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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

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

Civil Penalty Proceeding

Docket No. VINC 79-52-P  
A.C. No. 11-01008-03004

v.

PEABODY COAL COMPANY,  
RESPONDENT

AND

PEABODY COAL COMPANY,  
APPLICANT

Applications for Review

Docket No. VINC 78-389  
Citation No. 269304 May 16, 1978

v.

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

Docket No. VINC 78-390  
Citation No. 269305 May 16, 1978

Docket No. VINC 78-391  
Citation No. 269306 May 16, 1978

Baldwin No. 1 Mine

DECISION

Appearances: Leo J. McGinn, Esq., MSHA Trials Branch, Office of the  
Solicitor, U.S. Department of Labor, for MSHA  
Thomas F. Linn, Esq., Peabody Coal Company, St. Louis,  
Missouri, for Respondent/Applicant

Before: Administrative Law Judge Michels

The above-captioned cases consist of three applications for review filed June 2, 1978, by the Peabody Coal Company (Peabody) pursuant to section 105(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. 815(a), and a civil penalty proceeding concerning the same three citations filed November 8, 1978, pursuant to section 110(a) of the Act, 30 U.S.C. 820(a). These four proceedings were consolidated at the hearing (Tr. 10). They concern the issuance by Inspector Jack J. Eddy of three citations on May 16, 1978, charging a violation of 30 CFR 75.1700 for allegedly permitting in

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three instances an oil well hole to be drilled through the mine coalbed in active workings and for the maintaining of a barrier of less than 300 feet in diameter around those wells without the approval of the Secretary.

In each application for review, Peabody (1) denies that the circumstances justified the issuance of a citation under section 104(a) of the Act; (2) alleges that the actions of the inspector were arbitrary and capricious, without authority in fact or law, and exceeded his authority; and (3) asserts that the length of the abatement time was unreasonable, arbitrary, capricious, and not justified. In its answer, MSHA (1) admits the issuance of the citations; (2) denies the allegations otherwise; (3) asserts that the time to abate as extended was reasonable; and (4) alleges as an affirmative defense in the review cases that each of the citations has been abated and terminated and that the Act does not provide for review in these circumstances.(FOOTNOTE 1)

The petition for assessment of civil penalties was filed November 8, 1978, charging violations of 30 CFR 75.1700 in the three cited instances of a drilled oil hole and asking penalty of \$840 for each, or a total of \$2,520. Peabody answered with a general denial.

A hearing was held in St. Louis, Missouri, on March 7, 1979, at which both parties appeared through counsel. The parties have filed posthearing briefs and proposed findings and conclusions. Such of these as are not adopted herein or specifically rejected are hereby rejected as immaterial or not supported by the evidence.

#### Issues and General Conclusions

The general issues are:

- A. Has Peabody violated 30 CFR 75.1700 as charged?

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B. Were the citations issued with reasonable promptness?

C. If Peabody violated the mandatory standard, what should be the penalty assessed based on the criteria set forth in section 110(i) of the Act?(FOOTNOTE 2)

More specific issues are (a) whether 30 CFR 75.1700 governs the drilling of an oil or gas well through a section of a mine which has been worked out, although still an active part of the mine; and (b) whether MSHA acted arbitrarily and capriciously in requiring the building of extensive cribbing.

This decision holds that 30 CFR 75.1700 was violated by Peabody only because of its failure to notify the Secretary of the existence of the oil or gas wells after they had been located and that the section was not otherwise violated. This decision further holds that MSHA acted arbitrarily and capriciously in requiring the building of cribs. A nominal penalty is assessed.

#### Findings of Fact

Peabody Coal Company is the operator of the Baldwin No. 1 Mine which is a slope mine with 11 active sections. The size of the coal seam at the mine varies from 6-1/2 to 7 feet. Approximately 500 men are employed and the daily production is around 12,500 tons (Tr. 17-18).

Inspector Jack J. Eddy made a visit to the Baldwin No. 1 Mine on May 12, 1978, because he had been informed by his supervisor that oil wells were drilled through the active part of the mine. He asked Mr. Gary Craig, Peabody's assistant safety manager, for the location of these wells. Both went underground and attempted to determine the location of the wells from mine managers Jones and Laughland and two engineers. These persons did not seem to know the locations and Mr. Randall Dempsey, chief engineer, was called (Tr. 20-22). Mr. Dempsey was able to locate the wells and he apparently provided the engineers with a map showing their locations (Tr. 41).

After acquiring transportation, the engineers took the inspector to the well locations. One of the wells was identified as an oil well on the rib of the coal, but the other locations were not so identified. In each case, the wells were encased in blocks or pillars of coal of various sizes and the locations of the wells

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could not be determined visually (Tr. 26-27). The wells were located generally in the centers of the coal pillars (Tr. 51; R-8, R-9, R-10).(FOOTNOTE 3) The distances from the well to the nearest opening were as follows for the respective wells: Patton No. 1, approximately 25 feet; Stevenson No. 1, approximately 20 feet; and Hoffman No. 2, approximately 25 feet (Tr. 128). These were "active workings" even though the mining operation had advanced beyond the wells (Tr. 26-27, 61).(FOOTNOTE 4) There was no plan for retreat mining in this area (Tr. 38).

The existence and location of these wells had not been reported to MSHA by Peabody, but MSHA learned this information through other sources (Tr. 20). Peabody officials did not believe the regulation, 30 CFR 75.1700, related to these wells which were in a mined-out area (Tr. 104, 122).

The first well is identified as Stevenson No. 1 and it is located between the No. 6 and the No. 5 Main East entries in the intake aircourse. This well is 2,093 feet deep and passes the coal seam at 286 feet based on a surface elevation of 471 feet. The hole which passes through the coal seam is 7-7/8 inches in diameter. Stevenson No. 1 is located within a pillar of coal near the end of a long rectangle which measures 40 by 380 feet. This was the only barrier around the well. Drilling the well began on February 6, 1978, and was completed on February 12, 1978 (Tr. 29-30; G-12, R-1, R-9). This well has been plugged (Tr. 47).

The next well upon which a citation was issued is identified as Patton No. 1. It is 2,141 feet deep and is located between the third and fourth Main East entries. A 7-7/8-diameter pipe passes through the coal seam at 342 feet based on a surface elevation of 470 feet. The coal pillar through which the well is drilled measures 64 by 54 feet. This well is located approximately in the center of that pillar. Patton No. 1 was started June 6, 1977, and was completed June 12, 1977 (Tr. 31-32; R-8, G-14, R-1).

The final of the three wells is identified as Hoffman No. 2, a dry well which is located between the No. 10 and No. 11 East Main entries. This well is 2,098 feet deep and it passes the coal seam at 332 feet based on a surface elevation of 480 feet. The size of the well hole through the coal seam is 7-7/8 inches in diameter. This well is drilled approximately through the center of the coal

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pillar which measures 54 by 52 feet. Hoffman No. 2 was started April 21, 1978, and finished on April 25, 1978 (Tr. 32; R-10, G-13, R-1).

The inspector visited the Baldwin No. 1 Mine and determined the location of the oil wells on May 12, 1978, but he did not issue his citations until May 16 (Tr. 62). Inspector Eddy considered this to be an unusual situation and so before issuing citations, he consulted with the district and subdistrict managers who ultimately made the determination on the abatement procedures to be required. This was done before the citations were issued (Tr. 65). The decision by the MSHA managers that there was a violation included the procedure which would be required for abatement. The decision to issue the citations was not made by the inspector but by others in the district or subdistrict offices (Tr. 65). Inspector Eddy's supervisor, who had not inspected or seen the wells, told him to issue the citations (Tr. 55-56).

On May 17, MSHA made and communicated to Peabody its determination that cribbing would be required for abatement (Tr. 56). The conditions were thereafter abated by the construction of cribs pursuant to Peabody's plan approved by the MSHA district manager (Tr. 36). These cribs consisted of fire-resistant ties built box-like with the ties interlaced one on top of the other at the ends leaving spaces between them. The ties were wedged against the top (Tr. 37). The cribs or cribbing boxes are themselves separated. The plan drawn up for the cribbing is R-4 (Tr. 95). This plan provides: for Stevenson No. 1, 21 cribs and 714 ties surrounding one end of the coal pillar; Patton No. 1, 38 cribs and 1,292 ties completely surrounding the coal pillar; and Hoffman No. 2, 40 cribs and 1,280 ties completely surrounding the coal pillar.

The man-hours involved in building the cribs are shown on R-5 as totaling 511 hours. The total cost for the material, hauling and man-hours was \$21,000 (Tr. 110).

The purpose of the cribs was not to hold up the roof, but to prevent or diminish subsidence which might cause a rupture of the oil pipe (Tr. 38, 64). A rupture of the piping or casing could turn loose explosive gases creating a fire hazard in the view of the inspector (Tr. 39). Nevertheless, generally cribs used to support top are put near the center of the entry or crosscut (Tr. 57). Furthermore, the subsidence in this mine was normal and not very substantial (Tr. 109).

Subsidence was described by Mr. Eddy, the inspector, as a "squeezing, shifting of the earth" (Tr. 39). Witness William Jones, chief mine manager for Peabody, described subsidence in the following words:

I use the word "squeeze." That's where your top comes down to meet the bottom and that happens because you have, several things can cause it. You could have an area that is overworked out, in other words, your extraction is greater than it should be, your bottoms would be soft and you would have very good top in the area. And that good top, if you had pressure and you opened your cavity would be a larger cavity than what the bottom would support, it pushes the pillars down into the bottom or the fire clay which closes up that area. This, I think, is what they're referring to as the subsidence.

(Tr. 115). The pressure is mainly from the top downward though it could be riding to the side (Tr. 116).(FOOTNOTE 5)

Inspector Eddy, although he testified the subsidence at the Baldwin No. 1 Mine could cause a rupture of the oil well piping, had no special qualifications on the subject of oil well drilling and the special problems this may create in a mine. The inspector had been a coal miner for about 30 years prior to joining MSHA and he has been an inspector for about 9 years. As a coal miner, he had engaged in all practical coal mining and he also had been a foreman and mine manager for approximately 25 years (Tr. 16-17). Nevertheless, Mr. Eddy conceded that these oil wells created an unusual situation, one that he had never run into before (Tr. 65). He could not state whether, if subsidence occurred, the cribbing would or would not protect the oil well (Tr. 52).

Gary Craig, Peabody's assistant safety manager, who also did not appear to have any special qualifications in the field of oil well drilling, expressed the view that cribbing was a waste of time and money (Tr. 109). He testified that since the abatement he has examined the cribs and they have taken no more weight than is normal as the mine progresses and that is not a significant amount (Tr. 109). MSHA adduced no evidence contrary to such testimony about weight.

Randall Dempsey, area engineer for Peabody, supervises all mapping and plotting of the mine and supervises all permits issued for the mine. He has worked for Peabody for 9 years, has a B.S. degree in civil engineering from the University of Missouri and he has a registered professional engineer's license issued by the State of

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Illinois (Tr. 117-119). Mr. Dempsey testified that subsidence could happen and that in some cases it might be severe enough to take safety precautions, although not necessarily barriers (Tr. 137). In his view, the barrier provided by the coal pillars, in the case of the oil wells here in issue, was sufficient protection (Tr. 138).

There was no evidence around the three wells of any oil, water or gas seepage. Also, there was no methane (Tr. 50, 107, 140).

Peabody has no direct control over the drilling of oil or gas wells through its Baldwin No. 1 Mine coal seam. The evidence is sketchy, but it appears that Peabody either owns or leases the underground coal and other persons own the oil or gas resources and have a right of access to such resources (Tr. 68, 135). The driller is not required to obtain a permit from the mine owner to drill, but management at the Baldwin No. 1 Mine, when aware the drilling is to take place, requires the driller to operate where it will not be hazardous to the mine. Ordinarily, the driller informs State authorities, who, in turn, advise the driller to contact the operator of the affected mine. It is possible that drilling could take place without the knowledge of the operator unless the actual drilling is heard inside the mine. In the instances of the oil wells in issue, Peabody had advance notification of the drilling (Tr. 133, 135-136). Mr. Dempsey was aware of the drilling and he imparted this information on two of the wells to the supervisor of the mine, but he could not recall whether he had advised the supervisor about the third well (Tr. 133).

Peabody, when it locates an oil or gas well while advance mining, notifies MSHA of that fact and seeks a permit if it intends to mine within a 300-foot diameter around the well. One such permit is R-6. In that instance, MSHA granted a permit to extract coal within a 300-foot diameter subject to certain stated conditions, including one that the barrier would be no less than required by State laws. The pillar of coal containing the oil well in that situation was 110 by 100 feet and the well was in one corner of the pillar 30 feet from each of the two nearest openings or edges (Tr. 119-120, 129). There have been many permits of this nature issued to Peabody, but the minimum distance involved from the edge of the pillar to the well was 30 feet. A number of permits were in the 30- to 50-foot range (Tr. 141).

#### Discussion of Facts and Law

The inspector in these citations charged a violation of 30 CFR 75.1700 for each oil well drilled, stating, in substance, that the

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barrier was less than 300 feet in diameter and that there had been no approval given by MSHA for the smaller barrier.<sup>6</sup> The cited regulation, 30 CFR 75.1700, which is identical to section 317(a) of the Act, requires (1) that the operator take measures to locate an oil or gas well penetrating its mine, and (2) that when located, the operator shall establish and maintain barriers around such oil and gas wells in accordance with the State laws and regulations, except that such barriers shall not be less than 300 feet in diameter subject to exceptions for lesser or greater barriers depending upon the circumstances. (FOOTNOTE 7)

A contention of Peabody is that the citations were not issued with reasonable promptness as required by section 105(a) of the Act and, thus, that no violation of the regulation occurred. The conditions, as shown by the evidence, were observed by the inspector on May 12, 1978, and the citations were not issued until 4 days later on May 16. The 12th was a Friday, so the 13th and the 14th were non-business days. Thus, the time of the investigation and the time of the issuance of the citations were separated by 1 business day. Normally, a citation is issued on the same day the condition alleged to be a violation is found. In this instance, however, the inspector was not certain either that the conditions were violations, or if violations, what corrective action should be recommended. He consulted with his superiors because of the unusual nature of the

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matter and ultimately the district and subdistrict managers determined the course of action which the inspector was to take. It does not appear to me to be inappropriate that the inspector would consult his superiors in these circumstances. The consultation took a little extra time; thus, the delay of 2 business days does not seem unreasonable. This is particularly so where there is no showing that such delay was in any way prejudicial to Peabody. Accordingly, I reject this contention of Peabody and hold that the citations were issued with reasonable promptness.

The principal argument made by Peabody is that 30 CFR 75.1700 does not cover wells drilled after an area has been mined. Peabody argued during the hearing that the regulation covers only the discovery of a well already in existence as mining progresses. It based this argument on asserted differences in the two situations. Peabody contended that mining into a new area where a well is located presents a special hazard because pressures may have been built up which will burst out suddenly if the well casing is ruptured. On the other hand, it maintained that where wells are drilled in a mined-through area and are maintained and producing, there is no pressure and the hazard is not that which 30 CFR 75.1700 was intended to cover. Peabody, in its posthearing brief, takes essentially the same position, but stresses more the fact that MSHA itself was not sure about the way to handle this matter. Peabody also contends in its brief that cribbing was not a proper barrier.

MSHA argues that the requirement is for a 300-foot barrier around any oil or gas well in active workings whether it is before or after the area is mined. MSHA contends that the danger is the same in either case.

The statutory provision and the regulation, 30 CFR 75.1700, as noted above, are one and the same. In my view, there is no ambiguity in this section of the Act. It requires the operator to establish and maintain appropriate barriers wherever and whenever oil or gas wells are located. Nevertheless, a review of the legislative background may be useful in giving a context to this provision of the law.

The requirement for barriers around gas or oil wells was originated by Congress in the Federal Coal Mine Health and Safety Act of 1969. This was section 317(a) of the 1969 Act and it became mandatory safety standard 30 CFR 75.1700. This provision was not changed by the 1977 Act; hence, the background and history under the 1969 Act is relevant.

The Senate Report for the 1969 Act in its section-by-section analysis explains the reason for the section:

Numerous inundations of gas into coal mines have been caused by cutting into or approaching too near gas wells. The sudden introduction of oil or gas into coal mines presents hazards that are difficult to handle. All possible precautions should be exercised to safeguard against penetrating oil and gas wells by the operators.

Leg. Hist., Federal Coal Mine Health and Safety Act of 1969 (Comm. Print, 1970), pp. 83-84. I have found no other comments in the 1969 Act's Legislative History particularly useful in interpreting this section of the Act; however, see pages 869 and 1136, Legislative History, supra.

Congress, in requiring the operator to establish and maintain "barriers" around located gas and oil wells, did not indicate the kind of barrier it intended and there is little to suggest the exact purpose of the barrier other than for the brief explanation quoted above.

A "barrier," as defined in Webster's Third International Dictionary (1966), is "a material object or set of objects that separates, keeps apart, demarcates, or serves as a unit or barricade." In the mining industry, the term appears to have a more specific meaning. A Dictionary of Mining, Mineral and Related Terms (Department of the Interior, 1968), defines the term as follows:

barrier. a.) Blocks of coal left between the workings of different mine owners and within those of a particular mine for safety and the reduction of operational costs. It helps to prevent disasters of inundation by water, of explosions, or fire involving an adjacent mine or another part of a mine and to prevent water running from one mine to another or from one section to another of the same mine. Mason, v. 1, p. 312. See also barrier pillar. b.) A low ridge by wave of action near the shore. Fay.

The same dictionary defines a related term thusly:

barrier pillar. a.) A solid block or rib of coal, etc., left unworked between two collieries or mines for security against accidents arising from an influx of water. Zern. b.) Any large pillar entirely or relatively unbroken by roadways or airways that is left around a property to protect it against water and squeezes from adjacent property, or to protect the latter property in a similar manner. Zern. c.) Incorrectly used for a similar pillar left to protect a roadway or airway, or a group of roadways or airways, or a panel of rooms from a squeeze. Zern.

Based on these definitions, a "barrier" ordinarily would consist of a coal pillar or a rib of coal and the purpose is not only

to keep fluids and gases out of the mine, but also to prevent "squeezes," that is, the squeezing down of the top, at least from adjacent property. As a historical matter, it appears that the use of the coal pillar was originally developed by the petroleum and natural gas industry to prevent subsidence due to mining from rupturing or dislocating a well bore. *Quarto Mining Company*, Docket No. M 77-48 (Initial Decision, Judge Michels) (December 5, 1977), p. 3.

The term "barrier", as used in the statute, would, I believe, generally define a coal pillar, and its principal purpose, as referred to in the legislative history quoted above, would be to safeguard against penetrating oil and gas wells by operators. Nevertheless, there is nothing in the statute or the legislative history limiting the type of barrier to be used or its purpose so long as it relates to protection against hazards from wells. The Act and the regulation require simply that measures are to be taken to locate wells--there being no implication that such must be in existence when the coal is mined--and that appropriate barriers be established and maintained when a well is located. The oil wells in issue in this proceeding now exist; thus, the required measures to locate and to provide for appropriate barriers must be taken. These particular wells were located when the drillers made known to Peabody the fact that the oil wells were to be drilled and where they were to be located.

As indicated, ordinarily the barrier to be established and maintained would be the coal barrier, but when that no longer exists or only partially exists, other kinds of barriers made from other materials may have to be used. It is significant that the Act and the regulation, when referring to "barriers," or to a "barrier," in no place limits these to coal barriers; thus, they can be made of other substances. The use of barriers may be required to protect against subsidence if there is a risk that such a condition would rupture the wells and release gases or liquids. The regulation is clearly broad enough to protect the miners from hazards of such a rupture as well as ruptures from accidental cutting in the mining process.

The courts have consistently held that the 1969 Act, because it is safety or remedial legislation, should be broadly construed. The same construction would be applicable to the 1977 Act. In *District #6, UMWA v. Interior Board of Mine Operations Appeals*, 562 F.2d 1260, 1265 (D.C. Cir. 1976), the court stated: "Should a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise to safety, the first should be preferred." See also *St. Mary's Sewer Pipe Company v. Director of U.S. Bureau of Mines*, 262 F.2d 378 (3rd Cir. 1959); *Phillips v. Interior Board of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974); *UMWA v. Kleppe*, 532 F.2d 1403 (D.C. Cir. 1976); *Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals*, 504 F.2d 741 (7th Cir. 1974). If the statutory provision reflected in 30 CFR 75.1700 is not interpreted to include

wells drilled in mined-out areas, there would appear to be no practical way in which MSHA could take measures in appropriate instances to protect miners against the potential hazards of such well bores. The condition found by the inspector in this case did not constitute imminent danger and so, unless there is a violation, he would be powerless to correct the condition, though it is determined to be a safety hazard. Therefore, it appears especially important to construe the Act so as to implement the remedial purpose in this particular section.

Under 30 CFR 75.1700, after the wells have been located--in this case after notification to Peabody by the drillers--the second sentence of the regulation becomes operative. Therein, the Secretary or his authorized representative is empowered to permit or require lesser or greater barriers. It necessarily follows and is implied from the language of the Act, particularly where the minimum of 300 feet in diameter will not be provided, that the Secretary must be notified of such fact.

In these instances, in each case the coal pillar or barrier through which the well was drilled is significantly smaller than 300 feet in diameter. Consequently, it was necessary for Peabody to inform the Secretary and to obtain the necessary authorization. Such a notification is designed to give and would give the Secretary an opportunity to investigate or to otherwise make a determination if the lesser barrier is adequate. If it is found not adequate, then MSHA determines the size and type of any substitute barrier. Based on the evidence and the reasonable implications therefrom, I find that no notification was given to MSHA by Peabody as to the existence and location of the three oil wells.

The violations of 30 CFR 75.1700 as to the oil wells here in issue were, in my view, solely the failure to notify the Secretary and not the failure to take other action such as the construction of additional barriers. The facts show that Peabody had no control over whether a well would be drilled into the Baldwin No. 1 Mine, although it apparently could exercise some influence over the exact location of the well. Because Peabody could not prevent the drilling and because it had already mined the coal which would have constituted a 300-foot coal barrier, it can hardly be held liable for the failure to establish and maintain such a coal barrier. It can, however, be held for the failure to maintain a substitute barrier if that should thereafter be determined as necessary.

Thus, I find that Peabody as to each of the oil wells, violated 30 CFR 75.1700 as alleged because of its failure to notify the Secretary or his authorized representative that such wells had been located.

The primary challenge in these cases, however, is directed toward the requirements which MSHA imposed upon Peabody as an abatement measure. Peabody, as the statement of facts fully outline, was required to build cribs around each of the pillars at a cost to it of \$21,000. The position of Peabody, in effect, is that all of this cribbing was unnecessary and of little or no value.

As I found above, under 30 CFR 75.1700 the operator is obliged to notify MSHA that it has located oil or gas wells even if they are drilled after the area has been mined out. Further, it seems clear to me that under 30 CFR 75.1700, MSHA, after such notification, is obliged to make a determination of the adequacy of the existing barriers, which may be based upon an investigation. Thereafter, MSHA must advise the operator of the measures it must take, if any, to adequately protect the miners against potential hazards. While MSHA seems to have made that determination in this case it has, on the other hand, charged Peabody with violations of failures to have proper barriers prior to the making of the determination. In its posthearing brief, MSHA makes clear its view that the lack of a sufficient barrier constitutes the violation (MSHA Brief, pp. 2 and 3).

In the instances of these oil wells, the barriers of coal which were respectively 40 by 380 feet, 74 by 54 feet and 54 by 52 feet, all were obviously less than the 300 feet in diameter minimum required by the regulation regardless of where the wells were located within the pillars. In my view, the proviso reading "or unless the Secretary or his authorized representative requires a greater barrier where the depth of the mine, other geologic conditions, or other factors warrant such a greater barrier" is applicable to the conditions found. The "greater barrier" means in the instance of advance mining, a barrier of coal exceeding 300 feet in diameter, but in instances such as these oil wells where the coal has been partly removed before the drilling, it means one that exceeds the existing diameter or measurement.

Thus, as to the wells involved, MSHA should have made an initial or preliminary determination based on the depth of the mine, other geologic conditions and other factors as to the corrective action, if any, needed for the safety of the miners. Thereafter, if MSHA found that some additional barriers were necessary, its proper course of action would be to direct Peabody to erect such barriers and to fix a reasonable time for their completion. There would be no violation unless Peabody failed to comply within the time fixed and if it did fail it could be cited for a violation of 30 CFR 75.1700 even though the original lack of barriers is not a violation. MSHA did not so enforce the regulation, but found violations for the initial absence of barriers.

While MSHA did not follow the procedures outlined above, it did make a determination that additional barriers were needed and it is

my view that any such determination is reviewable. This is not an abatement procedure; rather, it concerns an initial determination by MSHA that barriers are needed based upon the depth of the mine, other geologic conditions or other factors. I will proceed hereafter to consider whether MSHA has shown on this record justification for its determination that greater pillars are needed.

The only evidence in support of the additional barriers was the testimony of the inspector and as disclosed in the findings of fact, the inspector was not an expert in this field. The inspector had never been faced with a situation similar to this and considered it sufficiently unusual to go to his superiors for a determination as to what action to take. The inspector did not know whether the corrective action taken would prevent rupturing of the pipes.

Furthermore, the inspector who had investigated the matter did not make the determination that cribs were necessary. The decision was made by Mr. Eddy's superiors, apparently including the subdistrict manager. The person or persons who made the decision are not identified in this record. There is no indication whatsoever that this person or persons had any firsthand knowledge of the Baldwin No. 1 Mine. The supervisor who told Mr. Eddy to issue the citations did not inspect the mine and had not viewed the conditions for which the citations were issued (Tr. 55-56).

On the other hand, Peabody's witnesses both testified to the effect that the use of the cribs was unnecessary and a waste of effort. These witnesses had viewed the scene and were fully familiar with conditions at the mine. Peabody's Randall Dempsey, a licensed engineer, has the best technical background of the three witnesses. While Mr. Dempsey conceded that in some instances it might be necessary to take safety precautions where an oil well is drilled through a small pillar, it was his opinion that the coal pillars existing as to each of the wells in issue were sufficient.

The Baldwin No. 1 Mine has been given permits many times for mining closer to wells than the mandated 150 feet and many of the permits were in the range of 30 to 50 feet. No evidence was adduced to show that the circumstances as to the wells in issue were markedly different from the other cases in which permits were granted or that the somewhat lesser distances involved were significant.

While it was revealed that the Baldwin No. 1 Mine had some subsidence, the evidence establishes that this is a normal condition. There is no evidence that the degree of subsidence was in any way unusual or that it was significant so far as the oil wells are concerned. No methane was detected and there was no evidence of any gas or oil leaks. In particular, there was no evidence that the extensive cribbing, while possibly preventing some subsidence, would be effective against an oil pipe rupture. The evidence is mostly to the contrary, that is, that the

cribbing would be ineffective.

Furthermore, because this is a mined-through area, there seems to be little or no danger of an accidental rupturing of an oil well and a sudden release of gas under pressure which may be occasioned by such a rupture. This is because the coal has already been mined in the area. No retreat mining is planned, but if it should take place, the locations of the wells are known and thus this particular danger would not be presented.

There are other circumstances bearing on the matter. The testimony indicates that there is no pressure on the wells which are active and pumping oil. The oil can be obtained only by pumping. Also, one of the wells, Stevenson No. 1, was securely plugged below the coal seam with cement. As to this particular well, the possibility of a gas leak would appear to be extremely remote, if not entirely eliminated. There is no evidence that a rupture in this case would present any potential hazard. MSHA's brief makes no claim of a significant hazard stating only that "the possibility of subsidence cannot be ruled out, and the reality of potential danger associated with the presence of oil or gas wells in underground workings was not entirely eliminated" (MSHA Brief, p. 4).

I find on the basis of the evidence of record that MSHA has failed to show that the cribs were necessary considering the depth of the mine, geologic conditions and other factors and that in the circumstances its action requiring that they be built was arbitrary and capricious.(FOOTNOTE 8)

In summary, Peabody violated 30 CFR 75.1700 by its failure to notify the Secretary or his authorized representative of the existence of the three oil wells. It did not violate the regulation by its failure to provide the cribbing which was ordered or required as a corrective measure. The question of erecting the cribs is now moot as they are already in place, but I further hold that MSHA did not prove the necessity for the building of such cribs and that its actions in the circumstances were arbitrary and capricious. MSHA in its posthearing brief seems to come close to admitting that the crib requirement was excessive, stating "It is possible that in this

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case, a lesser barrier would have been determined as adequate, but this decision rests not with the Operator but with the Secretary or his authorized representative %y(3)5C" (MSHA Brief, p. 3).

#### Assessment of Civil Penalties

Having found that Peabody has violated 30 CFR 75.1700, it is necessary to make specific findings on the statutory criteria set forth in section 110(i) of the Act for the purpose of assessing an appropriate penalty.

Peabody is a large company. There is no evidence that the penalties to be assessed herein will have an effect on the operator's ability to continue in business. The history of prior violations is shown by Government Exhibit No. G-10. This history will be taken into account although no prior violation of 30 CFR 75.1700 is shown. The testimony indicates that Peabody otherwise has complied with this regulation. Insofar as the building of the cribs is concerned, it appears that Peabody made good faith efforts to achieve rapid compliance (Tr. 66).

The inspector testified that the violations in this case were serious because of the potential hazards from the possible rupturing of gas or oil pipes. However, it is clear that the inspector was addressing himself to the failure to provide the larger barriers, a condition which has not been found to be a violation. The only violation found here was the failure to notify the Secretary of the existence of the wells and such a failure to notify could be serious. However, in this proceeding it appears that any danger resulting from such failure was remote. I therefore find the violations to be only slightly serious.

Finally to be considered is the matter of negligence. Peabody adduced evidence that it had always notified the Secretary in instances where it had located wells on advance mining. In these instances, it did not notify the Secretary because it believed that it was not required by the law to do so. While Peabody should have known the requirements of the law and the regulations, in this case because of the unusual circumstances, I find that it is liable only for slight negligence.

Considering the above and also the good faith difference of view over the application of the regulation to the particular condition shown, I believe that only a nominal penalty is warranted. Accordingly, Peabody is assessed \$25 for each of the three violations, or a total of \$75.

#### Conclusions

1. The Baldwin No. 1 Mine owned by Peabody Coal Company is subject to the Federal Mine Safety and Health Act of 1977.

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2. The Administrative Law Judge has jurisdiction in this matter.

3. The Applications for Review should be denied and those proceedings dismissed.

4. Peabody Coal Company violated 30 CFR 75.1700 as found herein and should be and is assessed a penalty of \$75.

ORDER

It is ORDERED that the applications for review are hereby DENIED and the proceedings for review are DISMISSED.

It is FURTHER ORDERED that Peabody Coal Company pay the penalties assessed herein in Docket No. VINC 79-52-P in the sum of \$75 within 30 days of the date of service of this decision upon it.

Franklin P. Michels  
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE ONE

1. MSHA also moved to dismiss the applications on June 15, 1978, asserting the same reasons stated in its affirmative defense and citing various authorities including Judge Richard Steffey's initial decision in Itmann Coal Company v. Secretary of Labor, HOPE 78-356 (May 26, 1978). The motion was denied by my order of August 22, 1978, but the hearing was delayed pending the filing of the prospective penalty case. The penalty case seeking assessment of civil penalties for the three citations upon which review was sought was filed November 8, 1978, and is included herein as Docket No. VINC 79-52-P.

The Commission's recent decision in Energy Fuels Corporation, DENV 78-410 (May 1, 1979), addresses this issue. Under that holding, I believe it is clear that the operator, in the circumstances shown, is entitled to a review of the citations.

~FOOTNOTE TWO

2. The issue of reasonableness of time for abatement was presented in the applications but was not raised during the hearing or in the posthearing briefs. Thus, the allegation as to abatement time is not considered as an issue.

~FOOTNOTE THREE

3. Peabody's exhibits are identified with a capital "R" and a number; MSHA's with a "G" and a number.

~FOOTNOTE FOUR

4. Peabody has not disputed in its posthearing brief that the well bores were in "active workings", that is, a place in a coal mine where miners are normally required to work or travel. See 30 CFR 75.2(g)(4).

~FOOTNOTE\_FIVE

5. "Subsidence" is defined in the Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior (1968), as follows:

"Subsidence. (a). A sinking down of a part of the earth's crust. Fay. (b). The lowering of the strata, including the surface, due to underground excavations. See also maximum subsidence. Nelson. (c). Surface caving or distortion due to effects of collapse of deep workings. Pryor, 3."

~FOOTNOTE\_SIX

6. The condition or practice described is the same in each of the three citations except for the locations and size of the pillars. That in Citation No. 269306 reads as follows:

"The operator permitted an oil well drill hole to be drilled through the mine coal bed in active workings in a pillar approximately 380 feet by 40 feet between the No. 5 east and No. 6 east Main entries. This was at the survey station No. 209á54. The Mine Safety and Health Administration did not give approval nor were they aware of the drilling taking place. The barrier was less than 300 feet in diameter."

~FOOTNOTE\_SEVEN

7. The regulation, 30 CFR 75.1700, in full text reads as follows:

"Oil and gas wells. Each operator of a coal mine shall take reasonable measures to locate oil and gas wells penetrating coalbeds or any underground area of a coal mine. When located, such operator shall establish and maintain barriers around such oil and gas wells in accordance with State laws and regulations, except that such barriers shall not be less than 300 feet in diameter, unless the Secretary or his authorized representative permits a lesser barrier consistent with the applicable State laws and regulations where such lesser barrier will be adequate to protect against hazards from such wells to the miners in such mine, or unless the Secretary or his authorized representative requires a greater barrier where the depth of the mine, other geologic conditions, or other factors warrant such a greater barrier."

~FOOTNOTE\_EIGHT

8. It should be stressed that this finding is based upon the evidence which the parties have presented. I have little doubt that the MSHA officials proceeded with good motives. Nevertheless, if MSHA had valid reasons for ordering the cribs, it failed to reveal them on the record. It may be that MSHA believes it is not required to justify such action and thus did not develop the evidence. If so, it cannot prevail because as I have held above, MSHA has the burden to prove the need for the corrective action it orders under this regulation.