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SOL (MSHA) V. UNITED STEEL  
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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.

UNITED STATES STEEL MINING  
COMPANY, INC.,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. PENN 84-49  
A.C. No. 36-00970-03537

Maple Creek No. 1 Mine

DECISION

Appearances: Thomas Brown, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for Petitioner;  
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania,  
for U.S. Steel Mining Company, Inc.,  
Respondent.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed under section 110(a) of the Act by the Secretary of Labor against U.S. Steel Mining Company, Inc., for two alleged violations of the mandatory safety standards.

The hearing was held as scheduled and documentary exhibits and oral testimony were received from both parties. At the conclusion of the hearing, the parties were directed to file written briefs simultaneously within 21 days of receipt of the transcript. The briefs were filed and have been reviewed together with the transcript.

The mandatory standard involved in each violation is section 302(a) of the Act, 30 U.S.C. 862(a), 30 C.F.R. 75.200 which provides as follows:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of

the roof or ribs. 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 6 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 such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

Citation No. 2104531

Citation No. 2104531, dated May 24, 1983 sets forth the alleged violative condition or practice as follows:

During the course of a fatal roof fall accident investigation it was revealed that there was a violation of safety precaution No. 3 of the operator's approved roof control plan dated 2/10/83. The violation occurred in the face area of No. 6 room and No. 20 split intersection. Two mining surveyors were approximately 26 inches and 36 inches in by permanent roof supports on the 20 split side and approximately 11p 3" and 6p 9" on the 6 room side, under unsupported roof. The roof control plan requires that only those persons engaged in installing temporary supports shall be allowed to proceed beyond the last row of permanent supports until temporary supports are installed. The violation occurred in 7 flat 8 room right 006 section. Note--this citation will not be terminated until the area involved is permanently supported and all employees (underground) are reinstructed in No. 3 safety precaution of the approved plan.

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Mr. Glenn Ward and Mr. Nathan Klingensmith were engineers or underground plan coordinators who installed spads and site lines so that entries and crosscuts would be driven straight and at proper angles (Tr. 9). Mr. Klingensmith was Mr. Ward's assistant (Tr. 23-24). On the morning in question the mine foreman, Mr. Earl Walters, assigned them to install site spads at various locations in the mine including the No. 20 split at the intersection of the No. 7 room (Tr. 16, 30, 34).

When Mr. Ward and Mr. Klingensmith arrived on the section they saw the section foreman, Mr. Walter Franczyk who was on the telephone at the time (Tr. 30-31, 34). They said hello to the section foreman but kept on going and did not stop (Tr. 36-37, 53). However, instead of going to the intersection of the 20 split and No. 7 room, they went to the intersection of the 20 split and No. 6 room (Tr. 26). None of the witnesses could explain why the engineers went where they did (Tr. 26, 29). When the engineers arrived at the 20 split and 6 room intersection, the continuous miner operator helper told them the roof was bad (Tr. 31). Mr. Klingensmith replied but his response was unintelligible (Tr. 31). Mr. Klingensmith then went beyond the last row of roof bolts and out under unsupported roof where he installed site spads (Tr. 31-32). He was under unsupported roof for five to ten minutes (Tr. 10-11, 31). The continuous miner machine was then repositioned and some loose coal was cleaned up (Tr. 31). Mr. Ward asked that the machine be left where it was at the face (Tr. 32). He then went out under unsupported roof and climbed up on the machine. Mr. Klingensmith also went out under the unsupported roof and was either beside the machine or climbing up on it when the roof fell killing both men (Tr. 32).

The operator does not dispute that both men were under unsupported roof when they were killed and that their actions violated the roof control plan which prohibits anyone from proceeding beyond the last row of permanent roof supports except for the purpose of installing temporary supports. Nor is there any dispute that the decedents were negligent in going beyond supported roof in violation of the roof control plan.

At issue is whether under the circumstances presented the operator also should be found negligent for the actions of its employees. In determining the amount of civil penalty to be assessed against an operator, consideration of a foreman's action is proper. Even where non-supervisory employees are involved, the operator is not necessarily shielded from imputations of negligence. *AH Smith Stone Co.*, 5 FMSHRC 13 (1983). In such a case it is necessary to look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervision, training and discipline of its employees to prevent violation of the standard in issue.

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In this case the section foreman knew that the decedents were on his section. Indeed, he saw them when they arrived. He was on the telephone and they said hello to him. He did not however, stop them to ask where they were going and what they were doing. I accept the testimony of the MSHA inspector that the section foreman is responsible for the safety of everyone on his section (Tr. 15, 24-25, 38). The section foreman himself specifically admitted this (Tr. 58). This being so, the section foreman was negligent in not stopping the decedents to find out their destination and what they were going to do. People cannot come and go as they please in an underground mine. It is simply too dangerous. It was especially dangerous here where the foreman, continuous miner operator and mine helper all knew the roof in the area was bad. The section foreman has the authority and responsibility to control what is happening on his section. He must exercise that authority and meet that responsibility. If he does not, he is negligent, as he was in this case. Under such circumstances the section foreman's negligence is attributable to the operator. The violation was very serious since it bore a direct causal relationship to the two fatalities.

A penalty of \$7,500 is assessed.

Citation 2104532

Citation No. 2104532, dated 5/24/83, sets forth the alleged violative condition or practice as follows:

During the course of a fatal roof fall accident investigation it was revealed that there was a violation of drawing No. 1 of the operator's approved roof control plan dated 2/10/83. The violation occurred during mining of the face of No. 6 room from No. 20 split, 7 to 6 room in 7 flat right 8 room right (006) section. After completion of mining sequence No. 3 a second temporary roof support was not installed on the canvas side (left side) as required by the approved roof control plan.

Drawing No. 1 of the operator's roof control plan entitled "Temporary Support During Mining" sets forth the mining sequence and the installation of temporary roof supports. The record is uncontradicted that the second temporary roof support was not installed when it should have been in the mining sequence (Tr. 68, 111-112). This constituted a violation of Drawing No. 1 of

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the plan and therefore a violation of the mandatory standard. The operator's argument that Drawing No. 1 should not be applied to this case must be rejected. I recognize that the intersection was open so that there were not two solid walls of coal on the sides of the No. 6 room. However, I find persuasive the MSHA inspector's testimony that the row of permanent supports ("c" on Operator's Exhibit No. 3) is analogous to or takes the place of a rib such as is indicated on Drawing No. 1 (Tr. 102-103). Moreover, I am not willing to adopt an interpretation of the roof control plan that would leave no guidelines or requirements for the routine driving of an intersection such as occurred here. Finally, the fact that the first roof support was installed in accordance with Drawing No. 1 shows that the miners themselves believed that Drawing No. 1 was applicable. Drawing No. 23, referred to by the operator is irrelevant because it is based upon methods of ventilation advancement and gas testing which everyone agreed were not present here (Tr. 79, 122).

The roof control plan is the operator's plan. If the operator believes it does not specifically cover a particular situation, especially a common one like this case, it can amend its plan and seek approval from MSHA. Here, the conclusion is unescapable that both the operator and MSHA believed Drawing No. 1 applied but that after the fatality occurred, the operator attempted to argue that nothing applied. This position is not persuasive. Moreover, ad hoc revisions of a plan by an Administrative Law Judge on a case-by-case basis should be avoided. In light of the foregoing, I conclude that a violation existed.

I accept the evidence which shows that the missing jack was designed for roof support. The absence of such a jack in an area of poor roof was serious and, meets the criteria adopted by the Commission for the finding of a significant and substantial violation. U.S. Steel Mining Co., Inc., 8 FMSHRC 1834 (1984); U.S. Steel Mining Co., Inc., 8 FMSHRC 1866 (1984). The Secretary's proof however, falls short of showing a causal link between the absent bolt and the fall that occurred since the inspector would only say, with visible reluctance, that it was "possible" that the additional bolt would have prevented the actual fall (Tr. 110-111). The inspector believed such a link was speculative (Tr. 110). The bolt would have been at the edge of the fall area which is where the fall should have been expected to break off even if a bolt had been installed (Tr. 111-112).

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The inspector testified that the operator was negligent in not having the approved roof control plan followed (Tr. 70-71). As set forth above, the Commission has held that the fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent. In such a case, the Commission has said that consideration must be given to the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue. A.H. Smith Stone Company, supra. The Solicitor did not address himself to any of these issues and the record is silent as to them. Old Dominion Power Company, 8 FMSHRC 1866, 1895-6 (1984). The Solicitor has failed to meet his burden on these factors. Accordingly, I find the operator not negligent.

A penalty of \$350 is assessed.

ORDER

Citations 2104531 and 2104532 are both AFFIRMED.

In light of the foregoing, the operator is hereby ORDERED to pay \$7,850 within 30 days from the date of this decision.

Paul Merlin  
Chief Administrative Law Judge