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SOL (MSHA) V. CONSOLIDATION 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
v.	Docket No. WEVA 80-289 A.C. No.
CONSOLIDATION COAL COMPANY, RESPONDENT	Blacksville No. 1 Mine

DECISION

Appearances: David Street, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Rowland Burns, Esq., Consolidation Coal Company, for Respondent

Before: Judge Moore

The above civil penalty proceeding was tried before Commission Administrative Law Judge John F. Cook, on September 18, 1980, in Meadow Lands, Pennsylvania, on March 5, 1981, in Washington, Pennsylvania, and on July 28, 1981, in McHenry, Maryland. On January 19, 1982, I notified the parties that Judge Cook was no longer with the Federal Mine Safety and Health Review Commission and that the case had been reassigned to me. The parties were requested to advise me if the reassignment created any problem. I have had no response from the parties, and I hold that by their silence the parties have waived any right to present further evidence or to object to a decision based on the record made before Judge Cook.

The procedure followed in this case was somewhat out of the ordinary. An unintentional roof fall had buried the continuous miner with the operator inside. The operator was trapped for approximately an hour but was not injured. In support of its case, the government produced two witnesses who had been to the scene of the accident after the roof fall. From the conditions they observed, they inferred that the roof had been bad and that Respondent failed to take proper precautions. After presenting a basically circumstantial evidence case, the government rested and Judge Cook denied Respondent's motion for judgment. In effect, he ruled that the government had made out a prima facie case. I consider Judge Cook's ruling as law of the case, and as such, it is binding upon me.

The defendant then produced three witnesses who had been at the scene prior to the roof fall, one being the foreman, one being the bolting machine operator, and the other being the continuous miner operator who was covered up in the roof fall. All of these witnesses stated that they had examined

the roof and that it was sound prior to the roof fall. In fact, the operator of the continuous miner said that the roof fall began in front of him at the face and worked back toward the intersection where he was located and where he was covered up by the roof fall. The bad top that the government claimed existed, was located along the inby edge of the intersection where No. 3 heading was started. This was 17 feet from where the roof fall started.

Respondent produced a fourth witness who had overheard some conversations during the course of the investigation subsequent to the roof fall. During cross-examination of this fourth witness, a Mr. Gross, government counsel inquired about some handwritten notes that he thought Mr. Gross had made. Mr. Gross denied making the notes and stated that he was not present at the investigation where the notes were made. (There were investigatory conferences on August 10 and August 15, 1979). The records available clearly showed that Mr. Gross had not been present when the notes were made, and Judge Cook properly refused to require Mr. Gross to testify concerning someone else's notes. A Mr. Webber had made the notes and the government attorney obviously was prepared to cross-examine Mr. Webber. Respondent chose not to put Mr. Webber on the stand and in my opinion, that should have ended the matter. I respectfully disagree with Judge Cook's decision to reconvene the hearing at a later date for the purpose of hearing Mr. Webber's testimony. The government had rested and had not announced its intent to put on any rebuttal witnesses. Mr. Freme, who later testified in rebuttal, was present on September 18, 1980.

If the record had been closed at that time, as I think it should have been, the vast weight of the evidence would have been on the side of Respondent.

The next hearing was on March 5, 1981, in Washington, Pennsylvania, and at that hearing Respondent's counsel Mr. Burns stated (Tr. 182) when referring to the end of the earlier hearing, "Thereupon, Mr. Street called Bob Gross, a Consol employee to the stand as his first rebuttal witness, and I stress the word "rebuttal'." In fact, Mr. Gross had not been Mr. Street's first rebuttal witness, but had been Mr. Burns' own witness (Tr. 154). Judge Cook apparently thought that Mr. Gross had been a rebuttal witness (Tr. 201) and Mr. Street who certainly should have known whether Mr. Gross was his own witness or not, did not bother to correct the misinformation of the Judge and Respondent's counsel. Nor had Mr. Street been surprised by the absence of Mr. Webber at the first hearing as stated by Respondent's counsel (Tr. 197). His only surprise was that Mr. Gross had not made the notes that he had in his possession for cross-examination purposes.

Another odd circumstance that developed during the second hearing, was the fact that Inspector Freme had based his entire testimony during the first hearing on the basis of notes taken by Inspector O'Neal rather than on his own notes. It is not clear whether Mr. Street knew that the notes were not Mr. Freme's

notes. He asked Mr. Freme if he testified with the help "of notes" (Tr. 303). The response was "yes I looked at the notes." He made further reference to "the notes" not "your notes" (Tr. 303, 304). On voir dire on the notes, the following took place (Tr. 307).

THE WITNESS: I don't remember exactly what the date was. August. I remember it being on the day shift. I have my notes in my pad.

MR. BURNS: Who's notes are these?

WITNESS: These are the notes that Mr. O'Neal wrote down while we were questioning the people involved in this event.

It was almost as if Mr. Burns had been led into asking Mr. O'Neal to testify concerning his own notes. It was after he made a statement that he would not object to Mr. O'Neal taking the stand that Mr. Burns realized that Mr. O'Neal had been sitting at counsel table throughout the entire proceeding whereas the other witnesses all been sequestered. Again, it's the law of the case, and I feel bound by the ruling that was made to allow the testimony. I will take these facts into consideration in the weight given to Mr. O'Neal's testimony and I will give very little weight to Mr. Freme's testimony in the first hearing since it was based, not on his recollection, or on a refreshed recollection, but on notes made by some other person about the incident.

Mr. O'Neal's testimony at the second hearing was not damaging to Respondent, but Mr. Burns apparently felt obliged to cross-examine any way, and managed to bring out testimony that it was company policy to treat a crack such as that found in the No. 3 entry in a manner different than that followed by the crew involved in the roof fall accident. That will be discussed further when the events surrounding the roof fall are discussed.

Exhibit M-10 is a four page handwritten document prepared by Mr. Webber which purports to summarize the statements made during the post-accident investigation. It is apparently the document that Mr. Street had in his possession when he was cross-examining Mr. Gross under the impression that M-10 was prepared by Mr. Gross. Mr. Webber's recollection was not refreshed by reading the document and he could not currently vouch for the statements therein. He admitted that he had prepared it from notes that he had taken during the investigation, but stated that the proceedings were so confusing that he might well have been inaccurate as to who said what. He was not the only witnesses to testify as to the confusion during the investigation. In these circumstances, the exhibit is of little help in resolving the differences in testimony among the witnesses. (FOOTNOTE a)

I will be referring hereinafter, to Exhibit No. M-6 which is a sketch of the roof fall area. There are two copies of M-6 in the record, and they are not identical. In one the exhibit No. "M-6" is in blue ink and the words "pressure crack" appear. In the other exhibit the marking "M-6" appears to have been made in black ink and the words "pressure crack" have been inked over, so they can not be read. While I am leaving both exhibits in the file, I will be referring to the one that does contain the words "pressure crack."

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The roof fall involved in this case occurred on August 10, 1979, in the intersection formed by the No. 3 entry and the last open crosscut, in the 3 West section of Respondent's Blacksville No. 1 Mine. Exhibit M-6, M-8, and O-1 are all depictions of the accident scene. Just prior to the beginning of the shift in question, the intersection was in the form of a T because the No. 3 entry had not yet been started on the inby side of the intersection. The face of No. 3 entry was actually just a part of the crosscut rib at this time. On the day before the roof fall, Richard Bissett, a miner operator who was running a roof bolter at the time, testified that there was a crack in the roof right at the edge of the rib that was later to become the face of entry No. 3. He bolted the area outby the crack and was of the opinion that the area was safe when he left it. Another roof bolter, Darrell Tucker, saw a crack in the intersection on August 9, but does not remember where the crack was. It was somewhere along the rib line in the intersection though, and he bolted the center of the intersection. Robert Burke was there working with Darrell Tucker and he described the intersection as follows: "The place was working, starting to break along the rib. Coal was flaking off . . . just a little rip, a crack. You could hear just a little. You could see a little coal flake off." (Tr. 293-294). He says Tucker bolted the crack (Tr. 294) whereas Tucker said he bolted the center of the intersection (Tr. 273) (it must be remembered that the roof fall was in August of 1979 and the second hearing in this case did not occur until March 5, 1981).

The three men most closely involved with the roof fall were Mr. Newhouse a loader operator, Mr. Bracken, the foreman, and Mr. Spooner the continuous miner operator who was covered up in the roof fall. All three testified for Respondent that the roof was good and solid when they started mining the No. 3 entry on August 10. The continuous miner drove 17 feet into the new face of the No. 3 entry, tested the roof with a scissors jack, and all who could hear it agreed that the roof sounded good. Just before they backed out, the roof began to fall at the face of No. 3 entry and worked back to the intersection and eventually the entire intersection fell trapping Mr. Spooner in his mining machine within the intersection. See Exhibit Nos. M-6 and O-1. While there was no testimony indicating that this roof fall, beginning at the face 17 feet away from the crack, was caused by the crack, it is nevertheless the government's position that the procedure used by this particular crew was incorrect. It states that the correct procedure would have been to mine in just a few feet to establish a brow, back out and then bolt the inby side of the crack. That argument assumes there was a crack all across the face area. As stated before, there was testimony that it was mine wide policy to mine in the manner described, but Mr. Phillips, the superintendent testified that there was no such policy although he recognized that a big slip should be bolted on both sides (Tr. 412). It apparently depends upon the extent of the flaw involved. The witnesses in this case described what they saw as a crack, a cutter, a slip, a rip, and a nick. Some witnesses say the "crack" went all the way across the intersection while others say that it was only on the right hand

side. Mr. Newhouse, the loader operator that witnessed the fall, stated that there was a small crack in the head coal on the right hand side of the face. He admitted that he may have been confused during the accident investigation and said left side but that in fact the "slip" was on

the right side. He also used the word "crack" and said extra bolts had been placed in that area. Mr. Bracken, the foreman stated that the mining machine had earlier nicked the roof and that the bolts were placed in the area of this nick on the right hand side of the entry. He said the nick was not a crack (Tr. 137), he said the extra bolts were all across the crosscut. When recalled at the last hearing, Mr. Braken denied that he had said during the accident investigation that there was a crack all the way across the intersection. (Tr. 415). He said a little head coal had fallen out and the area had been bolted. According to him after there has been a nick, air gets in the coal and in a few days some head coal falls out. He says there was no crack. Mr. Spooner, the miner who was trapped in the mining machine testified concerning the scissors jack test he made and said the roof sounded good and did not move. (Tr. 146). He also said that there was no "crack" going across the intersection, but he referred to a nick on the right hand side. He said that the fall could not have been foreseen. (Tr. 150).

While I generally favor the so called Susanna rule (Daniel, Chapter 13 Catholic Bible: Rule 615 of Federal Rules) I think sequestration of the witnesses may have backfired in this case. Some of them might have been using different words to refer to the same phenomenon. Also, I might be more impressed with a witnesses' description of the area if he knew that someone else had already sworn to a different description.

In the circumstances, taking into consideration all of the evidence including that which I would not have allowed had I been in charge of the case, I am nevertheless of the opinion that while it is a close question, the government has not sustained its burden of proof in this case. It has not shown that the roof fall was caused by mining inby the bolts in the intersection nor has it shown that the action of mining 17 feet inby those bolts was a violation of the standard. The citation is vacated and the case is dismissed. (FOOTNOTE aa)

Charles C. Moore, Jr.
Administrative Law Judge

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~FOOTNOTE_ONE
a. Under rule 803(5) of the Federal Rules of evidence, the document should have been read into the record rather than offered as an exhibit. In a nonjury trial, however, I fail to see that this makes any difference.

~FOOTNOTE_TWO
aa. Respondent's attorney insisted that his motion for a directed verdict filed at the conclusion of the government's case and renewed after the entire case had been presented was properly so designated. Our rules do not provide for such a verdict and the federal rule providing for that procedure does not seem applicable to an administrative hearing. If Respondent's

attorney means that the evidence was such that if it were a jury case I would direct a finding for Respondent then he is in error. I have already indicated that it is a close question. If he seeks a judgment in his favor, based on all of the evidence, then he has it. No motion was necessary at the end of the trial.