CCASE:

SOL (MSHA) v. WHITE COPPER

DDATE: 19810311 TTEXT: 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. LAKE 80-139-M A.C. No. 20-00371-05019H

White Pine Mine

v.

WHITE PINE COPPER DIVISION, COPPER RANGE COMPANY,

RESPONDENT

LOCAL 5024, UNITED STEELWORKERS OF AMERICA,

REPRESENTATIVE OF MINERS

DECISION

Appearances: Gerald A. Hudson, Esq., Office of the Solicitor, U.S.

Department of Labor, Detroit, Michigan, for

Petitioner;

Ronald E. Greenlee, Esq., Clancey, Hansen, Chilman, Graybill & Greenlee, P.C., Ishpeming, Michigan, for

Respondent;

Harry Tuggle, Safety and Health Department, United Steelworkers of America, Pittsburgh, Pennsylvania,

for Representative of Miners

Before: Chief Administrative Law Judge Broderick

Statement of the Case

This is a civil penalty proceeding growing out of the issuance of an imminent danger withdrawal order under section 107(a), and a citation under section 104(a) of the Act, charging a violation of 30 C.F.R. 57.3-22 because a scoop operator worked under loose rock on June 4, 1979.

A hearing was held on October 23, 1980, in Houghton, Michigan. Witnesses for the Secretary were Bruce Haataja, the Federal inspector who issued the citation and order and Benjamin Berno and Gordon Smith, miners and union members who accompanied Haataja during the inspection. Witnesses called by the company were William Carlson, a supervisory official of the Mine Safety

and Health Administration, Albert Goodreau, the company's safety engineer, Raymond Hicks, foreman of the unit where the violation is alleged to have occurred, and Fred Smith, the operator of the scooptram observed by Inspector Haataja. The Representative of the Miners did not call any witnesses.

The parties have submitted briefs stating their positions and, having considered them and the evidence adduced at the hearing, I make the following decision.

Regulatory Provision

Title 30, Code of Federal Regulations, section 57.3-22, reads:

Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

Issues (FN.1)

- 1. On June 4, 1979, at approximately 11 a.m., did a scooptram operator work under areas of loose rock in the subject mine as alleged by the inspector?
- 2. If so, was the condition a violation of 30 C.F.R. 57.3-22?
- 3. If a violation occurred, what is the appropriate penalty?

Findings of Fact (FN.2)

- 1. On June 4, 1979, at approximately 11 a.m., a scooptram operator was working under several areas of loose rock in SW30 heading of Unit 93 in the company's mine.
- 2. The size and condition of the loose rock was such that it could be reasonably expected to cause death or serious physical harm to miners working in the heading.

- 3. The condition was obvious and should have been noticed by miners working in the area.
- 4. The company demonstrated ordinary good faith in abating the violation.
- 5. The company is a large mine operator with a moderate history of previous violations. (FN.3) The civil penalty imposed herein will not affect its ability to remain in business.

Discussion

The White Pine Mine, located in Ontonagon County, Michigan, is an underground mine from which copper is extracted by the room and pillar method. Inspector Haataja testified at the hearing that, as his inspection party approached what he was told was the SW28 heading, he observed a scooptram backing out of the heading. When the tram had cleared the crosscut, he walked toward the face and found three areas of loose rock overhead about 30 feet inby the crosscut. The inspection party spent more than 15 minutes prying down (or "barring") a sizable amount of loose rock. A company representative was not present during this period. issuing the citation and order, the inspector considered the following: A large amount of rock was barred, the tram was not equipped with overhead protection, and no bar with which loose rock could be trimmed was observed in the vicinity. The inspector's testimony was corroborated by Benjamin Berno and Gordon Smith, who actually removed the loose rock.

The company introduced evidence that no work was being performed in SW28 heading during the morning of June 4, 1979. The company also argued that the tram was not actually observed under the loose rock. However, three witnesses testified to seeing the tram back out of a dead-end heading. When they walked down the heading, they saw tracks at the muck pile and evidence that part of the muck pile had been removed. The evidence clearly shows that the tram was operating under the loose rock. The testimony of Raymond Hicks and Fred Smith strongly suggests that the scooptram was actually working in SW30 heading during the period in question. Hicks, the unit foreman, claims that when he encountered the inspection party at about 11:30 a.m., they were in SW29 heading, which contained a small amount of barred loose rock and an untouched muck pile. No work was performed in SW28 heading until the afternoon, when it was readied for blasting.

The significance of this testimony can be gleaned from a description of the mining cycle. After the face is blasted with explosives, a pile of debris, containing the ore, remains which is called "muck." The next steps, roughly, are to inspect all parts of the heading for loose rock, wet the muck pile, remove the muck with a scooptram, bolt the roof, drill and prime

the face and blast again. Therefore, if there is an untouched pile of muck at the end of a heading, it is probable that the face has just been blasted and the area is about to be checked for loose rock. The company maintains that the inspector encountered loose rock in SW29 heading, for which no citation could be issued until a miner was scheduled to enter the heading and prepare it for mucking out. Cf. MSHA v. Asarco, Inc., 2 FMSHRC 290, 294 (April 15, 1980).

A consideration of all the evidence persuades me that the loose rock observed by the inspector was in SW30 heading, not SW29 or SW28. Haataja identified the heading as best as he could under the circumstances. There was testimony that not all the headings were clearly marked (Tr. 168). Even before the citation and order were reduced to writing, Hicks knew which scooptram operator Haataja had observed and where he was working at the time. Fred Smith spent the entire morning in SW30 heading, according to company records. This was sufficient notice of the location of the alleged violation. The company cannot evade liability because the inspector cited the wrong heading number when it was clearly aware of the location which was intended.

The number of the heading is inconsequential; the important facts are that a scooptram was observed by three witnesses backing out of a heading in which a sizable accumulation of loose, overhead rock was found. This prima facie case was never rebutted by the company. Hicks and Fred Smith both stated that they had checked their working areas for loose rock, but this cannot overcome the eyewitness testimony of Haataja, Berno, and Gordon Smith.

It is unclear how long the loose rock had been present in the back. The condition was obvious and could have been noticed by the tram operator, but there is no evidence that a supervisory employee knew or should have known of it. Abatement of the condition was rapidly achieved. The gravity of the violation was quite serious since it could have resulted in serious injury. The appropriate penalty to be assessed, under all the circumstances, is \$2,000.

Conclusion of Law

The condition found by Inspector Haataja on June 4, 1979, at the subject mine, and described by him at the hearing constituted a violation of 30 C.F.R. 57.3-22.

ORDER

Respondent, White Pine Copper Division, is ORDERED TO PAY the sum of \$2,000 within 30 days of the date of this order as a civil penalty for the violation found herein.

\sim FOOTNOTE_ONE

1 The company contends that the 107(a) withdrawal order was improperly issued. This case, however, is not a proceeding to review the order but a civil penalty proceeding and the issue is whether the violation charged in the order/citation occurred.

\sim FOOTNOTE_TWO

2 The parties stipulated that the Commission has both subject matter and personal jurisdiction in this case.

\sim FOOTNOTE_THREE

3 These conclusions are based on a motion for approval of a settlement which was filed on June 2, 1980.