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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

WHITE PINE COPPER DIVISION, COPPER RANGE COMPANY, CONTESTANT v.	Contest of Citation Docket No. LAKE 81-106-RM White Pine Mine
SECRETARY OF LABOR, RESPONDENT	
UNITED STEELWORKERS OF AMERICA, INTERVENOR	
SECRETARY OF LABOR, PETITIONER v.	Civil Penalty Proceeding Docket No. LAKE 81-171-M
WHITE PINE COPPER DIVISION, COPPER RANGE COMPANY, RESPONDENT	A.C. No. 20-00371-05037 White Pine Mine
UNITED STEELWORKERS OF AMERICA, INTERVENOR	

DECISION

Appearances: Ronald E. Greenlee, Esq., Clancey, Hansen, Chilman, Graybill & Greenlee, Ishpeming, Michigan, for White Pine Copper Division, Copper Range Co.
Leo J. McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Secretary of Labor;
Harry Tuggle, Assistant Safety Director, United Steelworkers of America, Pittsburgh, Pennsylvania, for United Steelworkers of America.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This proceeding was commenced on March 12, 1981, when White Pine Copper Division, Copper Range Company (hereinafter "White Pine") filed a notice of contest under section 105(d) of the Federal Mine Safety and Health Act of

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1977, 30 U.S.C. 815(d) (hereinafter "the Act") to contest a citation issued by the Mine Safety and Health Administration (hereinafter "MSHA") for violation of a mandatory safety standard, 30 C.F.R. 57-3.20. Thereafter, the United Steelworkers of America (hereinafter "USWA") intervened in this proceeding and the civil penalty proceeding arising out of this citation was consolidated with the contest action.

A hearing was held in Houghton, Michigan on June 2-3, 1981. MSHA's witnesses were Walter Leppanen and William Letzens. White Pine called the following witnesses: William Carlson, Glenn Scott, Albert Ozanich, David Charles, Albert Goodreau, Julio Thaler, Joseph Maher, and Jack Parker. The USWA called the following witnesses: Ed Hocking, Dale Sain, Frank Dove, Malcolm Penegor, Eugene DeHut, Gordon Seid, Joe Aknisko, and John Cestkowski. All three parties filed posthearing briefs.

A brief historical review is necessary to place the instant controversy in its proper perspective. White Pine management believed that no valid purpose was served by using roof bolts in certain parts of its mine. Accordingly, it decided to demonstrate that uniform installation of 4 foot roof bolts on 4 foot centers was not necessary and did not enhance safety. As White Pine's first initiative in this direction it removed roof bolts from an area in Unit 56 on February 5, 1980. Two weeks later, an MSHA inspector issued an imminent danger order pursuant to section 107(a) of the Act. The validity of this order was litigated before Judge Edwin S. Bernstein. On January 14, 1981, Judge Bernstein vacated the order and found that an imminent danger did not exist at the time the order was issued. White Pine Copper Division v. Secretary, 3 FMSHRC 211 (January 14, 1981). Neither MSHA nor the USWA petitioned for review of that decision. On February 27, 1981, White Pine began the next phase of its demonstration program by mining an area in Unit 56 without using roof bolts or other roof support. Thereupon, the instant citation was issued on March 3, 1981.

ISSUES

Whether White Pine violated the Act or regulations as charged by MSHA and, if so, the amount of a civil penalty which should be assessed.

APPLICABLE LAW

30 C.F.R. 57.3-20 states as follows:

Mandatory. Ground support shall be used if the operating experience of the mine, or any particular area of the mine, indicates that it is 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.

Section 110(i) of the Act, 30 U.S.C. 820(i), provides in pertinent part as follows:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

STIPULATIONS

The parties stipulated as follows:

The White Pine Mine is an underground copper mine owned and operated by the Contestant. The mine has products which enter commerce and has operations and products which affect commerce. The mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977. The Administrative Law Judge has jurisdiction pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977. Walter Leppanen is and was a duly authorized representative of the Secretary of Labor to represent him at all times relevant herein as a federal mine inspector.

FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

1. White Pine Mine is a large underground copper mine located at White Pine, Michigan.
2. Mining is done by the room and pillar method at depths ranging from 150 feet to 2,100 feet.
3. White Pine has used three different mining configurations: parting shale, full column, and upper shale.
4. Underground mining began at White Pine in the mid 1950's. At that time, the parting shale configuration was used but uniform roof bolting was not employed. Roof bolting was used in 60 to 70 percent of the area mined during the 1950's. All areas developed since the 1960's have used uniform roof bolts except for the area involved in the instant citation.
5. At various times in various areas, White Pine used the following types of roof bolts: 4 foot mechanical bolts on 4 foot centers; alternating 4 foot and 7 foot bolts; alternating 4 foot and 6 foot bolts; and finally, 4 foot resin roof bolts. Today, the entire mine, except for the area in controversy here, employs 4 foot resin bolts.
6. White Pine's ground control department monitors movement of the mine roof or back through use of extensometers, lights and gauges. This

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equipment can measure convergence of as little as 1/1000 of an inch. Flashlights attached to some of this equipment will light up if the ground converges a tiny fraction of an inch. The purpose of these lights is to warn miners of roof movement which might indicate instability.

7. On February 12, 1981, White Pine Superintendent, Julio Thaler, notified MSHA that White Pine intended to mine a drift in Unit 56 without the use of uniform roof bolts.

8. On February 27, 1981, White Pine began to mine the demonstration drift.

9. Approximately three pulls(FOOTNOTE.1) of 10 feet each had been completed by March 3, 1981. No roof bolts or other ground control had been installed in this area.

10. On March 3, 1981, MSHA inspector Walter Leppanen was conducting a regular health and safety inspection of the White Pine Mine. Before going underground on that date, he was informed that mining was being performed in Unit 56 without roof bolts.

11. Inspector Leppanen traveled to the demonstration drift in Unit 56. He observed that the sandstone roof or back was unsupported for a distance of approximately 32 feet from the face to the last row of bolts. White Pine foreman Joseph Lobeck informed the inspector that White Pine did not intend to install any bolts in the area. The inspector heard a popping and snapping sound in the roof or back which indicated to him a movement caused by pressure. He also observed a slip running a distance of about 27 feet diagonally through the roof. He also heard loose material falling from the roof to the floor. He saw a 3 foot area from which brown granular material had fallen from the roof. He saw a discoloration or oily substance along the edge of the slip for the entire length. Later, he observed a foreman standing in the area in controversy scaling the loose back in the unbolted area.

12. On March 3, 1981, Inspector Leppanen issued Citation No. 294190 pursuant to section 104(a) of the Act alleging a violation of 30 C.F.R. 57.3-20 as follows: "Roof support was not provided in N-94 & W-53 intersection in Unit 56. Prior operating experience of the mine indicates that roof support is required. Miners were/had been working under the unsupported roof."

13. The citation was terminated when White Pine abated the condition by permanently closing the area and posting it against entry.

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14. There had been approximately eight roof fall fatalities at this mine.

DISCUSSION

Contentions of the Parties

White Pine asserts the following: (1) The mine roof in the cited area does not require ground control; (2) White Pine's prior operating experience in parting shale establishes that uniform ground control is not required in the cited area; and (3) the issuance of the citation constituted a denial of due process of law. MSHA contends that the operating experience of the mine requires the use of ground support and the condition of the particular cited areas indicates a need for ground support. The USWA supports MSHA's position herein but goes on to assert the novel argument that "it is psychologically unhealthy to mine at White Pine without roof support even under the most ideal conditions." USWA Brief at 9.

The merits of this controversy will be discussed in detail infra. However, White Pine's "due process" and USWA's "psychologically unhealthy" arguments will be dealt with summarily. White Pine claims that the issuing inspector failed to consider data proffered by White Pine and that an MSHA supervisor failed to promptly respond to White Pine's request for advice concerning the demonstration project. It is not surprising that White Pine cites no authority in support of its claim since there is none. I find that the procedures followed by MSHA concerning the issuance of this citation afford White Pine the due process of law guaranteed by the Constitution.

The USWA argues that "it is psychologically unhealthy to mine at White Pine without roof support even under the most ideal conditions." Resolution of the issue of whether the mental health of miners, absent a contemporaneous threat to the physical health of miners, falls within the ambit of the Act must be postponed to another day. Suffice it to say at this time that the USWA failed to present any probative or credible evidence of probable impairment of the mental health of the miners due to the cited condition. Hence, this argument is without merit.

Condition of Roof or Ground in Cited Area

The citation was issued in the demonstration area where White Pine was attempting to establish that neither roof bolts nor ground support was needed. The citation does not allege any specific problem with the roof in the particular area cited. However, MSHA devoted much time at the hearing to establishing that roof bolts or ground support was needed in the particular area. It is undisputed that no roof bolts were used for a distance of approximately 32 feet in the drift in controversy.

While there is a dispute as to the condition of this particular roof, White Pine's safety engineer, Albert Goodreau, conceded the following: he heard cracking and popping in the

roof; he observed loose on the floor

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measuring up to 1 by 5 inches; and there was a 3 inch band of discoloration extending diagonally across the roof for a distance of 27 feet. MSHA Inspector Leppanen testified that in addition to the facts conceded by Mr. Goodreau, he observed a slip in the discolored area which was unstable. The inspector also observed loose falling from the roof. The miners' representative essentially confirmed the testimony of the inspector.

White Pine's witnesses testified that the condition of the roof in the cited area was good and that only a slight amount of scaling was necessary. MSHA witnesses testified that the combination of roof noise, falling loose, and a slip of considerable length in the roof mandated the use of ground control in the particular area. I find that the testimony of MSHA's witnesses was more credible and persuasive than the testimony of White Pine's witnesses. Hence, I accept MSHA's contention that ground support was required in this particular area.

While it might be possible to terminate the decision at this point, that would leave undecided the basic controversy surrounding the entire demonstration project and the substance of the citation, to wit: whether the operating experience of the mine indicates that ground support is required. Failure to address and resolve this issue would lead to further attempts to mine without ground support under different roof conditions. I believe that it is unfortunate that the provisions of 30 C.F.R. 75.200 do not apply outside of coal mining. Under that regulation, a coal mine operator must adopt a roof control plan approved by MSHA. Such plans must be reviewed every 6 months. There is no comparable requirement in metal mines such as White Pine. Thus, there is no formal method by which an operator may obtain MSHA approval for a roof or ground control plan. This is the second time within a year that White Pine has litigated its asserted right to employ an alternative ground support plan. I believe that, without further ado, White Pine is entitled to an answer to the question of whether the operating experience of the mine indicates that ground support is required.

Condition of Roof or Group of Entire Mine

White Pine posits its contention that uniform ground control is not needed upon the fact that during the 1950's "thousands of lineal feet of mine drift were mined without the use of any roof bolts whatsoever." White Pine Brief at 20. Moreover, much of the bolting which was done in those days was added "after many feet of mining and blasting had been accomplished under unsupported roof." Ibid. MSHA's objection, that such evidence was irrelevant to the instant proceeding because there was no federal law applicable to underground metal mines during the period of time when White Pine Mine was without ground support, was overruled. However, the weight to be given to such evidence remains to be decided.

For the past 20 years, White Pine has followed a uniform roof bolting plan throughout its mine. Previously, roof bolting

was used in the majority of areas mined but not in all of them. Even with roof bolting, White Pine has a history of approximately eight fatalities due to roof falls. White Pine

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presented evidence that the roof in Unit 56 consists of massive sandstone and that roof bolts do nothing to insure the stability of the roof. Joseph Maher, White Pine's Director of Mine Planning and Engineering, testified that the only function of roof bolts in this area was to suspend the immediate roof from the main roof. On the other hand, MSHA mining engineer, William Lutzens, testified that, in his opinion, roof control was required throughout the mine because of factors such as the location of the mine in horizontal bedding, the presence of square openings rather than arched openings, and the fact that sandstone rock is not the most competent rock.

The removal of roof bolts was the subject of a prior imminent danger order which was vacated after a hearing. MSHA's objection to the evidence concerning this demonstration project was overruled. The evidence on this matter is subject to different interpretations. White Pine claims that all of the loose which fell upon the bolt removal was anticipated. Moreover, White Pine asserts that no material fell above the roof bolt line. MSHA doubts that White Pine expected some of the roof falls and noted that loose of up to 2 feet in depth fell after bolt removal. Furthermore, MSHA asserts that the roof bolting had already accomplished its purpose by the time the bolts were removed and this demonstration area was not an active production section which was subject to blasting. I conclude that the roof bolt removal project and the results thereof are entitled to little weight because of the failure to connect those results with the instant controversy. In other words, White Pine failed to establish that the evidence gathered from the bolt removal project shows that mining without any roof support is as safe as mining under uniform roof bolts. Likewise, I find that the evidence concerning convergence data is also entitled to little weight in this proceeding because it is not connected to predicting when a roof fall will occur. In fact, Joseph Maher, White Pine's Director of Mine Planning and Engineering, conceded that even with all of the data and devices for measuring convergence, White Pine was unable to predict with any precision when a roof fall would occur. Thus, the methods of measuring convergence and the convergence data do not establish that roof support is unnecessary.

Returning to the issue of whether the operating experience of the mine indicates that roof or ground support is required, I am persuaded that the most relevant evidence on this subject is the uninterrupted 20 year history of uniform roof bolting. Although the regulation speaks only of the "operating history" as relevant to the issue of roof or ground control, I believe that even without any operating history, a new program would be acceptable if the operator proved that it was just as safe as the prior program. However, in the instant case, White Pine's evidence fails to meet that test. I have previously found that the roof in the cited area included a slip which was unstable and required bolting. The testimony of Jack Parker, a self-employed consultant from White Pine, Michigan, is not entitled to much weight in this proceeding because he appears to be an advocate of "no bolt" mining rather than an impartial expert. In fact, Mr.

Parker was employed by White Pine from 1961 to 1971 and, during that period of employment, he recommended "no bolt" mining. I find the testimony of MSHA mining engineer William Lutzen to be more credible. Thus, I conclude that the pertinent operating

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history of this mine requires the use of roof bolts in all areas of the mine. White Pine failed to establish that "no bolt" mining or "bolting as required" mining would be as safe as uniform bolting. The citation is affirmed and White Pine's contest is denied.

Civil Penalty

MSHA proposed a civil penalty of \$500 for the violation in this case. Although White Pine failed in its contest of this citation, I find that it was acting in good faith and was not negligent in choosing to eliminate the need for ground support in this manner. However, the gravity of this violation was serious because miners were exposed to severe injury or death in the event of a roof fall. The preponderance of the evidence further establishes that without ground support in the affected area, a roof fall was likely.

Based upon all the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty of \$250 should be imposed for the violation found to have occurred.

CONCLUSIONS OF LAW

1. The administrative law judge has jurisdiction over the parties and subject matter of this proceeding.
2. White Pine and its White Pine Mine are subject to the Act.
3. The operating experience of the White Pine Mine indicates that ground or roof support is required throughout the mine.
4. The condition of the unsupported ground or roof in the area cited herein indicated that the area required ground or roof support.
5. White Pine's evidence concerning certain areas of the mine which were mined in the 1950's without ground or roof support is entitled to little weight.
6. White Pine's evidence concerning the demonstration roof bolt removal project in Unit 56 is entitled to little weight.
7. Citation No. 294190 issued on March 3, 1981, charging a violation of mandatory safety standard 30 C.F.R. 57.3-20 is affirmed.
8. Pursuant to section 110(i) of the Act, a civil penalty in the amount of \$250 is assessed against White Pine.

ORDER

WHEREFORE IT IS ORDERED that White Pine's contest of

Citation No. 294190 is DENIED and Citation No. 294190 is APPROVED.

