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SOL (MSHA) V. SOUTHERN OHIO 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	Civil Penalty Proceeding Docket No. VINC 79-227-P A.O. No. 33-02308-03021F
v.	Raccoon No. 3 Mine
SOUTHERN OHIO COAL COMPANY, RESPONDENT	

DECISION AND ORDER

Appearances: Linda Leasure, Esq., U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio, for Petitioner David Cohen, Esq., Lancaster, Ohio, for Respondent

Before: Judge Kennedy

The captioned penalty proceeding came on for an evidentiary hearing in Columbus, Ohio on November 1 and 2, 1979. The Secretary charged that as the result of two separate occurrences on May 5, 1978, the operator violated section 302(a) of the Act, 30 CFR 75.200. The first charge was that as a result of an investigation of a fatal roof fall accident that occurred on May 5, 1978, it was determined that the victim and another miner had travelled inby permanent roof support for the purpose of removing temporary supports in violation of the prohibition against miners travelling under unsupported roof. The second

charge was that the investigation revealed that at the time of the accident the victim and another miner were removing temporary supports under unsupported roof by hand instead of by some remote means and without installing other temporary support in violation of Safety Precaution No. 3 of the approved roof control plan.

At the hearing, counsel for the operator conceded the two miners in question "were engaged in the practices that were stated in the citations" (Tr. Vol. I, 16) but now claims there was only one violation. The statute, however, clearly provides that each occurrence of a violation constitutes a separate offense and there is no dispute about that the fact that two miners participated in the conduct charged and that the conduct of each was in violation of the standard. The operator is fortunate that the Secretary did not charge, as he might have, that each of the miners violated the standard twice for a total of four violations.

The operator's theory of two for the price of one is, therefore, rejected.

At the conclusion of the hearing, and in accordance with the pretrial order, the parties presented oral argument in support of their proposed findings and conclusions and the presiding judge made a tentative decision on the record. At the request of the operator, the effective date of the bench decision was stayed pending receipt of the transcript

and the parties proposed findings, conclusions, and supporting briefs.

After a careful consideration of the parties' written submissions, I find my bench decision, as supplemented below, should be adopted and confirmed as my final decision in this matter. My decision, therefore, is as follows:

After observing the demeanor of the witnesses and based on a preponderance of the reliable, probative and substantial evidence, I find:

1. The two violations charged did, in fact, occur.

2. Because these violations were the proximate cause of the death of a miner they were extremely serious.

3. The violations were the result of a disregard for compliance with safe mining practices by Socco's top management, its Section Foreman, Lonnie Darst, the miner-victim, James Six, and the miner-survivor, John Endicott.

4. Mr. Six's knowing disregard of the prohibition against working under unsupported roof and the safety precautions of the approved roof control plan was an act of gross negligence.

5. The violations were also the result of a reckless disregard for compliance with safe mining practices by the miner-survivor, John Endicott. Mr. Endicott knowingly disregarded the same prohibitions of the mandatory safety standard and the safety precautions of the approved roof control plan as did Mr. Six.

6. The acts of the miners Six and Endicott were foreseeable and preventable by the Section Foreman Lonnie Darst and top management. As several witnesses testified it was not unusual for miners in the Raccoon #3 Mine to work under unsupported roof (Tr. Vol. I 94, 108, 110, 131, 136, 159-160; Vol. 2 144; GX-9). Mr. Darst and top management knew or should have known this.

7. More specifically, Lonnie Darst knew or should have known that Mr. Six could not knock the six jacks in the 15 entry with the loader without damaging the jacks seriously.

8. Lonnie Darst did not tell James Six how to knock and remove the six jacks without damaging them.

9. Lonnie Darst did not tell James Six how to load the coal in the 15 entry without removing the jacks.

10. James Six and John Endicott knew they were expected to knock and remove the jacks without damaging them.

11. It never occurred to Six and Endicott to knock out the jacks with the loader because this would have damaged the jacks and seriously impeded production.

12. It is not reasonable to believe that Lonnie Darst would have directed Six to employ a means of removing the jacks that would render them inoperable.

13. Lonnie Darst and top management condoned the violations committed by Six and Endicott because they did only what was expected of them.

14. Lonnie Darst's actions as well as those of Six and Endicott are, therefore, imputable to Socco.

15. Lonnie Darst was negligent in his supervision of the 15 entry of the 001 Section on May 5, 1978.

16. Socco's management is vicariously responsible for the negligence of its agents and employees and independently responsible for its failure to design, implement and enforce a mine safety program that ensures compliance with the Mine Safety Laws at all times--not just some times--by its section foremen and miners.

17. The operator's claim that the section foreman, Lonnie Darst and top management were not involved in the violations committed is without merit. The record shows the section foreman's failure to supervise and monitor the remote recovery of the temporary supports was in violation of the safety precautions set forth in 30 CFR 75.200-14. These precautions were issued in implementation of the underlying interim mandatory standard pursuant to the Secretary's authority under section 301(d) of the Act to "prescribe" the manner in which roof support recovery is to be accomplished under roof control plans adopted and approved under section 302(a), 30 CFR 75.200 of the Mine Safety Law. Inasmuch as this criteria "prescribes" the manner in which an operator is to "carry out on a continuing basis" his program of roof control as mandated by section 302(a), 30 CFR 75.200, it is an enforceable part of the underlying interim mandatory safety standard. Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 405 and n. 32 (D.C. Cir. 1976); United States v. Finley Coal Co., 493 F.2d 285, 290 (6th Cir. 1974), aff'g. 345 F. Supp. 62, 67 (E.D. Ky. 1972). Under decisions of the Board of Mine Operations Appeals, it is well settled that once an operator adopts and the Secretary approves a roof control plan the operator is "obliged to carry out" the plan in accordance with the cirteria set forth in 30 CFR 75.200-7 through 75.200-14. Affinity Mining Company, 6 IBMA 100, 109 (1976); Bishop Coal Company, 5 IBMA 231, 241-244 (1975) (75.200-1 through 75-200-14 "fill in some of the interstices" of the operator's obligation to "adequately" support or otherwise control the roof or ribs).

18. 30 CFR 75.200-14 prescribes a detailed method for roof support recovery. Mr. Darst's conduct and instructions violated this criteria in six particulars all of which are imputable to top management. Furthermore, top management is independently responsible for its own negligent failure to supervise properly Mr. Darst's performance of his duties and responsibilities.

19. Mr. Darst's six violations of 75.200-14 were as follows:

(a) 75.200-14(a) provides that "Recovery should be done only under the direct supervision of a mine foreman, assistant mine foreman, or section foreman." It is undisputed that at the time of the fatal roof fall the section foreman, Lonnie Darst, was not supervising the recovery operation but was in the No. 13 crosscut assisting another miner in hanging power cable (Tr. Vol. II, 101, 107, 156).

(b) 75.200-14(c) required that "The person supervising recovery should make a careful examination and evaluation of the roof, and designate each support to be recovered." Mr. Darst admitted that he failed to designate the jacks to be recovered (Tr. Vol. II, 108-109). In addition, the record shows that neither Mr. Darst nor the miners involved made any effort to sound or otherwise evaluate the condition of a badly fractured roof that, in the area where the fatality occurred, was unsupported for a minimum distance of 23 feet, 9 inches. The record further shows that despite the requirement for preshift and on-shift reports of hazardous conditions the operator tolerated the existence of this massive unsupported roof area for approximately 17 hours. This constituted a reckless disregard for management's obligation to exercise a high degree of care for the safety of the miners. Legislative History of the Federal Coal Mine Health and Safety Act of 1969, U.S. Senate, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., (August 1975), at 1515.

(c) 75.200-14(d)(1) directs that "Supports should not be recovered ... Where roof fractures are present or there are other indications of the roof being structurally weak." The record shows the operator had encountered extremely bad roof conditions while driving the 15 entry. The roof leaked

substantial quantities of water which indicated the overlying strata had lost its cohesive qualities and that the overburden was fractured. During the period it was unsupported, the roof had sagged and cracked. (Tr. Vol. I, 71, 74, 87-88, 93, 96, 108, 173, 193; Vol. II, 107, 159). Mr. Darst was fully aware of the condition of the roof in the number 15 entry. This knowledge is imputable to top management. In addition, top management knew or should have known of the hazardous roof condition in the 15 entry at the time it made its determination to recover coal from the area. Its determination to do so in the face of this criterion constituted a conscious and deliberate indifference to the safety of its employees.

(d) 75.200-14(e) requires that "Two rows of temporary supports on not more than 4 foot centers, lengthwise and crosswise, should be set across the place, beginning not more than 4 feet inby the support being recovered. In addition, at least one temporary support should be provided as close as practicable to the support being recovered." It is undisputed that the only temporary supports in the No. 15 entry were those taken down by the miners Six and Endicott. (OX-8, Tr. Vol. I, 91, 120-121). The record shows Mr. Darst's instruction for tripping the jacks with the loader directly contravened this criterion, the approved roof control plan, and the requirement that the operator control the roof adequately to protect Mr. Six from a roof fall during removal of the temporary supports. Section 302(a) of the Act, 30 CFR 75.200. Mr. Darst's instruction which was tantamount to a directive to violate the safety precautions set forth in the law was negligence per se and clearly imputable to top management which was responsible for ensuring that Mr. Darst performed his duties in accordance with the law.

(e) 75.200-14(f) provides that "Temporary supports used should not be recovered unless recovery is done remotely from under roof where the permanent supports have not been disturbed and two rows of temporary support, set across the place on 4 foot centers, are maintained at all times between the workmen and the unsupported area." Mr. Darst's instructions to knock the jacks out with the loader compelled action by Mr. Six that directly contravened this safety precaution as it was impossible to trip the jacks if two rows of temporary supports had been installed as required. Inspector Petit testified that to comply with this safety precaution and still recover the jacks it would be necessary, after setting the additional temporary support, to tie a rope around the jacks and then pull them out with the loader while remaining under supported roof (Tr. Vol. II, 59, 62-63). This, of course, would leave two rows of temporary support that could not be removed, nor could the coal. It is clear therefore that there was no way to effect remote removal of the temporary supports in compliance with the law and still recover the coal. Mr. Darst opted to flout the law and recover the coal. In doing so he set the stage for another roof fall fatality. It is a fair inference that Mr. Darst did not alone make the decision to go for the coal at the risk of a miner's life. I conclude therefore that top management of the Raccoon #3 Mine was primarily responsible for this regrettable case of institutional manslaughter.

(f) 75.200-14(h) requires that "Entrances to the areas from which supports are being recovered should be marked with danger signs placed at conspicuous locations." Mr. Darst admitted he did not danger off the unsupported roof area in entry 15 (Tr. Vol. II, 107). The failure to ensure compliance with this safety precaution was another instance of the operator's failure to carry out its obligation to protect its miners from travelling or

working under hazardous roof as required by section 302(a), 30 CFR 75.200. It also constituted another instance of the operator's failure to exercise the high degree of care imposed by the Act.

20. Finally, I find that the operator's independent failure to enforce sound mining practices, as evidenced by its failure to ensure compliance with the safety precautions applicable to the remote removal of temporary supports by its section foreman and the miners Six and Endicott as well as its foreman's failure to monitor and supervise properly the remote removal of the temporary supports by the miners Six and Endicott warrant the imposition of maximum penalties for the violations charged.

I conclude therefore that for the imputed negligence of its agents and employees as well as for its own acts of independent and contributory negligence, Socco is fully responsible for the violations charged. See Valley Camp Coal Co., 3 IBMA 463 (December 13, 1974) (section foreman's knowledge of dangerous condition imputable to operator for purpose of determining negligence); Pocahontas Fuel Co., 8 IBMA 136 (September 28, 1977) aff'd 590 F.2d 95 (4th Cir. 1979) (failure of preshift examiner to detect violation imputable to operator); Webster County Coal Co., BARB 78-185-P (June 7, 1978); Grundy Mining Co., BARB 78-168-P (June 19, 1978), appeal pending No. 78-3424 (6th Circuit) (foreseeable and preventable miner's negligence imputable to operator); Buffalo Mining Co., HOPE 78-333-P (October 30, 1979) (independent contractor's negligence imputable to operator); Cf. U.S. v. Illinois Central R. Co., 303 U.S. 239 (1938) (employee's

negligent breach of statutory duty imputable to employer); Atlantic and Gulf Stevedores, Inc. v. OSHRC, 534 F.2d 541 (3rd Cir. 1976) (employer liable for predictable and forseeable employee misconduct).

I further conclude that in order to deter future violations, heighten top management's awareness of the need for meaningful supervision and sanctions to backup the mine safety laws, and to ensure, if possible, voluntary compliance with those laws, the amount of the penalty warranted for each violation found is $10,000.00.

Accordingly, it is ORDERED that Southern Ohio Coal Company pay a penalty of $20,000.00 on or before Friday, March 21, 1980.

Joseph B. Kennedy
Administrative Law Judge