-R
Citation No. 8273702; 10/17/2012

Docket No. KENT 2013-197-R
Order No. 8273703; 10/17/2012

Mine ID: 15-18911
Mine: No. 28

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor,
Nashville, Tennessee, on behalf of the Secretary of Labor

Mark E. Heath, Esq., Spilman, Thomas & Battle, PLLC, Charleston, West
Virginia, on behalf of Contestant Cam Mining, LLC

Before: Judge Andrews

STATEMENT OF THE CASE

These contest proceedings are pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (the “Mine Act” or “Act”). A hearing was held on an expedited basis in Pikeville, Kentucky on January 10, 2013, at which the parties presented testimony and documentary evidence. This matter concerns Citation No. 8273702 and Order No. 8273703 both issued on October 17, 2012 under Section 104(d)(1) of the Act. After the hearing, Post Hearing Briefs and Reply Briefs were submitted.¹ The issue presented is whether the citation and order were validly issued.

¹ I have fully considered the contents of the Official File including the pre- and post-hearing submissions of the parties, and the exhibits admitted into evidence. The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness’s testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his demeanor. Any failure to provide detail as to each witness’s testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)(administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

JOINT STIPULATIONS

The parties agreed to the following stipulations at the hearing:

1. Cam Mining, LLC is subject to the Federal Mine Safety and Health Act of 1977, as amended (“the Mine Act”).
2. At all relevant times, Cam Mining, LLC and the mine, No. 28, mined and produced coal which entered Commerce, or had operations or products which affected commerce, within the meaning of the Mine Act.
3. Cam Mining, LLC is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the administrative law judge has the authority to hear the case and issue a decision.
4. At all relevant times, Cam Mining, LLC was an “operator,” as defined in the Mine Act, at the mine No. 28, when the citations at issue in this proceeding were issued.
5. The mine, No. 28, is a “coal or other mine” within the meaning of the Mine Act.
6. Cam Mining, LLC is a large operator, and imposition of a reasonable penalty will not affect the ability of Cam Mining, LLC to remain in business.
7. Each of the citations at issue in this proceeding was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Cam Mining, LLC.

DEFINITIONS AND PRELIMINARY MATTERS:

The Citation and Order in the instant case were issued during retreat mining. Retreat mining consists of a “pillaring” process where the coal pillars that are left for roof support after advance mining are later mined as the miners and machinery “retreat” back out of the mine. *See, Excel Mining v. Secretary of Labor*, 34 FMSHRC 99, 102. When retreat mining, the coal is taken out of these large pillars or blocks according to a specific sequence and to dimensions prescribed in the approved Roof Control Plan (“RCP”). *Id.*

To avoid confusion, it is necessary to assign a common meaning to different terms used by witnesses to describe the same or similar things. Therefore, in this decision the following terms will be used:

Pillar - this will describe the large 60 foot long by 50 foot wide blocks of coal left for roof support as mining advances into a coal seam. “Pillar” and “block” share the same meaning and both will be used in this decision.

Cuts - this term will describe the 12-foot wide parts of the pillar or block of coal that are mined or cut out. Exhibit Rx-E. Witnesses also used the terms “sumps”

and “lifts” and these have the same meaning, but “cut” will be substituted in this decision.

Stump - this will describe the material left at the outby corners of each pillar or large block of coal after all cuts have been taken out of the pillar. This stump extends from the floor to the roof of the mine. Witnesses also referred to this as a corner. The RCP refers to that part of a pillar not to be mined as the “stump” and also as the “outby corner”. Exhibit Gx-3, Rx-E. Where witnesses referred to the remaining material as a pillar, the term “stump” will be substituted.

Web - also referred to as a wedge, this is the 3-foot column of coal left between the 12-foot cuts into a pillar. See Exhibit Rx-E, where two of these webs are labeled on each side of the mined pillars.

Row - also referred to as a line, this is the entire horizontal row of pillars in the section being mined. On Exhibit Rx-G, a row of pillars would consist of all of the pillars or large blocks of coal from the red “L” on the left in a straight horizontal line to the red “Bs” on the right. Row and line will share the same meaning in this decision.

Breakers - the timber posts set in each entry along the breaker line of the pillars or blocks being retreat mined. A breaker line may be visualized on Exhibit Rx-G as extending along the inby edge of a line of pillars or blocks where the letters “CL” have been placed in blue ink in each of the squares representing a pillar.

At the outset of the hearing, the Secretary objected to so much of Contestant’s Exhibit Rx-G that depicts the pillars or blocks of coal with 2 cuts taken in each as not being an accurate illustration of the actual number of cuts being taken. The Exhibit was admitted, but on study of the entire record I find that the objection as it pertains narrowly to the number of cuts per block of coal should have been sustained. As will be discussed in greater detail in this decision, credible testimony and simple calculations reveal that the illustration of pillars with two cuts is misleading, inaccurate and self-serving, and therefore this part of the exhibit is found to have little probative value.

However, Exhibit Rx-G was useful for other purposes and extensively marked up during the hearing to show the location of entries, pillars, stumps, timber posts, check curtains, breaker lines and persons in the area. For these purposes *only*, and to help understand testimony, the Exhibit will be referred to frequently in this decision.

CITATION NO. 8273702

EVIDENCE

On October 17, 2012, at 1020 hours MSHA Inspector Carl Keith Little (“Inspector Little” or “Little”) issued this citation with the following Condition or Practice:

The approved roof control plan, dated 4-15-2011, is not being complied with on the 001-0/003-0 super section. Pages 24-26 of the approved plan require a minimum of 6 foot of the coal pillar to the left on each side of the entries at the outby corners of the coal pillars during retreat mining. The size of the coal pillars left on each side of the entries 1 thru 7 range in size from 1 foot to 5 feet with none of the stumps not mined being large enough to meet the minimum requirement of 6 feet. This violation is an unwarrantable failure by the operator to comply with a mandatory standard.

Standard 75.220(a)(1) was cited 15 times in two years at mine 1518911 (15 to the operator, 0 to the contractor). This violation is an unwarrantable.

After training on retreat mining the Citation was terminated at 1235 hours.

Gx-1.²

The cited regulation provides:

(a)(1) Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

30 C.F.R. § 75.220

A revised Roof Control Plan for Cam Mine #28 was submitted to MSHA on April 12, 2011 and approved on April 15, 2011. This approved plan was in effect on October 17, 2012. A substantial portion of the mine's plan covers safety precautions for retreat mining. Gx-3, pp.20-26. Pages 24, 25 and 26 are illustrations of the extraction plan showing the sequence, placement and dimensions of the cuts that may be taken in each 60-foot long by 50-foot wide pillar or block of coal. Also shown and explained are the minimum dimensions of the coal webs left in the block and the stumps left at the outby corners of each block. The minimum requirement for the stumps is to leave 6 feet at each corner. Gx-3, P. 24.

Inspector Little traveled to Mine No. 28 on October 17, 2012 arriving at about 8:00 am for a continuing EO1 inspection. Tr. 257, Gx-5, pp 1, 2. Little is a ventilation specialist for MSHA, having worked for MSHA for almost 8 years. Tr. 253. He has 40 years of underground mining experience, most of which as a Section Foreman, and has experience with retreat or pillar mining.³ Tr. 254.

² Hereinafter, Government exhibits will be referred to as "Gx" followed by a number. Contestant's exhibits will be referred to as "Rx" followed by a letter. Citations to the transcript will be labeled "Tr." followed by the page number(s).

³ See Employment History at Gx-6.

Inspector Little informed Foreman Jody Heath Baldwin (“Foreman Baldwin” or “Baldwin”) of the inspection, checked the mine maps, and decided to go the 001-0/003-0 area, where they were retreat mining. Accompanied by Baldwin, they arrived at about 10-10:15 am. Tr. 257, 258; Gx-5.

Inspector Little testified that mines engaging in retreat mining are visited at least once a month to make sure they are complying with their pillar plan.⁴ Tr. 253-255. Little described the process of observing the conditions in the line of blocks that had already been retreat mined as going to the breakers of the blocks being actively mined and looking inby at the stumps to see the size of the stumps that had been left. Little testified that to comply with the plan the outby stump has to be a minimum of 6 feet from the corner of the block back to where cutting into the block started.⁵ Tr. 255, 256. Little also testified to make sure there is compliance with the mine’s plan, an area they have mined is observed, and then the active mining cycle is observed. Tr. 328.

Inspector Little has at least 6 years of experience judging stump size. Tr. 263. He pointed out that there is a considerable difference between a 3 foot and 6 foot stump, and that it is easy to observe the size of a stump from twenty feet while standing in the breaker timbers. Tr. 264, 275, 297. He could also see the lines where the miner head had cut into the entries⁶ and not left the right size stumps Tr. 307. He further testified that when a cut is finished, you can see if the 6 foot is left. Tr. 317.

Beginning at the No. 1 entry⁷ to start the imminent danger check, Inspector Little observed from the breakers that the left side of the block just inby had not been mined. Tr. 36, 259, 260. Little explained that an imminent danger check is a requirement of all E01 inspections and consists of when an inspector goes to the section, looks at all the faces, and the pillar line, etc. to ensure there is nothing going on to cause an injury or fatality before it can be corrected. Tr. 259. When he begins the imminent danger check, he goes to one of the outside entries. Tr. 255. As he starts across the entries, he goes back to the breakers of the blocks that are being minded. *Id.* He then takes the curtain hung in front of the timbers and goes inby the curtain to observe the conditions that they had mined in the line of blocks before. *Id.* Based on the pillar plan the outby stump has to be a minimum of 6 feet from the corner of the pillar to where they start cutting. Tr. 256. Little testified that an inspector must also check all the breaker timbers and ensure they are set on 4-foot centers and do not exceed 4 feet from the coal ribs. *Id.* He further testified that the timber placement and the size of the stumps that are left are part of the inspection to ensure compliance with the pillar plan. *Id.*

⁴ References to the “pillar plan” are to pages 24-26 of the mine’s roof control plan containing the specifications for the coal to be left for roof support.

⁵ See Exhibit Rx-E (illustrating the outby corners of the pillars and the 12 foot wide cuts into each side of the pillars).

⁶ The continuous miner cuts into the pillar or block of coal from the entry. According to the mine’s Roof Control Plan, each of these cuts should be 12 feet wide and the depth is limited to 35 feet. See exhibit Rx-E for an illustration of a row or line of mined-out pillars of coal.

⁷ The numbers across the bottom of exhibit Rx-G provide an example of how entries are numbered.

At the number 2 entry, observing from the breakers, Inspector Little found that the left stump was approximately 2 feet wide back from the rib line,⁸ and the right stump lacked about 16-18 inches where a cut had been taken clipping off the inby side of that stump. Tr. 260-262. Little went on into each entry, from number 3 to number 7, again observing from the breaker line, and recording the stump dimensions in his notes. Gx-5, pp. 4, 5.

When moving across the section, at the middle entry, mining was halted outby by Foreman Baldwin until the inspection was finished. Tr. 266. While in the active section, he and Baldwin walked by the number 4 entry right at the intersection in front of the one block being mined that day, and the stumps there were not adequate either. He did not need to use his tape measure; he could see they were not big enough. Tr. 280, 281, 294, 295. Inspector Little had already told Baldwin that a citation for not complying with the pillar plan would be issued, and he also told Baldwin that if the conditions continued across the section, it would be a (d)(1) and he would need to stop mining and pull back leaving a row of blocks because roof support had been compromised. Tr. 260, 323, 324.

Inspector Little testified that the minimum 6-foot stumps required at the front of all of the blocks were not left. Tr. 269, 305. The largest was the left stump in the last entry, which was 60 inches as measured by Little with his tapeline.⁹ Tr. 266, 267. He pointed out that it is really easy when at the breaker line to see the stumps just 20-25 feet away. Tr. 275. He stated it was very obvious the stumps were not adequate; you can look and tell the difference between a 6-foot and a 2-foot stump. Tr. 284. Little also testified that when he went behind the curtains into the timbers he would move around and look at the stumps from different angles, and it did not take an educated guess to see that they were smaller than required. Tr. 302, 303. He and Baldwin had cap lights, and Baldwin's was pretty bright. Tr. 305.

Since the same conditions existed in 6 entries, Inspector Little asked that the next outby line of blocks where entry 4 was then being mined be breakered off and to restart the mining cycle in the second line of blocks back, or outby.¹⁰ Tr. 290. A safety meeting was held with training on the pillar plan, and then Little went back to make sure the timbers had been set and the places breakered off. Tr. 292. The section was pulled back one entire crosscut and when the new breaker line was set the citation was terminated at 1235 hours. Gx-1. After the new breaker line was set, no one would be allowed inby that location.¹¹ Tr. 293.

⁸ A "rib line" is an imaginary line projected across the outby edges of a line of pillars of coal as illustrated on Exhibit Rx-E in red ink and labeled "Rib Line."

⁹ The right pillar was not mined in this entry. Gx-5, p. 5; Rx-G.

¹⁰ The new breaker line was one full row of pillars back or outby from the breaker line where Little observed the pillar stumps. The new breaker line is indicated by the initials CL adjacent to each entry in blue marker pen on Rx-G.

¹¹ See also Gx-3, page 21, paragraph 16 of the roof control plan: "No person shall work or travel inby the posts installed at the breakline where full or partial pillaring has been performed".

Inspector Little testified that the part of the roof control plan violated in Mine No. 28 was the fact that they did not leave the minimum 6-foot stumps at the front of the blocks as required. Tr. 268. Little stated that the reason the front stumps were of most concern to him was because, “If those stumps are smaller than the required minimum and you have a roof fall starting back in there, in the area that’s already mined, those stumps will have a tendency to stop that roof fall of that wide area that you’ve already pillared out before it comes into the intersection where most people will be working.” Tr. 269. Little explained that the effect of having less than adequate stumps is that it compromises safety for the next block that will be pulled.¹² Tr. 269, 270. He added that if you don’t leave the minimums, a roof fall could come through into the active mining section and down the entry. Tr. 282. In the notes he recorded at the time he wrote: “Likely to cause a very serious accident or fatality if practice continues.” Gx-5.

Inspector Little noted that the miners were taking 3 cuts in all the blocks. Tr. 278, 300. Little learned this in a conversation with a miner, who told him it was hard to take 3 cuts and leave the 6 foot minimum stump. Tr. 279, 311, 339. According to the miner men, a cut will usually range from 14 to 16 feet wide. Tr. 280. Little calculated the size of the block compared to the usual width mined into the block and determined it would be difficult to leave the minimum 6 foot stump. Tr. 279, 280. He testified that by looking back into the pillar line, they had taken 3 cuts, because if there had not been 3 cuts, there would have been bigger stumps evident. Tr. 311. Inspector Little concluded that all of the stumps were deficient as they failed to meet the required 6 foot minimum in the roof control plan. Tr. 282, 284. When asked about a continuous miner rubbing an outby corner and knocking off the corner, Little testified that he did not see where a continuous miner had knocked anything off of a corner. He added that he could see the lines where the miner head had cut into a block and not left the right size of the stumps. Tr. 306, 307. Little pointed out that the presence of paint lines would tell you nothing about the size of the stumps being left; the size can be determined only when the area has been mined. Tr. 276. In his notes, Little documented that General Manager James Slone (“Manager Slone” or “Slone”) arrived on the section and Little invited him to travel the line and observe the cited conditions. Slone declined to observe to size of the stumps complaining he was tired and his back hurt. Gx-5, page 10.

Robert Henry Bellamy (“Graduate Engineer Bellamy” or “Mr. Bellamy”) also testified for the Secretary. Referring to Exhibit Rx-E, he testified that it shows the minimum size of the blocks and the number and width of the cuts or lifts that can be taken out of a block. Tr. 351, 352. The top and bottom remnants of a block have a minimum size and are most important for stability of the mine roof. *Id.* Mr. Bellamy explained this is because you don’t want to take out so much coal that the roof starts falling in on you. Tr. 353. Enough coal is to be left to where the block can be mined, it will remain standing, and miners can get out of the area. Tr. 354. When asked about the possibility of a back block sloughing off, crushing out, or equipment rubbing against it, Mr. Bellamy testified that one foot would not be as much of a concern as a 2, 3, or 4 foot reduction. Tr. 354, 355. However, he also testified that if there were a reduction from 6 foot to 5 foot across an entire section, indicating a practice of not maintaining the minimum amount, this would be a big concern. Tr. 355. As an Inspector, Mr. Bellamy stated he had issued citations, considering that stumps smaller than the plan provides to be a hazard. Tr. 356. He further testified where across a section an entire row of back blocks did not meet the minimum,

¹² “Pulled” is taken to mean “mined”.

this would be citable. Tr. 359. In addition, Mr. Bellamy testified that where you leave the coal is important; you want to leave it next to intersections and at the bottom of the block for support and to keep the roof from riding in on the pillar you are mining. Tr. 377.

Graduate Engineer Bellamy had conversations with Inspector Little and Danny Robinette (“Robinette”) after the citation and order were issued. He became aware that Robinette had gone up the bleeder line¹³ and looked at the pillar line from 2 rows of blocks below where Little had been. Tr. 367, 368. Mr. Bellamy testified that since Robinette had not looked at the same thing as Little, it was not surprising Robinette had said the mine was in compliance. Tr. 369.

James Tackett Jr. (“State Inspector Tackett” or “Tackett”) is an Inspector for the Office of Mine Safety and Licensing for the state of Kentucky. Tr. 234. He testified he was familiar with the No. 28 mine, and was there on October 18th. Tr. 234, 235. On Exhibit Rx-G, he indicated by a circle with a “B” inside in black ink where he was at the breaker line of entries 2 and 3. The pillars he noticed had not been pulled and he was told an order was issued and they had to pull back a line. Tr. 236, 237. Tackett also testified that when backing out, the breaker timber posts all across a row of pillars must be set in place prior to mining. Tr. 247. On the 18th, the entire row where mining was taking place was breakered off. Tr. 237-239. He did not go inby because it was breakered off and it was against the law for anyone to go inby. Tr. 239, 240. He could see the pillars that had not been pulled, but had no way of knowing about the size of the stumps that had been pillared inby the check curtain line.¹⁴ Tr. 240, 241. Although he had been at the mine several days before, on October 15th, he did not record in his notes any observations of residual stumps. Gx-4.

Contestant’s first witness was General Mine Foreman Jody Heath Baldwin (“Foreman Baldwin” or “Baldwin”). He has been a coal miner for 19 years and employed at Mine No. 28 for 5 years. Tr. 34. He has underground mine foreman and MET certifications and has been involved in pillaring for 12 to 14 years. Tr. 34, 35. He accompanied Inspector Little on October 17, 2012 in the retreat mining section. Tr. 36. Referring to page 24 of the Roof Control Plan, Exhibit Rx-E, Baldwin testified that 2 cuts of coal per side were taken out of the blocks on October 17th. Tr. 37, 42, 51. Referring to Exhibit Rx-G, he explained that there were 7 entries and the center entry, number 4, was where mining would begin after the 8 breaker timber posts were set.¹⁵ Tr. 39-41. He testified that each cut from a block is 12 feet wide. Tr. 43. Baldwin further testified the minimum stump is 6 foot, and the mine foreman marks this on the rib and roof for the miner operator. Tr. 45-49. He also testified that when each group of timber posts is set, no one can go past or inby that point. Tr. 50, 51; Ex. Rx-E

Foreman Baldwin testified that on October 17th, the top 2 rows of blocks had been finished and mining was in entry No. 4 of the middle row of blocks.¹⁶ Tr. 53. He and Inspector

¹³ Identified by the double line of large red letter “B”s on Exhibit Rx-G

¹⁴ The check curtain line is illustrated on Exhibit Rx-G by the letter “C” in all entries except entry 4.

¹⁵ The small circles on Exhibit Rx-E represent the timber posts.

¹⁶ The middle row is the third row from the top of exhibit Rx-G.

Little went to entry No. 1 through the check curtain and to the breaker timbers¹⁷ and looked up into the worked out area. At this location Little stated that the stump could possibly be too small.¹⁸ Tr. 56. Baldwin also testified that the distance from where they were standing to the stump was approximately 28 feet. Tr. 57.

From the same location in the number 2 entry, Little again stated to Baldwin that a corner (stump) was too small and informed Baldwin if any more corners looked the same he would write a “d” citation and a “d” order. Baldwin testified he did not think anything was wrong with them. Tr. 58. Again from the same location in entry No. 3 Little told him a corner was too small and in addition to the citations mining would cease and pull back one full row; Baldwin testified he could not tell that the stump was not 6 feet. Tr. 59.

In the number 4, 5, and 6 entries Little stated to Baldwin both corners were too small. Tr. 68, 69. At entry number 7 Baldwin testified he could not judge whether the corner was too small. Little went to the corner and measured it with his tapeline as 5 feet 4 inches or 5 feet 6 inches. Tr. 70, 71. Baldwin then told Little you could see where the corner had been rubbed by the miner, Tr. 97, and that could cause the measurement to be 5 feet. Tr. 101. Baldwin instructed the Section Foreman to pull back one row, pull the belt, and timber the row of pillars off.¹⁹ Tr. 61, 62, 73. In further testimony, Baldwin acknowledged that a minimum of 6 foot must be left on the outby corners of a block. Tr. 88, 96.

Danny Russell Robinette (“Robinette”) retired from coal mining after 44 years and 8 months, having spent 10 years and 3 months with MSHA, for a total of 34 years in the industry. Tr. 121. During that time, he held all positions from equipment operator to management. *Id.* Robinette was also a foreman during that period of time and had experience with pillaring. Tr. 122. His specialty while working with MSHA was roof control. *Id.* In his testimony, he described that his approach to inspecting active retreat mining as not worrying about anything inby the breaker line. Tr. 129, 131. On October 19th, he went to the breaker line, which was the same as the day before. Tr. 132. He did not go to the blocks where Inspector Little had issued the paper. Tr. 129. He testified that from where he was standing he could see the No. 2 block (stump) which looked smaller than 6 feet, but from the distance he could not tell and he was not going through the breaker timbers to go up there and measure it. Tr.134. He gave considerable testimony about rounding and other reductions in corner size due to the operation of machinery. Tr. 137, 139, 142, 150, 151. However, he acknowledged that only one corner of a block is allowed to be rounded. Tr. 153, 154.

James Slone (“Manager Slone” or “Slone”) is the Mine No. 28 Mine Manager. He has held this position for 4 and a half years, and had been a coal miner for 38 years. He also has a mine foreman certification. Tr. 167. Slone recalled on October 17th he was told that the section had been shut down and they were pulling back a row since Inspector Little was going to issue a

¹⁷ This area is illustrated by a large letter “C” and small circles in the entries just outby the mined out area on exhibit Rx-G.

¹⁸ The drawn red circle with the number 2 adjacent on the left side of exhibit Rx-G illustrates the location of this stump in entry number 1.

¹⁹ The new breaker line was then at the top of the row of blocks with the large letter ”F” on exhibit Rx-G.

citation and an order. Tr. 168, 169. The area cited had been mined on the 16th. Tr. 201. He went underground at about 12:00 to 12:30 pm, Tr. 192, to the entry No. 7 breaker posts, where he observed the No. 7 corner to have quite a bit of sloughage off of the rib but he did not see a plan violation. Tr. 170, 171. He then went to entries 6, 5, and 4 and observed no violations of the plan Tr. 170-174. Slone testified that in entries 7, 6 and 5 he could see painted lines on the roof 6 feet inby the imaginary rib line. Tr. 172-174. He met Baldwin and Little at entry 4. Tr. 174. He did not go to entry 3. Inspector Little invited Slone to go back over the area with him, but Slone testified he absolutely did not want to go with Little. Tr. 174, 175.

The next day, October 18th, Manager Slone testified he went back through all seven entries, saw painted marks on the roof, but did not see a violation of the roof control plan. Tr. 180. In his opinion, you cannot see any useful information about a stump from 28 to 34 feet away after pillaring has been completed. Tr. 184. He also testified that he took no notes on the 17th, 18th, or 19th. Tr. 192.

Jackie Lynn Holbrook (“Manager Holbrook” or “Holbrook”) is the General Manager of Operations at Cam Mining, having been involved with Mine 28 for 8 years. Tr. 212. Manager Holbrook has been a coal miner for 27 years and has certifications in surface and underground mining as well as a mine foreman certificate. *Id.* In addition, Holbrook has 27 years of experience in pillaring. Tr. 216. Holbrook testified that on the morning of October 18th, he and Slone went to the breaker timbers of every entry from 1 to 7 and he did not observe any violation. Tr. 214, 215. He also testified that from a 25 to 30 foot distance he could not see well enough to tell anything about a 6-foot corner. Tr. 222. He met James Tackett between entries 5 and 6. Tr. 225. He acknowledged that Tackett’s notes revealed he was one crosscut inby Spad No. 6671. This location, with the initials “JT” in black ink on Rx-G, is behind the new breaker line set the day before.

CONTENTIONS

Cam Mining argues that Citation No. 8273702 incorrectly alleges a violation of 75.220(a)(1) that the approved roof control plan for the 001/003 section was not being followed. Cam further argues that 6 feet of the outby corners of pillars as measured from the starting point where the miner head cuts into the pillar were left as provided in the RCP. Cam asserts that only 2 cuts were taken from each side of a pillar and more coal than anticipated by the RCP was being left. Cam contends that any appearance of a stump less than 6 foot can be caused by the continuous miner and shuttle cars contacting a stump while maneuvering, collapse of the stump under normal roof pressure, or viewing the stump from the breaker line 25 to 26 feet away with only cap lights. Cam also maintains that the Foreman paints a 6 foot mark on the rib prior to mining, but the paint may not be visible after the ripper head cuts into it. Cam supports its arguments by referencing Roof Control Specialist Robinette’s statement to Mine Manager Slone on October 19, 2012 that he did not see a violation.

The Secretary contends that the operator failed to follow the approved RCP on October 16, 2014 by not leaving the minimum 6 foot stumps. The Secretary asserts that each stump in the row of pillars mined on the 16th was readily visible looking inby from the breaker line and each was smaller than required by the RCP. The Secretary argues that a miner admitted to the

Inspector they could not leave the minimum stumps with the cutting plan they were using. The Secretary contends any paint lines would only show where the Foreman intended to cut and not where cuts were actually made, and any residual paint cannot establish compliance with the RCP. The Secretary further argues that the testimony of the Inspector is more credible than that of the mine's witnesses because none of them took notes regarding the stumps and they did not see the stumps as observed by the Inspector since the breaker line on October 18th was one full row of pillars outby where it was at the time of the inspection.

DISCUSSION AND ANALYSIS

Inspector Little and Foreman Baldwin arrived at the area of active mining at about 10:00 to 10:15 AM on October 17, 2012. On that day, compliance with the mine's approved RCP was a part of the regular inspection of retreat mining at Mine No. 28. Little had considerable mining experience, including as a Section Foreman in retreat mining and at least 6 years judging stump sizes. The process he uses to inspect for RCP compliance is to begin at the breaker line of an outside (left or right) entry and then, when travelling across each entry, he goes back to the breaker line of the row of pillars being mined. He moves inby the curtain to look at both the timber post placements and the sizes of the stumps left after the previous row of pillars, just inby, were mined. When standing in the timbers he moves around to look at those residual stumps from different angles.

At entry number 1, only the right pillar had been mined, and Inspector Little observed that the minimum stump had not been left. As he moved from entry to entry, from a distance of about 20 to 24 feet across the crosscut, he observed that the stumps were smaller than required. At the last, number 7 entry, only the left pillar was mined, and with his tapeline Little measured the residual stump as about 5 feet 4 inches to 5 feet 6 inches. Little concluded that none of stumps remaining in the row of mined out pillars met the 6 foot minimum requirement, and the citation issued reflects this finding.

Since roof support had been compromised for the area of active mining, the row of pillars just outby the noncompliant stumps, Inspector Little asked that this row of pillars be breakered off and mining moved back to the second row of pillars outby. This was accomplished in about 2 hours and the citation was terminated at 1235 hours. The new breaker line was now one full row of 60-foot long pillars back or outby from where Little observed the noncompliant stumps. It is important to note that prior to mining the next row of pillars, the breaker line timber posts must be set in place across the entire row. This means that as of the afternoon of October 17th, the new breaker line was two crosscuts and one full pillar length, or about 100 feet, from the stumps observed by Little. It is uncontroverted that no one²⁰ is allowed inby a breaker line²¹.

From the testimony and notes of Inspector Little, the following chart is a summary of the approximate stump sizes he found at each entry.

²⁰ The exception is that a MSHA Inspector may go inby, as Little did to measure the stump at entry 7.

²¹ See Exhibit Gx-3, the RCP, page 21, paragraph 16.

<u>Entry</u>	<u>Left Stump</u>	<u>Right Stump</u>
1	not mined	minimum not left
2	2 feet	42 inches (Lacks 16-18")
3	4 feet	3 feet
4	3 feet	18 inches
5	2 feet	4 feet
6	3 feet	1 feet
7	5 feet	not mined

Gx-5, Tr. 321, 322.

I find the testimony of Inspector Little to be credible. He made careful, direct observations and specific size estimates and documented his findings in his notes. Far from speculation, his conclusions were grounded by judgment based on his underground experience, knowledge and expertise including retreat mining. Further, at entry 7, Little even used his tapeline to confirm that the left stump was too small. What is remarkable about the residual stump sizes, as shown by the chart, is that most of the stumps were *so far reduced in size* that failure to meet the minimum was very obvious. Even the largest stump was measured at less than 6 feet.

From the above discussion it follows that I find credible the determination of Inspector Little that 3 cuts were being taken from each side of each pillar. While this was not a part of the condition or practice described in Citation No. 8273702, Contestant has argued that only 2 cuts were taken out of each side of the pillars, in an effort to show that the minimum 6 foot stumps were left after mining. This argument fails. Little's conversation with a miner that morning when added to his own observations is very revealing. The miner told him it was hard to take 3 cuts and leave the 6-foot minimum stump. The miner also said the cuts taken were 14 to 16 feet wide. Little noted that if there had *not* been 3 cuts, the stumps would have been bigger.

This can easily be understood using only simple calculations. Where the length of a pillar is 60 feet and 3 12-foot cuts are taken leaving 2 3-foot webs, a total of 42 feet of the length of the pillar is accounted for leaving 18 feet or about *9 feet* available for each outby corner stump. But if 3 14 to 16 foot wide cuts are taken, as reported by the miner, the residual stumps would be reduced to 6 feet or less.

Where, as contended, only 2 cuts are taken leaving 1 3-foot web and the cuts are 12 feet wide, only 27 feet of the 60 foot length of the pillar is accounted for leaving 33 feet or about *16 feet* for each outby corner stump. Even using 2 14 to 16-foot wide cuts the residual stumps would still be about *12 to 15 feet* at each corner.

With about 9 or more feet left for each corner stump, a considerable amount of coal is left to account for the "sloughage" and "rounding" so much contended by Contestant. It follows that if less than 6 feet is actually left for a corner stump, more coal is being removed than allowed by the RCP. The consequence is less roof support to protect the miners working just outby in the next row of pillars. Contestant's attempt to show that only 2 cuts were being taken, including the illustration of 2 cuts on Exhibit Rx-G, is simply not believable. Indeed, the miner's report to

Inspector Little of 14 to 16 foot cuts when combined with 3 cuts on each side of a pillar better accounts for the noncompliant remnants actually left, especially with the “sloughage” and “rounding” the Contestant contends occurred.

I find the testimony of Graduate Engineer Bellamy to be credible and supportive of the testimony of Inspector Little. Mr. Bellamy candidly testified that a 1 foot reduction in the size of *one* stump would not be a concern, but also testified that further reduction in that stump size or a reduction of 1 foot in *all* stumps across a row would be a big concern. As an inspector, he had issued these kinds of citations since smaller stumps than allowed would be a hazard. Mr. Bellamy pointed out that the minimum size is important for stability of the mine roof; you don’t want to take out so much coal that the roof falls in. Mr. Bellamy testified that where you leave the coal is important, next to intersections and at the bottom of the block for support.

State Inspector Tackett’s testimony is notable because he was there on October 18th, the day after the breaker line had been moved one row of pillars outby, and from this new breaker line he saw pillars that had not been pulled. The entire row where mining was taking place was breakered off. He did not know anything about the next inby row of pillars. Therefore, he and anyone else in the area on October 18th could not see what Inspector Little observed and cited the day before.

Foreman Baldwin accompanied Inspector Little on October 17th across each entry and was present at the breaker line as Little made his observations. Baldwin was in the best position to rebut the findings of the Inspector. Yet his testimony falls far short. Unlike the detailed estimates of Little, Baldwin only stated that he *did not think anything was wrong with the corners* and he *could not tell or judge if a stump was too small*. He provided no estimate of the dimension of any stump.

Further, Baldwin referred to Exhibit Rx-E, page 24 of the RCP, and testified that only 2 cuts of coal were being taken out of the blocks on October 17th. But the noncompliant stumps were left by the previous mining cycle, the day before. What was happening in active mining at the time of the inspection would not necessarily be the same as the conditions during the prior mining cycle that left the noncompliant stumps. However, during the inspection, Inspector Little walked right by where active mining was just ceased in entry 4, and observed that the stumps there were also too small. Vague and evasive, Baldwin’s testimony is not credible and does nothing to discredit the findings of Inspector Little.

Manager Slone in his testimony attempted to contradict the findings of Inspector Little as well. Slone stated he “felt like what [he] had observed was in compliance.” But Slone went to the area *after* it was shut down, and when invited to accompany Inspector Little across the line and look at what was being cited he claimed the onset of back pain and tiredness and refused the invitation. Gx-5, p. 6. Remarkably, he testified that he absolutely would not go with Inspector Little. This thinly veiled expression of hostility, even in the context of the excuse offered, was perhaps due to mining pulled back a full row and the loss of that revenue²², or perhaps to the discovery by the Inspector that the mine was taking more coal than allowed by the RCP. Looking at only a part of the area on the 17th with the knowledge that citations were going to be

²² Tr. 15, 219.

issued, Slone, who had worked as General Mine Manager for Mine No. 28 for 4 and a half years, would be more likely to fail to perceive any violation of the roof control plan.

Manager Holbrook and Manager Slone went to every entry the next day, October 18th. Both testified they did not observe any violation. Both testified to the effect that from the distance across a crosscut, you cannot see well enough to tell anything useful about a stump. But in his testimony, Holbrook acknowledged he was behind the new breaker line set the day before. Therefore, on October 18th, neither Slone nor Holbrook saw what Inspector Little observed, documented and cited.

It is particularly telling that Slone did not document any of his observations on any day, and did not venture an actual estimate of the size of any stump across the row. His testimony was also vague, essentially stating his opinion that the mine was “in compliance”. The testimony of this witness was so vague and self-serving that I cannot find it to be credible. Holbrook’s testimony is discounted as not relevant to the citation issued.

Robinette’s notes recorded on October 19th do not show anything other than he did not observe a violation. Rx-C. He did not go to the places where Little issued the paper. He was 2 crosscuts and a row of pillars outby the stumps cited by little, a distance of over 100 feet. Graduate Engineer Bellamy testified that since Robinette had not seen the same thing as Little, it was not surprising Robinette had said the mine was in compliance. This comment is made only to show that Contestant’s attempt to support its arguments by referring to Robinette’s statement to Manager Slone on October 19th is misplaced.

The mine is required to mark the coal ribs to indicate the minimum size of the stump not to be mined. Gx-3, page 20, paragraph 3. Slone testified he could see painted lines on the *roof* 6 feet *inby* the rib line. However, the presence of paint on the roof is not controlling; it is the size of the residual stump left after a pillar is mined that is important. This testimony by Slone is remarkable as it tends to eviscerate one of Contestant’s primary arguments (and Slone’s own testimony) that you cannot see anything useful from across a crosscut. Certainly, if a paint mark can be seen from 20 to 25 feet away and estimated to be 6 feet inby the rib line, one would also be able to see and estimate the size of the stump at that same location.

I find that it is entirely possible to estimate, from the breaker line, the size of the residual stumps left after coal pillars are mined. As will be set forth below, it is also *necessary* to perform this task.

From the above it follows, and I specifically find, that there was a violation of 30 C.F.R. 75.220(a)(1).

Order No. 8273703

EVIDENCE

After arriving at the mine on October 17, 2012 Inspector Little checked the record books and found there was a retreat mining section and that no hazards were reported for the 001-0 and

003-0 areas. Gx-5, pp. 2,3. After discovering the violation discussed above, at 1100 hours he issued this Order with the following Condition or Practice:

A perfunctory pre-shift exam was conducted on the 001-0/003-0 super section on 10-17-2012. The hazardous conditions cited in citation 8273702 which were created by not leaving the required size coal stumps to protect miners from falls caused by retreat mining should have been observed by the examiner, reported to the operator, and corrected prior to beginning mining. This citation is evaluated S&S due to the failure of the examiner to recognize and correct the conditions created by faulty pillar recovery. This violation is an unwarrantable failure by the operator to comply with a mandatory standard. This violation is an unwarrantable failure to comply with a mandatory standard.

After a safety meeting, the Order was terminated at 1330 hours.

The section of Title 30 of the regulations cited was §75.360(b)(3).

Gx-2.

Preshift examinations at fixed intervals are governed by 30 CFR §75.360. As relevant to this case:

(a)(1)...a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed...

The specific section of the regulation cited for this Order provides, in pertinent part:

(b) The person conducting the preshift examination shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(11) of this section...at the following locations:

(3) Working sections and areas...if anyone is scheduled to work on the section or in the area during the oncoming shift. The scope of the examination shall include the working places, approaches to worked-out areas...and the examination shall include tests of the roof, face and rib conditions...(emphasis added)

Paragraph (b)(11) links preshift examinations to other regulatory provisions, and subsection (i) requires that preshift examinations include identification of violations of roof control standards:

(11) Preshift examinations shall include examinations to identify violations of the standards listed below:

(i) §§ 75.202(a) and 75.220(a)(1)--roof control...

As set forth above, §75.220(a)(1) requires the mine to follow its approved Roof Control Plan.

Inspector Little had told Foreman Baldwin that the preshift examiner is required to look for hazardous conditions, including violations of the roof control plan. Tr. 286. Little further told Baldwin that the pre-shift examiner was to record hazardous conditions and correct them before mining began. Tr. 286. At the time, there should have been 2 preshift examinations by 2 foremen, 1 on the 16th and the 1 before the current shift started, providing at least 2 shots at finding and correcting the conditions. Tr. 270, 306.

Little testified that when he had conducted preshift examinations on a retreat section, he looked for several things. He usually began by checking the entries that would be pillared in. Tr. 271. He checked the test holes to see if there was any separation above the roof bolts. *Id.* He checked the timbers to ensure they were not broken in the entries that had been breakered up ready to mine. *Id.* He also checked back in the pillar line that had been mined the shift before to see the condition of the roof in that area, and see if timbers were broken. *Id.* Little also indicated that the back breakers on the last center block must be checked to ensure they are all in place, unbroken and in proper numbers with proper spacing. *Id.*

Inspector Little testified a preshift examiner is supposed to look for violations of the RCP, report such violations and take corrective action. Tr. 272. Little stated that when observing the size of stumps from the breakers, people are not in danger since that is where the ventilation check curtains are hung and retrieved. Tr. 272. He noted that when the preshift examiner is in the breakers, not only is a gas test taken, but the ribs, top, timbers and stumps are checked. Little also testified that the time required to make an observation regarding the size and quality of the stumps is five minutes per entry, and that it is real easy to see the stumps just 20 to 25 feet away. Tr. 273, 275. Looking at the corners from the timber line, both he and Baldwin had cap lights, and Baldwin's light was pretty bright. Tr. 305. He pointed out you do not have to enter the worked out area to observe the stumps, and whether the area inby the breakers has the right amount of support has an effect on the active section. Tr. 329, 330.

Inspector Little testified he did not tell anybody they had to go inby the breaker line because no one is allowed beyond the breakers except an Authorized Representative.²³ Tr. 286, 287. He also testified that if the operator hanging a curtain and writing danger on it precluded inspectors from going to the breaker line, any type of violation could be hidden behind that curtain. Tr. 287. Little stated the mine's examiners must look for violations of the approved RCP, and this includes retreat mining. Tr. 331. Little noted the only way you can make sure of compliance with the RCP is to observe an area that has been mined. Tr. 328.

In the notes he recorded regarding this Order, Inspector Little wrote:

Hazardous conditions observed & cited in citation #8273702 should have been observed and corrected prior to the start of production on the 001-0/003-0 MMU's. Conditions were obvious and should have been observed by examiner to be sure pillar plan was being followed.

²³ A MSHA Inspector may be accompanied by a Miner's Representative.

GX-5. In addition to the mined area just inby the breakers, Inspector Little testified he walked right by the number 4 entry where they were pillaring and he could see the stumps were not big enough; he did not need to measure them with his tape. Tr. 294, 295.

Graduate Engineer Bellamy, the roof control and impoundment supervisor for District 6 MSHA, in his testimony supported Inspector Little's conclusions. Mr. Bellamy testified that the roof control plan requires an examiner to check the line of pillars being mined. Tr. 362. Mr. Bellamy stated that in a retreat mining section, a mine examiner should look back thru the breakers to see what is going on just inby. The examiner should determine if the roof is showing signs of being weak, the stumps are starting to crush out, or the timbers are breaking, all before you start mining a new line. The examiner should look at the front stumps. Tr. 361-364. This is in addition to taking air readings and conducting a gas test. Tr. 362.

Foreman Baldwin testified for Respondent that a preshift examiner at the check curtain would check a number of things, but would not look at the stumps in the worked out area to figure out the dimensions. Tr. 80, 81, 110. Robinette responded to leading questions that he had never told an operator a preshift examiner was required to check the corners of a previously mined pillar line, and that he did not worry about anything inby the breaker posts. Tr. 130, 131. Baldwin, Robinette, Slone and Holbrook all testified that the way to check compliance with the RCP is during active mining. Tr. 85, 86, 125, 190, 224. Robinette, Slone and Holbrook all testified to the effect that you cannot tell anything useful about a stump from the breaker line. Tr. 123, 184, 222.

CONTENTIONS

Cam argues no mine examiner should be required to examine and try to determine the size of the stumps left on the outby corners of the previous row of mined pillars. Cam asserts that the Secretary's position is virtually impossible to comply with. Cam contends that if mine examiners are required to go to the breaker line timbers they would be exposed to unnecessary risks and hazards. Cam further argues the order was issued for an area not a part of the preshift examination. Cam maintains there was no hazardous condition.

The Secretary contends the operator failed to conduct an adequate preshift examination of the retreat mining section on October 17, 2012 since all hazards and violations were not recorded in the preshift book. The Secretary maintains that the mine's personnel do go to the breaker line timbers and observe a number of required conditions including the timbers, roof, ribs and air direction. The Secretary argues that neither Inspector Little nor anyone from MSHA has stated that they expect an examiner to go *beyond* the breaker line to evaluate the size of stumps. The Secretary asserts the operator was taking the 3 cuts allowed by the RCP out of the pillars but the remaining outby stumps were less than the required 6 foot minimum. The Secretary further maintains the practice of leaving less than the minimum sized stumps is very dangerous to miners exposing them to the hazard of a roof fall.

DISCUSSION AND ANALYSIS

If, as Contestant argues, the residual stumps along a row of pillars just mined cannot be part of a preshift examination, ongoing violations of the RCP could be effectively hidden from the required process of observation, reporting and correction of hazardous conditions. Even though the RCP specifies the size of each stump to be left, the mine's own examiners, according to Contestant, would not check for compliance. Notwithstanding that the examiners go to the breakers to check air quality and direction, and observe the timbers, roof and ribs, Contestant asserts they could not and should not look across the crosscut to make sure the residual stumps are the correct size and hence adequate for roof support and the safety of miners working just outby.

The controlling regulations are clear that the preshift examination includes identification of violations of roof control plans. Paragraph (b)(11) of §75.360 refers directly to roof control standard §75.220(a)(1), set forth above. The Cam Mine #28 RCP specifies that the outby corners of pillars left after retreat mining, the stumps, must be a minimum of six feet. To comply with §75.360 and the RCP, each examination should and indeed must include a check of the pillars just mined.

Contestant argues that the preshift examiner cannot observe the residual stumps. However, I have already found, above, that it is entirely possible to observe and estimate the size of the stumps from the breaker line across a crosscut. I also find there is virtually no additional danger to the examiner who is already in the area for other observations and tests, and simply checking the stumps would take a minimal amount of additional time.

Contestant's compliance arguments regarding paint marking the six foot dimension before the beginning of a cut by the miner is clearly an incorrect reading of the mine's RCP. The plan specifies "a minimum of 6' will be left on the outby corner of the block". The plain meaning of "will be left" is the amount of coal remaining *after* the block is mined. Contestant's attempts to change the meaning of the requirement through testimony at hearing fail. Where paint marks are placed does not control. It is the required dimensions and hence volume of the residual stumps left to support the roof that is important to the safety of miners.

The remaining compliance argument is essentially that at issue is a worked out area not subject to preshift examination requirements. Contestant identifies the area as "off the section" and worked out" and not a "working section" pursuant to §75.360(b)(3). Contestant points out the rule against going past the last open crosscut to examine a worked out area has not been relaxed.

The regulation includes not only working sections but also approaches to worked-out areas. Also, it is clear that examiners are not required to cross into or enter an area that has been mined and breakered off. Standing at the breaker line does not violate the rule. I find that the act of walking up to the breaker line to perform a number of observations and tests fits comfortably into the phrase "approaches to worked out areas". And, as noted by the Secretary, the roof and timbers located in the intersection beyond the breaker line are checked for hazardous conditions.

Certainly, if the roof and timbers can be checked, so can the readily visible stumps only 20 to 25 feet away.

I find Inspector Little's testimony to be the most credible as he followed the general procedure he uses for all inspections²⁴ and the validity of this was confirmed by the testimony of Graduate Engineer Bellamy. Mr. Bellamy testified that the roof control plan requires an examiner to check the line of pillars being mined. Mr. Bellamy added that the examiner should go up to the pillar line and see what is going on just inby in addition to taking air readings and conducting a gas test. *Id.*

Respondent's witnesses testified that compliance with the RCP should be checked during active mining. But that would be in *addition to*, and not *instead of*, checking the residual stumps. Baldwin testified that as an examiner he would not look at the stumps, and Robinette, Slone and Holbrook testified that you cannot tell anything useful about a stump from the breaker line. None of this testimony is persuasive, nor is Robinette's response to leading questions that he did not worry about anything inby the breaker posts. Robinette also testified that the preshift examiner must only examine a worked out area where miners are going to work and travel. This assertion is an incorrect statement of the law. 30 CFR 75.360(b)(11) requires the preshift examiner to identify violations of the list of standards contained in that subsection, without qualifying that requirement by showing that miners will work and travel in that area. 30 CFR 75.360(b)(11)(i) specifically requires that the preshift examination include identification of violations of roof control standards.


Because the preshift examiner did not examine for hazardous conditions by looking into the area recently mined and checking compliance with the RCP, Contestant violated 30 CFR §75.360(b).

CONCLUSION

For the reasons set forth above, I find the Contestant mine did violate 30 CFR § 75.220(a)(1) and 30 CFR § 75.360(b)(3) and Citation No. 8273702 and Order No. 8273703 were Validly issued to Cam Mining LLC.

ORDER

The valid Citation and Order issued to the Contestant are **AFFIRMED**.


Kenneth R. Andrews
Administrative Law Judge

²⁴ Little's procedure is consistent with MSHA Handbook Number PH 13-V-4, appendix J, which names as *critical* pillar retreat sections, and instructs that inspections should check the dimensions of final stumps among other things. The Handbook section was in effect in October 2012.

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