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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. DENV 79-201-P
A.C. No. 48-00837-05001

v.

Bill Smith Mine

KERR-MCGEE NUCLEAR CORPORATION,
RESPONDENT

DECISION ON REMAND

Appearances Thomas E. Korson, Esq., Office of the Solicitor, U.S.
Department of Labor, for Petitioner
Richard F. Campbell, Esq., Oklahoma City, Oklahoma, for
Respondent

Before: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Denver, Colorado, on September 27, 1979, at which both parties were well represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during closing argument, I entered a detailed opinion on the record. (Footnote 1) It was found that the violation charged in the withdrawal order did not occur. My oral decision, containing findings, conclusions and rationale appears below as it appears in the record:

"This is a civil penalty proceeding which arises under the Federal Mine Safety and Health Act of 1977. The alleged violation occurred some 20 days after that Act went into effect.

The parties have been represented by competent counsel who I commend initially for their complete and, I would say, beyond the ordinary presentations in this case, and in their demeanor, their preparation and their general

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conduct of their respective actions and representations in this case.

The parties have waived the right to file briefs. There is a question whether the right to submit proposed findings of fact and conclusions of law are made mandatory by the Administrative Procedure Act's provision in the sense that the same can be insisted upon being put in writing. My own view is that such should be given to the discretion of the administrative law judge, but in this case that issue is not being posed. I will not make a specific finding to the effect that oral presentations sufficiently meet the APA requirements.

The issues in this case primarily are whether or not a violation of the cited regulation, 30 CFR 57.3-20 occurred, and if so, whether the same resulted from Respondent's negligence and whether or not such alleged violation was serious.

Preliminarily, I find that based upon stipulations submitted to me, that this is a large operator that which during the time it was operating the Bill Smith Mine, was producing approximately 243,000 tons annually of coal, and that on or about the time of the alleged violation it employed approximately 75 employees. Based upon the evidence before me, I would not conclude that this is one of the industry giants. On the other hand, it is a large operator, to be distinguished from a small or medium-sized operator in the context of a three-level spectrum.

Also I find, based upon stipulation, that it has no history of previous violations, or that it abated the withdrawal order which contained the citation of the violation alleged in good faith, meaning that it proceeded to rapidly achieve compliance with the standard allegedly violated after being issued the withdrawal order.

I finally find preliminarily that any proposed penalty I would make in this case would not affect the Respondent's ability to continue in business.

Turning now to whether or not a violation did occur, such question revolves necessarily upon the construction which should be given the regulation allegedly violated. 57.3-20 provides, and I quote, "Ground support shall be used when the operating experience of the mine, or any particular area of the mine, indicates that it is

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required. If it is required, support, including timbering, rock bolting, or other methods shall be consistent with the nature of the ground and the mining method used."

As I will note more clearly subsequently, the second sentence I find to be the critical one, and there are certain key words in that second sentence which, I believe, govern this proceeding. I do not find the salient, indeed critical, factual setting of this proceeding to be in substantial dispute. There is no question is there but that a rock fall did occur on March 29, 1978, and that some 12 to 24 hours earlier blasting had occurred in the general area on a prior shift.

I do find that the roof fall did occur in what is termed an "open stope" area, and that Respondent's mining methods were such that in open stope areas no ground support was required.

I find that on March 29, this inspector, Gary Frey, properly issued Withdrawal Order No. 338802, which is the subject of this proceeding, and that the same was issued prior to noon on said date, and further, that the order was issued after Inspector Frey had observed the area where the rock fall occurred, which observation occurred within moments or within minutes after the fall.

I find that there were several pieces of rock which fell, one of which went or weighed approximately 35 tons.

I find that the withdrawal order was properly issued, since its purpose was to insure the safety of persons in the area.

I find that in the area where the rock fall occurred, which was generally in the intersection clearly indicated on Exhibit R-1, and also shown clearly Exhibits P-1, 2, 3 and 4, had been supported by efforts on Respondent's part by the use of bolts and wire mesh.

I do not find, on the basis of the testimony, that the bolts used to support the ground in the area of the roof fall had been used or were being used to slush from, as demonstrated by Exhibit P-7. I note, parenthetically, that while the purpose of P-7 was not to show the use of the bolt as part of the slushing process, but merely to show the process generally, that it does depict the same and that it indicates that the sheave block was being attached to such.

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In finding that these bolts were not used as part of the slushing process, I note that the inspector, on cross-examination, did indicate that, and I quote, "it could have been that these bent bolts I saw were not used for ground support and that the bent bolts which the inspector did see lying on the ground after the roof fall, were only one or two in number."

In any event, the inspector also indicated that roof bolts which had been weakened or bent by use in the slushing process only "could have contributed to the rock fall."

On the basis of all the testimony, I am unable to infer from the fact that a rock fall occurred that one, there was some specific cause for the rock fall. I have not found in this proceeding any evidence specifically pointing to a direct approximate traumatic or other type of cause; or two, that the rock fall would not have occurred had other types of means of ground support been employed by Respondent.

I recognize that such proof is difficult, if not impossible, to obtain in those circumstances. To establish precise causes or even other evidence from which inferences can be taken would have required a truly indepth study by experts, I believe, after this rock fall had occurred.

In any event, and I believe the bottom line with respect to the use of the bolts and mesh methods, vis-a-vis timbering, which would include use of the stulls on the one hand or the square set timbering method on the other, does not provide the ultimate key to the resolution of this case.

I make the finding, since they were one of the more blatant areas of dispute. The precise condition or practice described in the order then is that, "Adequate ground support is not being utilized in the 203 pillar stope access areas. A fall of ground occurred in the front access, approximately 35 tons. Men were traveling through this area."

The question raised by the description of the violation is, was there adequate ground support? The inspector testified that there was, in his opinion, inadequate support because there was no timbering. He indicated that had it been his decision, he would have used stulls. The question then arises, is there any provision or regulation that requires the use of timbering in the situation at the

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time and place involved in this proceeding? There is no such provision in the Act itself. The regulation which is cited, 57.3-20, consists of two sentences, the second of which I will repeat again at this juncture for the purpose of focusing on it. It states, "If it is required, support, including timbering, rock bolting or other methods, shall be consistent with the nature of the ground and the mining method used." Support includes timbering, rock bolting or other methods. There is nothing in that provision which says in a given situation a given type of support is required.

I note that in the normal situation where roof control plans are required, there is an effort to be more specific in terms of the requirement. I think there should be such a requirement in this case. I am sympathetic to MSHA's position in this case; I think a dangerous situation was occurring, and I do believe, from all the evidence, that there was a certain looseness, indeed sloppiness with respect to putting up signs in this area, in all the ways, in all the accessways, and I believe there are loopholes in the system here which could cause fatalities ultimately. I think that the regulations are lacking in the type of detail which is designed in the plans which must be approved by MSHA and which can be changed and updated periodically.

However, the binding provision is that which I above quoted of the regulations. I construe it to do the following things: One, it gives the operator almost complete discretion on which type of ground support to install in a given situation. Two, the types of ground support which it can utilize, and I underline this word, includes, timbering, rock bolting or other methods. Three, that whatever method it employs shall be consistent with the nature of the ground and the mining method used.

The evidence here is that its mining method was open stope, which would, one have required no ground support. The only question which I see is whether "The nature of the ground would require timbering of some kind." I am unable, on the basis of the record in this case, to conclude that that nature of the ground which was identified as sandstone, which in some places hard and some places soft, is such to conclude that timbering would be required. I therefore specifically find that that is no basis upon which I can apply the regulation to require the use of timbering. Even assuming there had been sufficient evidence of the nature of the ground

