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SOL (MSHA) V. AMHERST COAL  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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

v.

AMHERST COAL COMPANY,  
RESPONDENT

Civil Penalty Proceeding

Docket No. WEVA 81-355

A. C. No. 46-01364-03026V

Amherst No. 4H Mine

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor, U. S.  
Department of Labor, Philadelphia, Pennsylvania, for  
Petitioner  
Edward I. Eiland, Esq., Eiland & Bennett, Logan,  
West Virginia, for Respondent

Before: Judge Lasher

A hearing on the merits was held in Charleston, West Virginia, on May 11, 1982, at which both parties were represented by counsel. After consideration of the evidence submitted by both parties and proposed findings and conclusions proffered by counsel during closing argument, a decision was entered on the record. This bench decision appears below as it appears in the official transcript aside from minor corrections.

This proceeding was initiated by the filing of a petition for assessment of civil penalty against the Respondent by the Secretary of Labor on May 12, 1981, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C., Section 820(a).

The Secretary seeks a penalty of \$1,000 for the violation alleged to have occurred in citation number 912359, dated September 18, 1980, which was issued by the duly authorized representative of the Secretary (hereinafter "Inspector") and which charged Respondent as follows:

"The approved roof control plan in Road 218 was not being complied with (sic). The TRS system was not being maintained in proper working condition in that in  
Number 4

heading crosscut left working face, the TRS supports were not placed firmly against the roof before the roof bolter operators proceeded in by permanent supports."

In notes contained after description of the condition or practice on the face of the citation, the Inspector added, "You could see over top of the TRS when it was extended at full length," and also, "Area of equipment: the roof bolter was removed from service." The citation which was issued at 1800 hours was terminated at 1830 hours on the same date, in reference to which the issuing Inspector, Earnest E. Mooney, Jr., noted: "The RCP was discussed with the section crew and roof jacks were set as required, and the plan was being complied with."

The Secretary contends that the alleged violation is a transgression of 30 C.F.R. 75.200. The Respondent generally contends that because of the specific language of the roof control plan, no violation occurred. Their arguments will be more specifically discussed subsequently herein. Based upon my consideration of all the testimony, having observed the demeanor of the witnesses and having considered the weight which differing views of the evidence should be accorded, I find that the reliable probative evidence submitted during the formal hearing herein preponderates in the following manner.

(1) On September 18, 1980, Inspector Mooney, while conducting a triple A inspection of Respondent's 4-H Mine and while being accompanied by Respondent's evening shift foreman, Robert Mitchem, approached a crosscut where roof bolting was being conducted in Road 218 by two roof bolter operators, Lee Brown and Ernie Adkins. Brown and Adkins were installing roof bolts with the use of a Lee-Norris TD-2 roof bolting machine as depicted on Exhibit 10 (Respondent's Exhibit 1), and which has on each side safety arms which are extendable to at least 72 inches.

(2) The Respondent's roof control plan (portions of which have been placed in the record as Petitioner's Exhibit G-2) provides specific safety precautions for roof bolting machines with approved automatic supports. Page 6 of this plan provides:

"The (ATS) and (TRS) system maintained in proper working condition is acceptable support during roof-bolting operations, provided that:

"(a) The controls necessary to position and set the automated supports are located in such a manner that they will be operated from under permanent support.

"(b) Such supports are placed firmly against the roof before the roof bolt operator proceeds inby permanent supports.

"(c) The sequence of installing supports and bolts, as shown on the drawing, is followed. The distance from automated supports to the rib shall not exceed five feet unless additional support is installed to reduce the distance.

"(d) The manner in which the automated support system is otherwise employed is consistent with the approved roof control plan.

Temporary supports in accordance with an approved plan shall be installed prior to bolting when the automated support system is inoperative or does not make firm contact with the roof." (FOOTNOTE 1)

(3) At approximately 1800 hours on September 18, 1980, Inspector Mooney walked up to the roof bolting machine in question, sometimes referred to as a "Top Dog" machine and "double headed roof bolter," and observed that the roof bolters were going around to the left of the crosscut in question. Inspector Mooney observed that the first cut had recently been made and that a normal phenomenon was ensuing, i.e., that the roof was "working" or "falling down."

(4) The Inspector observed that one of the roof bolters was working under a canopy-which is attached to the safety arm (or boom) which in turn is attached to the roof bolting machine-which was not firmly set against the roof. Inspector Mooney asked Foreman Mitchem if he observed the same condition and, if so, what he was going to do about it. Mitchem told the operator of the machine to shut it off, after which the machine was taken out of service.

(5) The canopy (or ring) under which Roof Bolter Ernie Adkins was working, at the time observed by the Inspector, was not placed firmly against the roof under which Adkins was working. Adkins was thus four feet beyond (inby) permanent supports.

(6) After the continuous miner had made its first cut into the crosscut in question, Brown and Adkins cut or drilled and installed two rows of roof bolts (pins) and were in the process of installing a third row of roof bolts when the Inspector arrived on the scene. The first row, consisting of of one bolt, and the second row, consisting of two bolts, were both installed by Mr. Brown who was working on the left-hand side of the roof bolting machine under the canopy attached to the top of the safety arm on the left-hand side of the machine. The roof bolts were, according to the plan, to be set four feet

apart and the rows were to be four feet apart, thus in effect establishing a system of four foot centers for the placement of roof bolts.

(7) After the completion of the second row, the roof bolting machine was moved forward a distance of four feet. As customary practice dictated, Mr. Brown on the left-hand side of the roof bolting machine and Mr. Adkins on the right-hand side of the roof bolting machine, elevated the safety arms with the canopies attached simultaneously. This function was completed in a matter of seconds. Upon completion of this procedure and before drilling on the third row commenced, both canopies (roof supports) were placed firmly against the roof. Adkins and Brown then commenced drilling holes in the roof for the placement of roof bolts. The hole is drilled at a point in the center of the canopy (or ring) affixed to the boom.

(8) After drilling approximately 35 to 40 seconds the roof bolting machine operator prevented their further drilling by turning off the machine at the direction of Mr. Mitchem. At some point in time during this 35 to 40 second period, the exact juncture of which is not subject to more precise identification, a defect in the bushings (sometimes referred to in the record as "rollers") (FOOTNOTE 2) occurred which resulted in the canopy-roof support dropping down from the roof a distance of three or four inches. When this happened, the condition was observed by Inspector Mooney, who immediately took action to stop further drilling since the roof bolter was under unsupported roof. As previously noted, such action was his bringing the situation to Mr. Mitchem's attention. (FOOTNOTE 3)

(9) On September 15, 16, 17 and 18, 1980, Respondent's Assistant Mine Foreman Grover Grimmett, in on-shift reports, emphasized that he had reminded the pin crew (the roof bolting crew) to use jacks where the canopies didn't touch the top.

(10) On September 18, 1980, Mine Superintendent Elster Hurley was told by the day shift foreman, after the day shift was completed, that the coal seam was getting higher and that

the TRS equipment might not reach the top so as to support the same. At the time the evening shift started, approximately 3:30 p.m., Mr. Hurley talked with section foreman and the roof bolters themselves to emphasize that jacks should be set before they started pinning since the TRS equipment might not reach the higher top.

(11) The top (roof) of the 4-H Mine was "the worst" that Superintendent Hurley and Foreman Robert Mitchem has experienced in their many years in coal mining.

(12) After the Inspector issued citation number 912359, he explained the roof control plan to those of Respondent's employees who were concerned with the same. The citation was then abated, and roof bolting continued with the use of jacks, which are rectangular metal poles and which were capable of assuming a greater length than the safety arm of the TRS system. Subsequently, Respondent, after it had moved the defective Lee-Norris TD-2 machine out of the area, replaced it with a Lee-Norris TD-1 roof bolting machine. Subsequently, five rows of roof bolts were installed (approximately) in a continuation of the installation pattern which was interrupted at the third row when the defect in the canopy occurred, and these rows were installed at a height which could have been accomplished by the Lee-Norris TD-2 machine, which was removed from service after issuance of this citation.

(13) The failure of equipment which occurred and which resulted in issuance of the citation, i.e., dropping of the canopy by reason of defective bushings, is rare. The bushings in question were defective because of wear over a long period of time and not because of any traumatic happening or unusual circumstances which occurred on September 18, 1980.

(14) Because the bushings or rollers in question were not maintained in proper working condition, they failed, resulting in the roof above the canopy on the right side of the roof bolting machine in question not being supported and ultimately resulting in the occurrence of an unsafe condition which jeopardized the life and well-being of the roof bolter working under the canopy, Ernie Adkins.

(15) The bushings were so located on the roof bolting machine as to be externally visible.

#### Ultimate Findings, Conclusions and Discussion

The background conditions affecting the circumstances which are involved in this litigation are that the mine in question has a very bad, presumably dangerous, top, and that the Respondent's management has taken, and had taken prior to the incident in question, unusual

measures toward prevention

of roof falls. One of these courses of action was causing those who worked under this roof to be intensely aware of safety precautions which should be taken because of the unusual hazards posed. The record indicates that jacks were to be used whenever the TRS equipment was unable to reach the roof and support it because of the height of the coal seam being extracted. However, equipment failure is another means by which a safety hazard can come to fruition. The Government has taken the position that a violation occurred because the roof control plan was not complied with because when the roof bolting machine was moved from the second row to the third row of support in the crosscut in question, the seam of coal was too high and the result was that the TRS equipment did not reach the top so as to support it. I find that the Government's theory throughout this case was not supported by the evidence, other than a rather tenuous belief of the Inspector which was articulated in a relatively unclear manner. Thus, much of the focus of the evidence in this case from the Government's standpoint was misfired. Nevertheless, I do believe that a violation was established within the context of the matters alleged in the citation and within the mandatory safety standard alleged by the Inspector to have been violated, 30 C.F.R. 75.200.

The Respondent contends that no violation occurred because, under Paragraph (b) of the roof control plan at page 6 thereof, the roof bolt operators did not proceed in by permanent supports before the TRS supports (in this case, the canopies) were placed firmly against the roof. The key word in Respondent's contention is the word "before." Indeed, I have found that the great preponderance of the evidence in this case is that the right-hand side canopy was firmly placed against the roof when Mr. Adkins proceeded to institute drilling at that point.

I have also found that the defective failure of the bushings occurred some time in the 35 to 40 second period after Mr. Adkins commenced drilling. However, Paragraph (b) is not operative without the coincidence of the prerequisites required in the opening paragraph of the required "Safety Precautions For Roof Bolt Machines With Approved Automated Supports," appearing on page 6. That paragraph requires that the TRS system to be acceptable support during roof bolting operations be maintained in proper working condition.

The roof control plan is authorized by and is an extension of the mandatory standards implemented by Congress and further delineated in 30 C.F.R. 75.200. In pertinent part, that section provides:

"A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every six months, by the Secretary taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of support will not pose a hazard to the miners."

The key word in the last sentence is "adequate." The requirement of the mandatory standard is that the temporary support system be adequate. Read in this light, the provision of the roof control plan requires that the system must be maintained in proper working condition, and then, in that underlying safe environment, the TRS supports are to be placed firmly against the roof before the roof bolt operator proceeds inby permanent support.

I find that the (essence of the violation) is that the roof bolting machine was not maintained in proper working condition, and that it was inadequate. It did, indeed, fail, and this I find to be a violation of 30 C.F.R. 75.200. I find Respondent's argument to be hypertechnical in view of the testimony as to the severe problem which the roof in this mine presents. One person, Mr. Adkins, was placed in jeopardy by the hazards created by the violation. There is no showing of specific negligence in the occurrence of this violation. However, reference is made to the general tort principle that the unexcused violation of a governmental safety regulation is negligence per se. *Gatenby v. Altoona Aviation Corp.*, 407 F.2d 443 (3rd Cir., 1968); *Miles v. Ryan*, 338 F. Supp. 1065 (1972), affirmed 484 F.2d 1255 (3rd Cir., 1973). I therefore find that the Respondent was negligent in the commission of the violation.

The parties have stipulated that Respondent is a medium sized coal mine operator and that the assessment of a reasonable penalty in this case will have no effect on its ability to continue in business. The parties also stipulated that the operator proceeded in ordinary good faith to achieve rapid compliance with the violated mandatory safety standard after notification thereof. I further find, based on stipulations, that in the 24-month period preceding the commission of the violation in question the Respondent committed 105 violations of the Act.

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I find this, based upon other evidence in the record, to be a normal number of violations, and on that basis the penalty imposed will neither be increased nor decreased.

Weighing all the factors which I have previously described in this case, and further considering the extreme risks-which are well documented in mine safety law-flowing from roof control violations, and considering the evidence which Respondent has placed into evidence in mitigation (for the most part evidence of extreme safety consciousness with regard to roof control violations), I find that the penalty initially proposed by MSHA in this case, \$1,000, is reasonable, and it is so assessed.

ORDER

Respondent is ordered to pay the Secretary of Labor the sum of \$1,000.00 within 30 days from the date hereof.

Michael A. Lasher, Jr.  
Judge

~FOOTNOTE\_ONE

Petitioner primarily argues that Paragraph (b) is the section which was violated by Respondent.

~FOOTNOTE\_TWO

Shown as points "B" to "C" on Exhibit 10.

~FOOTNOTE\_THREE

A conflict in the testimony between the Inspector and Mr. Mitchem on this point was posed at the hearing. The Inspector indicated that it was he who told the operator to stop the machine. Mitchem testified that it was he who told the operator to shut the machine off. I find this conflict to be a relatively unimportant disagreement on facts which have little, if any, bearing on the determination of the ultimate issues involved. I have previously concluded that Mr. Mitchem's version will be accepted on this point.