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MSHA V. BETHENERGY MINES
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
August 25, 1989
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
v. Docket Nos. PENN 87-94
PENN 87-200-R
BETHENERGY MINES, INC. PENN 87-201-R
PENN 88-38

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners
DECISION
BY THE COMMISSION:
This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (the "Mine Act"), and involves three alleged violations of 30 C.F.R. □75.1704, the mandatory escapeways standard for underground coal mines. 1/ The issue is whether the cited areas are "working sections"

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1/ Section 75.1704 essentially restates section 317(f)(1) of the Mine Act, 30 U.S.C. • 877(f)(1), and provides:
Except as provided in •75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of
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within the meaning of the standard and, thus, subject to the requirements of section 75.1704.
Commission Administrative Law Judge Roy J. Maurer concluded that the subject areas were not "working sections" and vacated the two citations and the order of withdrawal containing the violations and dismissed the

associated civil penalty proceeding. 10 FMSHRC 224 (February 1988) (ALJ). We granted the Secretary of Labor's petition for discretionary review and heard oral argument. For the reasons that follow, we affirm the judge.

I.

The facts underlying the cited conditions in this matter are essentially uncontroverted.

Docket No. PENN 87-94

Several weeks before October 7, 1986, BethEnergy Mines, Inc. officials began rehabilitating the 1 Right Section in the Mine 84 Complex ("Complex") and assigned workers there, on an intermittent basis, to ready the section for resumption of coal production, which had ceased ten months earlier in December 1985. On October 7, 1986, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Lloyd Smith, conducted a regular quarterly inspection of the Livingston Portal area of the Complex. Before he proceeded underground, the inspector was advised by a company official that a crew had been sent into the 1 Right Section. There were several things that needed to be done on that section before coal production could begin, including clean-up work.

Upon arriving at the section, Smith observed the crew, as well as a mechanic and several construction workers. A continuous mining machine, a roof bolting machine, a shuttle car, an air pump, and a belt conveyor were present in the area. A load center was also present but it was not yet operable. Because the load center was not operable, there was no power in the 1 Right Section. In addition, the belt conveyor was inoperable because there was no hopper at the end of the belt to receive coal from the shuttle car. Because of various difficulties, coal production on the section was not actually resumed until December 1986.

Inspector Smith reviewed the section map and travelled the No. 2 and No. 3 entries, the routes identified on the map as the designated

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the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency. (Emphasis added.)

~1447

intake air and alternate escapeways. Smith discovered that the escapeways were obstructed by two seven-foot high metal overcasts with no means for traversing them. 2/ Smith, believing the 1 Right Section to be a "working section" requiring two travelable escapeways "maintained to insure passage at all times of any person," concluded that the obstructed escapeways

violated section 75.1704, and he cited BethEnergy for a violation of the standard. Subsequently, BethEnergy abated the violation by installing steps with handrails at each overcast.

Docket No. PENN 87-200-R

Some nine months later, on July 27, 1987, MSHA Inspector William Brown conducted an inspection of the same general area of the Complex. This inspection took place at the end of a month long mine shutdown. Prior to travelling underground, Brown was advised by a union safety committeeman that a roof fall had occurred in the designated intake air escapeway for the 53 Parallel Section of the Complex and that miners were working in the section. The roof fall blocked the escapeway at the No. 74 stopping. Inspector Brown went to an area where three miners were grading non-combustible material from the bottom to permit a mantrip to extend into the Complex's new A-Left Section. Two masons were constructing an overcast nearby. Because the mine was at the end of its shutdown status, no coal production was underway, although coal had been mined there previous to the shutdown and further coal production was planned after the shutdown ended. (In fact, production resumed in the A-Left Section approximately eight days later.) The inspector believed that the area where the miners were working was a "working section," and he concluded that the obstructed intake escapeway violated section 75.1704. Therefore, he cited BethEnergy for violating the standard.

Docket No. PENN 87-201-R

After leaving the 53 Parallel area, Inspector Brown proceeded to the 3 Right Longwall Section, which was serviced by the same intake air escapeway as the 53 Parallel section. Arriving there, Inspector Brown determined that miners were installing roof supports and preparing the section for longwall mining. However, coal production was not yet possible because only one half of the roof support shields were installed at the face, the headgate drive and the shear, used for cutting coal, were not at the face (they were in BethEnergy's shops), and, although the pan line was installed, the conveyor was not connected to the mining equipment. In fact, coal production did not commence on the 3 Right longwall section until some eight days after the inspection. Believing the longwall section to also be a "working section" and because the designated intake air escapeway for the section was impassable, the inspector cited BethEnergy for another violation of

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2/ An overcast is defined as an "enclosed airway to permit one air current to pass over another one without interruption." Bureau of Mines, U.S. Dep't of Interior, Dictionary of Mining, Mineral, and Related Terms 780 (1986).

section 75.1704.

II.

After a hearing in Docket No. PENN 87-94 and in Docket Nos. PENN 87-200-R and PENN 87-201-R, Judge Maurer issued his decision holding that in each instance the Secretary failed to prove a violation of section 75.1704. Because section 75.1704 requires escapeways to be provided from each "working section," the judge and the parties agreed that existence of the three alleged violations turned in each instance upon whether the cited area was a "working section" within the meaning of the standard. The judge initiated his analysis of this issue by referring to 30 C.F.R. •75.2(g)(3), the regulatory definition of "working section." 3/ The judge noted that the definition of "working section" depends in turn upon the definition of "working face," which is defined in the regulations and the Mine Act as "any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle." 30 C.F.R. •75.2(g)(1); 30 U.S.C.•878(g)(1). Because the term "mining cycle," as used in the definition of "working face," is not defined in the Mine Act or the Secretary's regulations, the judge considered definitions of the term offered by the witnesses and agreed with those that defined the term "mining cycle" as meaning those mining operations most immediately connected with the extraction of coal--supporting the roof, cutting and loading the coal, and transporting the coal out of the mine. 10 FMSHRC at 230-32. The judge rejected BethEnergy's argument that actual coal extraction must have commenced in order for a working face or a working section to exist. However, noting that "in order to have a working section one must have a working face," the judge stated that the "term is closely related to actual or at least imminent coal production at the face, i.e., roof bolting, cutting, loading and/or transporting coal out of the mine." 10 FMSHRC at 232.

In analyzing whether each of the cited areas had the capability for imminent production, the judge utilized the test proffered by the Secretary's witnesses John DeMichiei, MSHA District Manager, and MSHA Inspector Lloyd Smith that the operator must at least have assembled the equipment that it needs to produce coal. 4/ 10 FMSHRC at 231-32, 233, 237. Regarding Docket No. PENN 87-94, the judge found that on October 7, 1986, in the 1 Right Section, although much of the mining equipment necessary to produce coal was present on the section, not all

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3/ 30 C.F..R •75.2(g)(3), which restates section 318(g)(3) of the Mine Act, 30 U.S.C. •878(g)(3), defines "working section" as follows:

"Working section" means all areas of the coal mine from the loading point of the section to and including the working faces.

4/ At the time that he testified, DeMichiei was an MSHA Subdistrict Manager. Subsequently, he was promoted to District Manager.

of the necessary equipment was present or operable. Specifically, he found

that there was no bin or hopper at the end of the conveyor belt enabling the shuttle car to unload coal onto the belt. He further found that the load center that would provide power to the mining equipment was inoperable. 10 FMSHRC at 228. In addition, he found that permissibility checks had to be done on the equipment, ventilation had to be adjusted, waterlines established, and rock dusting completed. Id. He also noted that BethEnergy did not actually produce coal in the section until December 1986, some two months after it was cited for the violation. He concluded, therefore, that at the time of citation on October 7, 1986, coal production in the section was not actual, imminent, or even contemplated. 10 FMSHRC at 232. The judge concluded that the 1 Right Section on that date had no working face or loading point and, therefore, that the Secretary had failed to prove a violation of section 75.1704. 10 FMSHRC at 232-33.

Regarding Docket No. PENN 87-200-R, the judge noted that while the Secretary referred to the alleged violation as having occurred in the 53 Parallel Section, BethEnergy referred to the same area as the A-Left Section. The judge held that the nomenclature of the area did not matter, and that the important factors were whether a working face and a load point were present in the area thus qualifying it as a working section. 10 FMSHRC at 234. The judge found that the A-Left faces were "working faces." He also found that there was a loading point that would be used for removing coal from the A-Left faces during production. 10 FMSHRC at 235-36. He concluded, however, that because the miners working in the area of the grading job were working outby this loading point, and the definition of "working section" only encompasses areas from the face to the loading point, they were not working in an area that could be termed a "working section" and, therefore, escapeways were not required. 10 FMSHRC at 235-36.

In Docket No. PENN 87-201-R, the judge reiterated that the term working face "implies at least imminent capability of coal production from that face," and noted the Secretary's concession that at the time of the alleged violation BethEnergy did not have assembled the equipment necessary to produce coal in the 3 Right Longwall Section. 10 FMSHRC at 237. The judge held, therefore, that the Secretary failed to prove a violation of section 75.1704.

III.

On review, the Secretary argues that the judge erred in defining the term "working section" by placing an unduly restrictive definition upon the term "mining cycle." The Secretary contends that the judge's conclusion that "mining cycle activity ... is limited to 'roof bolting, cutting, loading and/or transporting coal out of the mine,'... is error." PDR 7. The Secretary also argues that the judge failed to accord the Secretary's interpretation of section 75.1704 due deference. In addition, the Secretary argues that the judge's holding in Docket No. PENN 87-200-R, that no violation of section 75.1704 occurred because the miners were working

outby the working section, improperly focuses upon the location of the miners rather than the existence of the working section.

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BethEnergy responds that the judge properly interpreted the meaning of "working section" in holding that an area of a mine does not become a "working section" for the purpose of section 75.1704 until the equipment necessary to produce coal is present in the area and production is imminent. BethEnergy contests the Secretary's claim to deference by pointing to conflicting testimony by the Secretary's witnesses as to the appropriate definition of "mining cycle" and as to when a working section comes into existence. BethEnergy also asserts that substantial evidence supports the judge's finding in Docket No. PENN 87-200-R that the area cited by the inspector at the grading job was not a working section.

IV.

All underground mines have routes of ingress and egress that can be used in emergencies whether or not the miners using them are located in working sections. These routes must be shown on a map posted where all miners can acquaint themselves with them. 30 C.F.R. •75.1704-2(d). In addition, practice drills must be conducted so that each miner is familiar with the evacuation system. 30 C.F.R. •75.1704(e). As counsel for the Secretary acknowledged at oral argument, even though the escapeways at issue here were unavailable for use by miners, other routes were available. Oral Arg. Tr. at 17. However, the presence of these various evacuation routes does not relieve an operator from the duty to comply with section 75.1704, i.e., to provide two designated escapeways from each working section of a mine.

Section 75.1704 provides in pertinent part that "at least two separate and distinct travelable passageways ... shall be provided from each working section...." The term "working section" first appears in conjunction with a federal mining escapeways standard in section 6.g. of the 1953 Federal Mine Safety Code for Bituminous Coal and Lignite Mines of the United States, issued by the Bureau of Mines, United States Department of the Interior. Earlier federal mining laws and regulations used the terms "active sections" and "active face areas" to denominate areas of the mine now generally encompassed within the definition of "working section" set forth in section 75.2(g)(3). See, e.g., Federal Coal Mine Safety Act Amendments of 1952, Pub. L. No. 82-552, 66 Stat. 692 (1952).

"Working section" was accorded its present statutory definition in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. • 801, 878(g)(3) (1976)("Coal Act"). The Senate Subcommittee report stated that the Bureau of Mines provided the definition to Congress and advised that the term was one "commonly understood in the coal mining industry." S. Rep. No. 411, 91st Cong. 1st Sess. 86, reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 91st Cong. 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act

of 1969, at 212 (1975). The Coal Act's definition of working section was also promulgated by the Secretary of the Interior as part of the Coal Act's mandatory safety standards. 30 C.F.R. •75.2(g)(3). Subsequently, the definition was carried over into the Mine Act, 30 U.S.C. •878(g)(3), and remains part of the Secretary's mandatory safety standards for underground coal mines. 30 C.F.R.
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□75.2(8)(3)
A search of the legislative histories of the various mine safety statutes, mine safety regulations, and the Secretary's published interpretations of the regulations reveals no further elucidation of this "commonly understood" term prior to the inception of the controversy now before us.
Notwithstanding the "common understanding" of the meaning of the term and the fact that it has been a part of the federal mine escapeway requirements for over 35 years, the judge in this proceeding was presented with no less than four distinct constructions of "working section," and three of these were propounded by MSHA personnel. MSHA witnesses Smith and DeMichiei testified that a working section comes into existence when the section contains a loading point and mining equipment integral to the coal extraction process, and that actual coal extraction is not required. Contradicting Smith and DeMichiei were the Secretary s other witnesses, former MSHA District Manager Don Huntley and Inspector Brown. Huntley testified that in his view section 75.1704 is applicable when the "first event" that facilitates extraction of coal from an area takes place, however minor that event may be. According to Huntley, the "first event" may not necessarily involve roof bolting, cutting or loading, or the movement of equipment necessary for these operations into the cited area; rather, it may include ancillary activity outby the loading point, such as belt or track installation that will ultimately facilitate the extraction of coal. Huntley stated that his definition could be interpreted to include all areas of the mine. Tr. III at 469. MSHA Inspector Brown asserted that the standard applies once a potential working section is delineated; i.e., by identifying a particular face and its attendant loading point as discrete geographical locations regardless of whether equipment has been moved into the area. On the other hand, BethEnergy's witness Mine Superintendent Thomas Mucho testified that a "working section exists for purposes of section 75.1704 only when actual coal extraction has commenced in an area of a mine containing a working face and a loading point. From BethEnergy s point of view, two escapeways need not be established until the operator starts his equipment and commences mining.
In view of the divergent "definitions" of "working section" offered at the hearing by the Secretary:s witnesses, we cannot conclude that the further refined interpretation of this term urged by counsel for the Secretary on review--that "working section" be defined broadly to encompass

areas of the mine between the working face and loading point where the work of preparing, maintaining, or disassembling the section is occurring, regardless of whether coal is being produced or the necessary equipment is present (Sec. Br. at 11, 21; Oral Arg. Tr. at 6) -- is a longstanding or consistent departmental interpretation justifying the deference that the Secretary claims is merited here. See, e.g., 1.N.S. v. Cardozo-Fonseca, 480 U.S. 421 (1987); American Mining Congress v. EPA, 824 F.2d 1177, 1182 (D.C. Cir. 1987).

Indeed, we note that on January 27, 1988, after this matter had been briefed to the judge, the Secretary published a proposed revision

~1452

of the escapeways standard. 53 Fed. Reg. 2704-05 (1988). The revision retains the existing requirement that at least two travelable passageways in each mine be designated and maintained as escapeways from each working section. In connection with this proposed revision, MSHA has set forth, apparently for the first time, a written interpretation of when the requirements of section 75.1704 become applicable. In a Notice of Public Hearings on the proposed revisions the following appears in Section D.:

"As under the existing provisions. MSHA intends that the proposal would apply not only to areas where coal is being produced, but to all areas where miners are working underground." 53 Fed. Reg. 16873 (emphasis added). This interpretation of the purported broad reach of the existing escapeway provision was, however, disavowed by counsel for the Secretary at oral argument before us. Oral Arg. Tr. at 10-12, 51. Furthermore, at a public hearing on the proposed standard on June 6, 1988, the following MSHA position was stated:

> MSHA wishes to clarify its position with respect to the proposed requirement on escapeways which would retain from the existing rules that two escapeways be provided to each working section. MSHA believes that the existing rule and the proposal would require escapeways to be maintained during the installation and removal of mining equipment as well as during the actual production and extraction phase.
>
> MSHA intends to clarify the final rule to remove any possible ambiguity with this proposed provision. That is, any ambiguity that the escapeway would not have to be maintained during the process of getting the equipment ready for production.

Submission of counsel for Secretary to Commission, Document 3 (March 17, 1989) (emphasis added). These statements highlight, in our view, the Secretary's failure to articulate a consistent departmental position regarding the circumstances under which the requirements of section 75.1704 apply.

Given these varying interpretations offered by MSHA, an operator

could claim with some force that it had no notice of the standard of conduct expected of it by MSHA under the regulation. Indeed, the chronology of events in this proceeding starkly reflects the result of MSHA's equivocal approach to enforcement. The first alleged violation was cited in October 1986, and an evidentiary hearing on the violation was held before the second and third citations were issued in July 1987. District Manager DeMichiei testified at that first hearing regarding the requirements of section 75.1704. When the subsequent violations were being cited, BethEnergy officials argued to the inspector that in determining whether the requirements of section 75.1704 were applicable to the involved area of the mine, they had relied upon the criteria for compliance as testified to by DeMichiei at the previous hearing. Subsequently, at the hearing on the second and third cited violations, the Secretary's witnesses either disavowed or distinguished DeMichiei's criteria. In fact, MSHA witness Huntley testified that he could

~1453

understand how BethEnergy officials, relying on DeMichiei's testimony, could reasonably have concluded that escapeways were not necessary until there was "adequate equipment on the section." Tr. III at 461.

We believe that the above progression vividly illustrates the difficulties BethEnergy faced in attempting to comply with section 75.1704. BethEnergy cannot lightly be presumed to be aware of what the standard required when the Secretary's own witnesses were so uncertain and in such wide disagreement as to the meaning of "working section." See Jim Walter Resources, 9 FMSHRC 903, 908 (May 1987).

Given the absence of any consistent Secretarial interpretation of the meaning of the standard meriting deference, the standard must be interpreted in a reasonable manner, giving effect to its wording and intended safety purpose. As the judge essentially found, all relevant factors pertaining to the status of the cited area of a mine must be considered. In general, the record suggests that the following broad factors are chief among those bearing on whether an area of a mine is a "working section": the hazards associated with the work being done in the area (hazards); the geographical components of the area (location); the physical components of the area and their functional readiness (capability); and the development of the area with respect to actual production (timeliness).

For example, the hazards associated with the work being done in the area include the increased dangers associated with the ongoing activities in a section. As acknowledged by counsel for the Secretary at oral argument, the activities associated with reasonably imminent coal production introduce increased hazards to the particular area of the mine where production takes place. Oral Arg. Tr. at 12. It is the presence of the increased hazards to miners attendant to actual or reasonably close coal production that form a pragmatic basis for the

two escapeways requirement of section 75.1704. It is then that methane is more likely to be released in larger quantities during extraction of coal at the face. Also at this time, there may be an increase in the generation of suspended coal dust, an increase in the possibility of sparking, and an increased possibility of exposure to unsupported roof. The geographical components of a working section, as delineated in section 75.2(g)(3), are the existence of an identifiable face from which coal is or will be extracted, as well as a section loading point. The physical components of an area and their functional readiness relate to the presence of those mechanical mining components integral to the method of extraction contemplated in the identified location. In this regard, the presence of a functioning power center, a functional loading point connected to the mine's main haulage system, and necessary roof support equipment (such as shields where longwall mining is involved) are appropriate indicators of a section s capability. On the other hand, the location of equipment that merely has to be trammed into position--such as a continuous mining machine, roof bolter or shuttle car--is not necessarily dispositive of the "capability" of a section to extract coal. Timeliness is linked to capability and refers to the imminence of production. We agree with the judge that while actual production is not necessary, the term "working section" is inextricably linked to the term "working face" and that term, we conclude, implies coal production that is reasonably close in time. Once production is

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reasonably close, mechanical and electrical problems that temporarily interrupt the otherwise established capability of a section to produce coal do not relieve the operator from compliance with the mandates of section 75.1704. Other relevant factors also include the status of the mine's operations at the time of the alleged violation and any evidence as to the operator's plan for establishing unobstructed escapeways prior to the start of production activities. See Oral Arg. Tr. at 23-24.

V.

Weighing the facts presented in these proceedings in light of such factors, we conclude that substantial evidence supports the judge's finding in each instance that BethEnergy did not violate section 75.1704. We note generally that the mine, or in the case of the first citation, the area of the mine where the alleged violation occurred, was in a state of shutdown at the time of each citation and BethEnergy was maintaining and readying the area for future coal production. Also, there is no evidence that BethEnergy would have begun coal production with the escapeways remaining in their obstructed state. Counsel for the Secretary admitted as much in oral argument before us. Oral Arg. Tr. at 24.

Specifically, the violation alleged in Docket No. PENN 87-94 concerned the 1 Right Section. In this section, there existed identified faces from which coal was to be extracted, as well as a loading point.

However, the loading point was not functional because the hopper or bin needed to permit unloading of coal from shuttle cars had yet to be constructed and the power center was inoperable. Further, as the judge noted, mining was not resumed until December 1986. Thus, there is ample support in the record for a finding that at the time of citation the section was not capable of coal extraction and that production was not reasonably close in time. Moreover, setting up the belt, conducting permissibility examinations, and moving equipment--operations underway when the inspector issued his order--are not the type of mining activities generally associated with the increased hazards of the traditional mining cycle-- roof bolting, cutting, loading and/or transporting coal out of the mine.

The violation alleged in Docket No. PENN 87-200-R covered an area where miners were grading the entry and two miners were working nearby on overcasts. The judge concluded that the miners were not physically located in an area that could properly be denominated a "working section" for purposes of section 75.1704. He determined that although the A-Left Section had an identifiable face and a loading point, the miners referred to by the inspector in the citation were outby the physical limits of the A-Left Section.

We agree with the Secretary that the judge erred in focusing solely on the location of the maintenance crew in determining whether escapeways were required in the A-left section at the time of citation. As discussed above, the proper focus must be on an assessment of all the relevant factors bearing on whether an area of the mine is a working section. Nevertheless, we conclude that substantial evidence supports the finding that the A-left was not then a working section. In addition

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to the fact that the only work being performed in the area was maintenance work during the mine shutdown, the A-left was not capable of coal production because, as part of the maintenance work, the 53 belt conveyor, necessary for removing coal from the section, was disassembled. Tr. III at 485-86, 490. In fact coal was not produced in the A-left until a week after the citation was issued. Id. at 508.

The violation alleged in Docket No. PENN 87-201-R occurred in the 3 Right Longwall Section. The inspector determined that six miners were installing temporary roof supports (shields) and connecting hoses to prepare the section for longwall mining. Tr. 345-46. It is undisputed that only half of the shields were installed at the face, that the headgate drive and shear were in BethEnergy's shops, and that, although the pan line was installed, the conveyor was not connected to any of the mining equipment. Tr. 348-50, 379-81, 517-18. Indeed, the installation of the longwall was not completed and production did not commence on the section until approximately one week after the violation was cited. Therefore, the section was not capable of coal production nor was production reasonably

close in time on the 3 Right Longwall section when the violation was cited. Thus, the section was not, as of that date, a working section requiring compliance with the requirements of section 75.1704.
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VI.
We thus conclude that the judge's findings that the requirements of section 75.1704 were not applicable to the cited three areas of the Complex are supported by substantial evidence. Accordingly, we affirm the judge's decision.
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