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MSHA V. KAISER COAL  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
July 13, 1988

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

v. Docket No. WEST 86-225-M

KAISER COAL CORPORATION  
OF SUNNYSIDE

BEFORE: Ford, Chairman; Backley, Doyle, and Lastowka,  
Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"), the issue is whether Commission Administrative Law Judge August F. Cetti erred in finding that Kaiser Coal Corporation of Sunnyside ("Kaiser") violated 30 C.F.R. § 75.205, a mandatory safety standard for underground coal mines that requires "[w]here miners are exposed to danger from falls of ... ribs the operator shall examine and test the ... ribs before any work or machine is started." 1/ 9 FMSHRC 1164 (June 1987) (ALJ). For the reasons that follow, we affirm the judge's finding that Kaiser violated section 75.205.

The essential facts are not in dispute. On March 7, 1986, Jerry Dimick an employee of a mine equipment service company, arrived at Kaiser's Sunnyside No. 1 mine to examine a malfunctioning stage loader. Dimick was accompanied underground by Kaiser's General Longwall Foreman, Duane Wood. Dimick and Wood traveled to the intersection of the 19th Left Longwall Section and Crosscut No. 28, the area where the stage loader was located. Before Dimick started

to inspect the stage loader,

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1/ 30 C.F.R. § 75.205 restates section 302(f) of the Mine Act, 30 U.S.C. § 862(f), and provides:

Where miners are exposed to danger from falls of roof, face, and ribs the operator shall examine and test the roof, face, and ribs before any work or machine is started, and as frequently thereafter as may be necessary to insure safety. When dangerous conditions are found, they shall be corrected immediately.

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Wood visually examined the ribs at the worksite for signs of instability or hazardous conditions, but he did not perform any physical test of the ribs to verify their condition. Wood then proceeded beyond the stage loader and away from Dimick.

In order to examine the stage loader, Dimick knelt between the rib and the equipment, with his back to the rib. While Dimick was looking at the stage loader from this position, two of Kaiser's section foremen, Gary Kuhns and Darrell Leonard, walked by Dimick. Kuhns testified that because of the position of the stage loader, he had to walk between Dimick and the rib to get by Dimick, and that there was no more than two feet of space between Dimick and the rib. Tr. 91. Both Kuhns and Leonard visually examined but did not physically test the rib as they continued down the entry. While Dimick was kneeling between the rib and the stage loader, a portion of the rib -- approximately six by four by two feet in size -- detached and fell on him. Dimick died that evening from injuries received in the accident.

Inspectors from the Department of Labor's Mine Safety and Health Administration ("MSHA") arrived at the mine at about 6:00 p.m. on March 7, 1986, to conduct an investigation into the circumstances surrounding the accident. Upon completion of the investigation on March 10, 1986, an MSHA inspector issued to Kaiser a citation pursuant to section 104(a) of the Act. 2/ The citation alleged a significant and substantial violation of section 75.205 and stated:

A test of the rib condition was not conducted after a visual examination was made for crosscut No. 28 and inby to the longwall face of the 19th Left longwall section. A service representative was performing an examination of a piece of equipment [sic] that was not operating properly. This person was required to place himself in close proximity to the lower rib. The untested rib fell striking the victim and causing fatal injuries.

The citation was abated on March 10, 1986, after all underground employees at the mine were given hazard training on roof and rib control.

Before the judge, Kaiser argued that it had complied with the requirements of the standard by conducting a visual examination of the

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2/ Section 104(a), 30 U.S.C. § 814(a), provides in pertinent part:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this [Act] has violated this [Act], or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this [Act], he shall, with reasonable promptness, issue a citation to the operator....

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rib. Kaiser asserted that, because of the particular rib conditions at the mine, testing of the ribs would be ineffective in detecting flawed ribs that might fall or could even create or enhance the possibility of such falls. Kaiser argued that it was not required under the standard to test the ribs in such circumstances. The judge rejected these arguments, holding that the standard unambiguously requires both visual examination and testing of ribs. He further held that in view of the conditions under which Dimick had to work, he was exposed to a danger of a rib fall and that Kaiser was therefore required by the standard to test the ribs. The judge also found that the violation was of a significant and substantial nature, and he assessed the civil penalty amount of \$1,000 for the violation. 3/ 9 FMSHRC at 1176-78. We conclude that substantial evidence supports the judge's finding of a violation of section 75.205.

There is no dispute that the Sunnyside No. 1 mine has a history of unstable ribs. Witnesses for the Secretary and Kaiser agreed that because of this Kaiser's miners and MSHA's inspectors have made it a practice to walk in the center of the entries in order to position themselves as far from the ribs as possible. At the scene of the fatal accident, the travelway between the stage loader and the rib was approximately seven and one-half feet wide, as contrasted with the normal entry width of nineteen and one-half feet. Exhibit 2. In order to work on the malfunctioning stage loader, Dimick had to position himself two feet from the rib, on his knees and with his back to the rib -- a position which left him vulnerable to rib falls from behind. In addition, the inspector testified without dispute that approximately fifteen minutes before the accident, the longwall shearing machine had cut coal in the vicinity of the stage loader and that the shearing process generally causes the ribs to loosen. Tr. 36-37, 104. We agree with the judge that under these circumstances, Dimick was exposed to a danger of a rib fall and that under the standard it was incumbent upon Kaiser to test as well as to examine the ribs before work on the stage loader commenced. In failing to test the ribs, Kaiser violated section 75.205. If Kaiser believes that there may be instances where the testing of the ribs at the mine will diminish safety, we agree with the judge that the remedy lies in petitioning the Secretary for modification of section 75.205 pursuant to section 101(c) of the Act, 30 U.S.C. § 811(c). 9 FMSHRC at 1176-77. See Penn Allegh Coal Co., Inc., 3 FMSHRC 1392, 1398 (June 1981).

Finally, Kaiser asserts that the section 104(a) citation was issued because there had been a fatality, rather than because the

inspector believed that there had been a violation of section 75.205. Kaiser argues that, as a result, the citation is invalid and should be vacated. We have reviewed Kaiser's contention and find it to be without merit. Section 104(a) provides that an inspector shall issue a citation "[i]f ... [he] ... believes that an operator of a ... mine ... has violated ... any mandatory health or safety standard." See n.2, supra. Our review of the evidence establishes that the section 104(a) citation

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3/ Review of the significant and substantial finding or of the penalty amount assessed has not been sought.

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was issued because the MSHA inspector believed a violation of a mandatory safety standard occurred. See Tr. 42-45. We find that the section 104(a) citation was based on the inspector's belief that, in failing to test the rib, Kaiser had violated section 75.205. That this relief had its genesis in the investigation of a fatal accident at the mine does not undermine the validity of the section 104(a) citation.

The decision of the administrative law judge is affirmed. 4/  
James A. Lastowka, Commissioner

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4/ Commissioner Nelson did not participate in the consideration of or Decision on the merits of this case.

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