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SOL (MSHA) V. C F& I STEEL
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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

v.

C F & I STEEL CORPORATION,
RESPONDENT

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 80-469

A/C No. 05-00296-03046 F

Mine: Allen

Appearances: James H. Barkley, Esq., Office of Henry C. Mahlman,
Associate Regional Solicitor, United States Department of Labor,
Denver, Colorado 80294,

For the Petitioner

Phillip D. Barber, Esq., Welborn, Dufford, Cook and Brown
Denver, Colorado 80202,

For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration, (MSHA), charges respondent CF&I Steel Corporation, (CF&I), with violating the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Petitioner issued citation number 387105 pursuant to Section 104(a) of the Act [30 U.S.C. 814(a)]. It is alleged that CF&I violated Part 30, Code of Federal Regulations, Section 75.200 which provides as follows:

75.200 Roof control programs and plans.

[Statutory Provisions]

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions

thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

Petitioner seeks a civil penalty of \$7000. After notice to the parties a hearing on the merits was held on April 1, 1981, in Denver, Colorado.

ISSUES

The issues are whether a violation occurred and, if so, what penalty is appropriate.

SUMMARY OF THE EVIDENCE

CF&I's roof control plan for the Allen Mine in effect on the date of this fatality provides, in part, as follows:

Two safety jacks must be kept on the bolting machine at all times to be used when adverse roof conditions are encountered and the automated support does not supply adequate protection for the bolt operator (Tr. 36, 41-42, P2).

On February 26, 1979 roof bolter Maestas with his crew, consisting of Silva and victim Casias, were installing roof bolts in the Allen Mine (Tr. 5, 6).

The double boom roof bolter is 32 feet long and 12 feet wide (Tr. 6-7). The bolter has a boom on each side. The bolter consists of two basic parts: the canopy mechanism and the drive mechanism (Tr. 7-8, 190-192). The canopy is powered by an hydraulic jack which, when activated, forces the canopy up against the roof (Tr. 192-193). The portion that can be pressured against the roof measures 22 inches wide and 36 inches long (Tr. 193). "Elephant ears" extend downward at a slight angle

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below each canopy. The ears measure 14 inches by 36 inches (Tr. 193). The canopy pressure against the roof seeks to support the roof and the "elephant ears" prevent rock from falling directly on the operator and his helper (Tr. 8, 194).

On the day of this fatality the continuous miner had finished cutting and was backed out of a crosscut. The roof bolting crew was going to roof bolt the crosscut between the two entries (Tr. 10). In order to install a roof bolt Maestas moved the right side of the roof bolter close to the rib line (Tr. 11). In this position it was impossible for Maestas to install the pin and the glue (Tr. 11). In most cases Maestas' helper, Casias, would have operated the left side of the bolter so it was agreed Casias would put up the pins on that side (Tr. 10). Casias came to the side of the bolter and put in the glue and pin. Maestas activated the thrust lever to meet the pin. At this point a slab of rock fell (Tr. 11, 12, 14, 16, P1, R1). As the rock fell it hinged, broke, and a portion of it fell under the supported portion of the roof pinning Casias against the inside of the canopy (Tr. 16, 22, 23, 30). The portion of the rock trapping Casias was four feet wide, seven feet long, and one to three feet thick (Tr. 30). The entire rock fall measured 13 feet by 7 feet (P1, R1).

When the rock fell Casias was standing immediately under the bolter canopy and he was either under, or at the edge of, the permanently supported roof (Tr. 15, 26, P1, R1).

Maestas jumped over and unsuccessfully tried to move the rock. He then used the thrust arm to move the rock (Tr. 16).

The crew was going to roof bolt at the point where the crosscut had been turned (Tr. 19). When turning a crosscut extra support is needed (Tr. 19). Maestas had observed a visible slip 13 to 17 feet away (Tr. 27). A slip, which is like a glass surface, is a possible roof deformity. It is a separation of the roof and there isn't much holding it up. Slips are dangerous (Tr. 18, 19, 31).

There were two safety jacks on the roof bolter used for holding up beams and for temporary roof support. The safety jacks were not used on the day of the accident (Tr. 19-21).

The entry immediately adjacent to where this roof fall occurred was heavily supported by steel beams, steel straps, and timber (Tr. 45).

According to MSHA inspector Jordan whenever you encounter bad roof you use temporary roof supports until permanent support can be installed (Tr. 46-47). In Jordan's opinion Casias could have installed temporary supports while remaining under the permanently supported roof (Tr. 48). Such temporary supports might have provided some protection. They are normally installed by two workers (Tr. 51, 64).

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It is a common occurrence that if rock is supported on one edge it will hinge back, as it did here, when it falls (Tr. 62, 88). If temporary supports had been installed they might have enabled Casias to get out of the way, although this is speculative (Tr. 89).

Salapich, the foreman of the roof bolting crew, stated at the closing conference that he observed a slip in the area where the crosscut had been turned. The continuous miner operator tried to bring it down with the head of the miner but it didn't come down. So Salapich and the crew decided to hurry up and bolt it rather than let it sit (Tr. 198-199).

DISCUSSION

I agree with CF&I that MSHA carries the burden proving all of the elements of a violation. *Brennan v. OSHRC*, 511 F 2d 1139 (9th Cir. 1975).

Accordingly, the two pivotal issues in this case concern whether the rock bolting crew encountered adverse roof conditions and whether the automated support, (ATRS), supplied adequate protection. If both conditions arise then the roof bolters are required to use the two safety jacks which were admittedly on the bolting machine. It should be noted that the temporary supports are in addition to and apart from the canopy and elephant ears on the roof bolter machine. The canopy is generally referred to as the ATRS system.

CF&I initially asserts that the roof was not adverse in the area of the crosscut where the bolting took place. I disagree. The uncontroverted evidence shows otherwise: the entry itself was "heavily" supported by steel beams. According to Arthur Haske, chief coal mine inspector for Colorado, there was adverse roof 50 feet in all directions adjacent to the crosscut (Tr. 133, 145-146). There was a great amount of roof support in the area [of the entry] indicating CF&I felt they needed the support (Tr. 140). The picture is this: the roof of the entry was in such adverse condition that it required straps with pins, 16 foot steel beams, and five inch by five inch by four foot spacers as part of its permanent support system (Tr. 105, R1).

Given this situation one would not anticipate that the roof immediately adjacent to this entry would suddenly become something less than adverse.

In addition, roof bolter Maestas acknowledged that it was common to put beams up in this section (Tr. 19). Here a crosscut was being turned. When turning a crosscut you need extra support (Tr. 19). Safety jacks on the bolter can be used to hold up the beams and also for temporary support (Tr. 19). Further, before the roof fall Maestas saw at least one of the two visible slips 13 feet to 17 feet away (Tr. 27). He further knew that a slip is dangerous and a possible separation of the roof (Tr. 18, 19).

In addition to the foregoing facts the asserted admission of foreman Salapich made at the closing conference, as set forth in the summary, supra, page 4, is uncontroverted.

I agree with CF&I that the determination of whether temporary supports should have been used cannot be based on an after-the-fact determination. However, the preponderance of the evidence clearly establishes that the roof was adverse within the meaning of the roof control plan.

For the reasons previously stated I reject Maestas' opinion that the top was quite good (Tr. 105, 110).

CF&I also contends that the evidence establishes that it was reasonable for the miners to believe that they would be protected by the ATRS canopy. If they are adequately protected then the roof control plan does not require the use of temporary supports. I disagree that the miners were adequately protected by the canopy. The evidence shows that when the rock fell Casias was standing under or at the edge of the permanent roof. That particular location was probably the most dangerous position for him because if a fall occurred the permanent roof could cause part of the rock fall to hinge and fall inward under the permanent support. The ATRS on the roof bolter would not protect the miners in any fashion because the rock was being hinged by the edge of the permanent roof support. If anything the ATRS canopy contributed to the toppling motion of the rock. Maestas describes the accident: "the rock that hit Casias toppled forward on him. When the rock fell the canopy held the front end from falling straight down - it caused the back end to fall first, then break, toppling back on him" (Tr. 30).

Based on the physics of the situation I further credit MSHA inspector Jordan's testimony that rock will frequently fall in a toppling manner (Tr. 212). In other words, if a rock is supported on one edge it will hinge when it falls (Tr. 62). I reject CF&I's contrary evidence from Maestas and Haske (Tr. 107, 136). What the CF&I witnesses are saying is that rock usually falls straight down. I agree. Further, they had never seen rock fall "in this manner." However, we have this situation: the rock was partly held by permanent support, and the portion outside of the permanent support falls. In this circumstance the falling rock will, in my view, usually always hinge and fall under the hinge point, or as in this situation, under the permanent roof support and the canopy.

CF&I contends that MSHA's evidence only suggests that jacks might have been used and they might have saved Casias. CF&I points to inspector Jordan's testimony that it was "highly speculative" what protection, if any, the temporary supports would have provided. Further, Maestas testified that CF&I uses two men to install temporary supports thus their installation might have lead to the death of two miners.

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I agree CF&I's analysis of the evidence. It is highly speculative whether the temporary roof supports might have protected Casias. In fact, we can speculate that 16 foot 6 inch I beams, such as were in the entry, might not have contained this rock fall. However, CF&I has misjudged the thrust of the regulation. There was adverse roof and the canopy was inadequate. Unfortunately, we will never know what protection would have protected Casias.

CF&I states that MSHA's indecisiveness underscores the reasonableness of the miners' actions. The record clearly supports indecisiveness by MSHA in its effort to decide whether CF&I violated its roof control plan. I further agree with CF&I that this is not a strict liability standard. In other words this case does not reduce to a roof fall, a fatality, and a citation. MSHA may have been indecisive but the Secretary did in fact issue a citation and the determinative facts are set forth in this decision. Mere indecision by MSHA and conclusionary statements by MSHA inspectors that no violation occurred do not invalidate the Secretary's case.

CF&I further invokes the "greater hazard" doctrine. It is claimed that the installation of temporary support would create a greater hazard than not installing them.

The Review Commission has extensively reviewed the greater hazard doctrine and concluded that there is a statutory procedure for an operator to obtain a waiver or modification of a mandatory standard. Any such relief must be obtained in a forum different from this Commission, that is, such waiver or modification rests with the Secretary of Labor. Penn Allegh Coal Company, Inc., 3 FMSHRC 1392, 1399 (June 1981), 30 U.S.C. 811(c); 30 C.F.R. Part 44.

CIVIL PENALTY

Section 110(i) of the Act [30 U.S.C. 820(i)] provides as follows:

The Commission shall have authority to assess all civil penalties provided in this Act. 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.

At the trial the Secretary encouraged the Judge to impose a lesser penalty than the proposed \$7000 if it was determined that a violation

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occurred (Tr. 221, 218). CF&I urges that even if a violation existed it would only be technical and a fine, if any, should be minimal.

As previously discussed there is little evidence establishing a casual connection between the facts of the alleged violation and the death of miner Casias. However, a casual connection in the sense urged by CF&I is not a requirement under the regulation.

Considering the statutory criteria I deem that a civil penalty of \$2500 is appropriate.

Based on the foregoing findings of fact and conclusions of law I enter the following

ORDER

1. Citation 387105 is affirmed.
2. A civil penalty of \$2500 is assessed.

John J. Morris
Administrative Law Judge