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SOL (MSHA) v. ALABAMA BY-PRODUCTS
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATIVE (MSHA)
PETITIONER
v.

Civil Penalty Proceeding

Docket No. SE 80-121
A/O No. 01-00322-03044F

Maxine Mine

ALABAMA BY-PRODUCTS CORP.,
RESPONDENT

DECISION

Appearances: Murray A. Battles, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner, MSHA;
H. Thomas Wells, Jr., Esq., Cabaniss, Johnston, Gardner, Dumas and O'Neal, Birmingham, Alabama, for Respondent, Alabama By-Products Corporation.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Government against Alabama By-Products Corporation. A hearing was held on April 14, 1981.

At the hearing, the parties agreed to the following stipulations (Tr. 4-5):

- (1) The operator is the owner and operator of the subject mine.
- (2) The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
- (3) I have jurisdiction over this case.
- (4) The inspector who issued the subject citation was a duly authorized representative of the Secretary.
- (5) A true and correct copy of the subject citation was served upon the operator.
- (6) The alleged violation was abated in good faith.
- (7) The imposition of a penalty will not affect the operator's ability to continue in business.

(8) The operator's history of previous violations is average.

(9) Witnesses who testify are accepted generally as experts in coal mine health and safety.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 9-165). At the conclusion of the taking of evidence, the parties waived the filing of written briefs and agreed to make oral argument and have a decision rendered from the bench (Tr. 165). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation (Tr. 183-187).

BENCH DECISION

This case is a petition for the assessment of a civil penalty for an alleged violation of 30 C.F.R. 75.202, which provides in pertinent part as follows: "Loose roof and overhanging or loose faces and ribs shall be taken down or supported."

The essential facts are not in dispute. They are set forth in the MSHA Report of Investigation admitted into the record as Government Exhibit No. 2. The operator was engaged in retreat mining. The roof control plan and the pillar control plan were being complied with. The pillar being mined out was at the intersection of a "brushed" entry, which was 6-1/2 feet to 8 feet high and of a crosscut, which was low coal of about 3-1/2 feet. After the third cut had been started in the pillar, the ventilation man sounded an area to the right outby side of the continuous mining machine whereupon a piece of rock fell from that area on the cable of the continuous mining machine, knocking out the power from the machine (see the drawing in Government Exhibit No. 2). The operator then began removal of the fallen material.

At the hearing today, the parties have stipulated that in addition to the facts set forth in the Report of Investigation, the continuous miner operator after the first fall tested an area immediately inby and adjacent thereto and that this second area was sound. The second area was rib rock, which had a pronounced curvature. It was part rib, part roof, and part corner. However, shortly afterwards, this second area of rock also fell, killing the section electrician, who was standing beneath it. It is undisputed that the section foreman told the electrician and the other men not to go on that side of the continuous mining machine and that in so doing the electrician disobeyed orders which he had received only moments before.

MSHA's allegation of a violation is predicated upon the assertion that under the mandatory standard, the area

of the second rock fall should have been taken down or supported.

Since this area had just been tested and found sound, the Solicitor has not contended at the hearing today that this rib rock was loose, although previously his answer to one of the operator's written interrogatories appears to be that the roof fell because it was loose. The Solicitor has maintained throughout that the area was overhanging and that therefore, under the mandatory standard, it should have been taken down or supported.

For present purposes, I assume that the rock rib is within the definition of the mandatory standard. The principle issue is whether under the circumstances presented this area was required to be taken down or supported in accordance with the mandatory standard. The section foreman's testimony that before the second area fell the operator tried to pry it down but was unsuccessful is uncontradicted and I accept it. MSHA's mining engineer testified that timbers could have been set under this rib rock. The operator's section foreman testified that he considered timbering and discussed it with the pin man. However, according to the section foreman, because of the curvature of the arch, timbers could not be set straight and therefore, would not serve as support. Moreover, the section foreman stated that if the area fell, the timbers themselves would create an additional hazard by throwing the rock even further with the timbers also being thrown. The section foreman's testimony was corroborated by that of the pin man. After much consideration of the matter, I accept the operator's evidence regarding timbering.

The section foreman also testified that he consulted with the pin man about roof bolting and that this, too, was not feasible because the bolter would be exposed under roof without canopy protection due to the curvature. I also accept this testimony. Finally, the possibility was discussed that the rib rock could have been shot down. Both the section foreman and MSHA's engineer agreed that this approach created the danger that a great deal of rock, indeed much more than was intended, might come down. Also, the hole for such a shot would have to be drilled by an individual standing on the continuous mining machine and the powder would have to be put in the hole by an individual either standing on the machine or standing in an unprotected location.

In each of the foregoing instances, the proposed solution presents hazards equal to if not greater than those presented by the original condition. I conclude that 75.202 requires that loose roof and overhanging or loose faces and ribs be taken down or supported, where the taking down or support would not create greater hazards to life and limb than already exist. Here the risks presented by the proposed solutions are higher

than those presented by the situation itself. The cure cannot be worse than the illness. Accordingly, I cannot find that a violation exists.

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This is of course, not an easy case. I recognize that a life was lost. However, I cannot interpret the subject mandatory standard to impose more dangers to life and limb than would exist without it. I cannot interpret this mandatory standard to require the operator to do things which would jeopardize even more lives than the one that was lost. It may be that in view of the situation presented, the operator should have removed all personnel from the section forthwith. But this consideration does not fall within the stated mandatory standard which is all that is before me.

The petition is DISMISSED.

ORDER

The foregoing bench decision is hereby AFFIRMED.

The petition to assess a civil penalty in the above-captioned proceeding is DISMISSED.

Paul Merlin
Assistant Chief Administrative Law Judge