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SOL (MSHA) V. RIO ALGOM
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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
	DOCKET NO. WEST 79-122-M
v.	
	MSHA Case No. 42-00677-05005
RIO ALGOM CORPORATION, RESPONDENT	MINE: Lisbon

DECISION

Appearances:
James H. Barkley Esq.
Office of the Solicitor
United States Department of Labor
1585 Federal Building, 1961 Stout Street
Denver, Colorado 80294,
For the Petitioner

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P.O. Box 11898
Salt Lake City, Utah 84147,
For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

This proceeding arose through the initiation of an enforcement action brought pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1978), (hereinafter the "Act"). The Secretary of Labor, Mine Safety and Health Administration (hereinafter "the Secretary") seeks an order assessing a civil monetary penalty against the respondent for

its violation of 30 C.F.R. 57.3-22.(FOOTNOTE 1) Specifically, the Secretary alleges that the part of the standard which was violated is that part which requires: "Ground conditions along haulageways and travelways shall be . . . supported as necessary" (Pet. Br. at 1). Rio Algom Corporation duly contested the proposed assessment, and a full hearing on the merits was held. Both parties filed post hearing briefs. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

PROCEDURAL BACKGROUND

On January 29, 1979, in the course of an investigation of an unintentional roof fall at the respondent's Lisbon Mine, MSHA inspector Ronald Beason issued Order No. 336661, pursuant to section 107(a) and 104(a) of the Act, alleging that respondent violated 30 C.F.R. 57.3-22.

Respondent filed an application for review of the order issued under 107(a) of the Act and a hearing was held on September 5, 1979, before Administrative Law Judge Forrest E. Stewart. The sole issue considered and determined by Judge Stewart in that case was whether on January 29, 1979 and imminent danger existed in the Lisbon Mine which warranted a withdrawal of the miners. Judge Stewart stated in his decision dated January 29, 1980 as follows: "A finding need not be made, therefore, as to whether a violation of section 57.3-22 existed. Such a finding would not be determinative of the issues in this case." Judge Stewart decided that the issuance of a 107(a) withdrawal order was the appropriate action taken in view of the facts presented. Rio Algom Corporation, 2 FMSHRC 187 (January 1980) (ALJ) Docket No. DENV 79-347.

On September 18, 1979, the Secretary filed a petition for the assessment of a civil penalty based upon the Citation/Order No. 336661 issued January 29, 1979 alleging respondent violated 30 C.F.R. 57.3-22 of the Act and proposing a civil penalty of $445.00.

On October 12, 1979, respondent filed an answer to the proposal for assessment of civil penalty stating that it had received the order of withdrawal No. 336661 but at no time was a citation issued. Respondent also alleged that all issues were litigated in the case involving Docket No. DENV 79-374 before Judge Stewart and that petitioner is estopped from bringing this action to enforce a civil penalty and is barred by laches from seeking to issue a citation or impose a penalty based upon order No. 336661.

On January 28, 1981, respondent filed a motion to dismiss the proposal for assessment of a civil penalty and to vacate the hearing based upon the grounds that No. 336661 was an order of withdrawal and not a citation and that the matter was so determined in the hearing before Judge Stewart. Petitioner filed a memorandum in opposition to respondent's motion wherein he contended an order and citation may be issued for the same facts and that respondent was issued a citation and order concurrently for the same conditions that gave rise to the 107 imminent danger order. Respondent filed its reply alleging that the petitioner had included factual inaccuracies with respect to the procedural background, that all issues concerning 336661 had been litigated and are res judicata, and that these proceedings under Docket No. WEST 79-122-M violated its rights.

On February 11, 1981, petitioner filed a motion for partial summary decision requesting a decision be issued holding that respondent had violated 30 C.F.R. 57.3-22 based upon the findings of facts and conclusions of law in Judge Stewart's decision and that only the amount of the penalty needed to be tried in the present case. Respondent filed a reply arguing that the motion was not timely filed and that genuine issues as to material facts remain in the present proceeding.

On February 20, 1981, this Judge issued an order, having considered all of the above motions and arguments, finding that in the prior case, Docket No. DENV 79-347, Judge Stewart had denied a similar motion by respondent to dismiss and vacate the citation, or, in the alternative for a summary judgment and had proceeded to hear and decide that case on the sole issue of whether an imminent danger existed in the mine which warranted a withdrawal of the miners. Further, Judge Stewart did not consider or dispose of the issue as to whether a violation of a safety standard occurred. Also, the Federal Mine Safety and Health Review Commission had considered a similar set of facts and decided that the Act mandates assessment of a penalty for a violation of mandatory safety standard whether that violation is alleged in a citation issued under 104(a), or in a withdrawal order issued under section 104(d) or other section of the Act. Island Creek Coal Company, 2 FMSHRC 279 (February, 1980), Van Mulvehill Coal Company, Inc., 2 FMSHRC 283 (February, 1980). Both respondent's and petitioner's motions were denied.

Upon commencement of the hearing in the present case, respondent made a motion in the nature of motion in limine to restrict the receipt of any evidence in this case related to a violation of a standard and renewed the arguments made in its earlier motions. I denied respondent's motion at that time for the same reasons stated in my prior order dated February 20, 1981. At this point, having had the benefit of hearing all of the evidence presented at the hearing, reviewing the record in the prior case heard and decided by Judge Stewart, and weighing the arguments of the parties presented in their pleadings prior to the hearing and arguments at the hearing, I conclude that my prior order of February 20, 1981 is valid and adopt its reasoning and authorities therefore without restating the full text herein.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, respondent was the owner and operator of an underground uranium mine near LaSalle, Utah, known as the Lisbon Mine.

2. The operator employed approximately 120 people including supervising personnel. The mine operated on a 24 hour basis with the day shift commencing at 8:00 a.m.

3. On Wednesday, January 24, 1979(FOOTNOTE 2) at approximately 10:30 a.m., a roof fall occurred at the Lisbon Mine in the 13 North and 18 North drift area near the 911 shop. This is part of the 1 and 11 contract areas where production of ore was in progress. The 911 shop was used to service and repair the 911 loader.

4. The material from the roof fall extended for a distance of 40 feet down the drift and was of such a height that a miner standing on the floor of the drift could not see over it. It was as wide as the drift except for an area on the east side that was open to passage by reason of cribs that remained standing after the fall (Tr. at 206).

5. Miners continued working in the 1 and 11 contract area following the roof fall on January 24 until 10:00 a.m. on the following day January 25, a period of 23 1/2 hours (Tr. at 162). Some miners set additional timbers near the shop so that the 911 loader, tools, and equipment could be extracted. Other miners continued working at driving the 13 North drift and in production in the 18th North drift area.

6. On Thursday, January 25, Charles B. Pearson, respondent's safety supervisor arrived at the mine and upon learning of the roof fall proceeded underground to inspect the area. At approximately 10:00 a.m. all miners were withdrawn from the 13 North drift and 18 North drift area (Tr. at 216).

7. On Sunday, January 28, MSHA inspector Donald L. Beason received a report from a miner that a roof fall had occurred at the Lisbon Mine on January 24. This occurrence had not been reported by respondent to MSHA as of that date and time (Tr. at 29-30).

8. On Monday, January 29, Beason arrived at the Lisbon Mine to investigate the reported roof fall and went underground accompanied by Mervyn Lawton, manager and president of Rio Algom, John Vancil, mine superintendent, and Charles Pearson. As a result of his inspection, Beason issued Order/Citation No. 336661 to respondent citing four areas in the mine as presenting an imminent danger to miners and a violation of mandatory safety standard 57.3-22. The four areas were 13 North 4 East Pillar, 13 North 6 West, 13 North 7 West, and 13 North 7 West through 4 West.(FOOTNOTE 3)

9. During his inspection Beason observed in the 13 North 4 East area ten 8 x 8 timber sets all showing caps pressed down into the posts with one cap deflected and showing a 3 3/4 inch gap in the center. Also, 25 roof bolts were without plates (Tr. at 38-39). At 13 North 6 West, Beason saw five sets of 8 x 8 timbers with caps pressed down into the posts and "smashing" of the caps on the first set splitting the post (Tr. at 43-33). Also, 13 roof bolts of the split set type were observed with rings broken and plates missing (Tr. lt 45). At 13 North 7 West intersection, a caved area was encountered which was 10 to 12 feet in width and extended 25 feet into the 13 North drift. It occupied the full width of the drift but the inspection party could climb over the muck pile to get by. The rock that fell had extended above the anchor points of the roof bolts. This was not the roof fall that occurred near the 911 shop area on January 24 but was a fall that occurred sometime between January 25 and the day of the inspection (Tr. at 46-47). In the 13 North haulage drift between 7 West and 4 West crosscuts, Beason saw plates stripped off of the roof bolts and cracks in the plates. The wire mesh incorporated with the roof bolts for roof control was bowed out. This area is a travelway in the mine (Tr. at 49-50). Other areas cited by the inspector were access routes in this area of the mine (Tr. at 51).

10. On January 29, the day the imminent danger withdrawal order was issued, no miners were present in the area covered by the order as all miners had been withdrawn by the respondent four days prior thereto.

11. Beason had inspected the Lisbon Mine several times prior to the roof fall on January 24. On August 1, 1978 he issued a citation and suggested that the area described as 18 South haulage drift located near the 911 shop area should be monitored for roof support (Tr. 62 and Exhibit P-2). On January 11, 1979, Beason issued a citation to the respondent covering an area described as 18 South Main and 15 East Fuel drift and 5 East 11 North. This is an area 50 to 75 feet from the 911 shop on the same haulageway. The respondent was cited for loose unconsolidated material on the brow of 18 South main and also 5 East needing attention (Tr. 6 and Exhibit P-3). On January 15, 1979, Beason returned to the 1 and 11 contract area of the Lisbon Mine and walked the travelway into 13 North drift near the 911 Shop. Based upon this inspection, he terminated the citation issued January 11 (Tr. at 134, 140).

ISSUES

The issues in this case are whether the respondent violated mandatory safety standard 30 C.F.R. 57.3-22, and, if so, the appropriate amount of the civil penalty which should be assessed for such violation pursuant to section 110(a) of the Act.

DISCUSSION

The precise question before me is whether respondent violated that portion of section 57.3-22 which states that "Ground conditions along haulageways and travelways shall be . . . supported as necessary." Petitioner contends that the roof fall in 13 North 7 West would not have occurred if the roof had been adequately supported and that the inspector's observation of conditions in the other areas incorporated in the order/citation and a history of two roof falls within five days in the area cited as indicative of a lack of adequate support (Pet. Br. at 3).

Respondent has challenged the citation in controversy for the following reasons: (1) the area affected by the citation did not involve a haulageway or a travelway; (2) that there is no evidence that ground support was inadequate; and (3) that petitioner cannot penalize respondent for conditions as they existed on January 29 when the inspector first observed them for the reason that all mining had ceased and miners withdrawn from the area on January 25.

Based upon a careful review of the testimony of witnesses, exhibits, and arguments of counsel, I reject the respondent's arguments and find that a violation of the cited standard occurred. The most credible evidence of record shows that inspector Beason was experienced, both as a miner and mine inspector, having worked ten years as a miner and supervisor in

various mines and seven years as a mine inspector. Also, prior to the occurrence involved

in this matter, Beason had inspected the Lisbon Mine on several occasions and issued citations and warnings to the operator's management regarding loose ground along haulageways including the fuel drift near the 911 shop and the area near where the second roof fall was discovered (Finding of Fact No. 11).

Beason testified that upon entering the mine on January 29 to investigate the first roof fall, he discovered that a second fall had occurred sometime between January 25 and 29 in what is considered an access route of the mine. Also, he observed areas designated as 13 North 4 East, 13 North 6 West, and 13 North 7 West through 4 West showing evidence of ground movement. This involved caps being mashed down on tops of posts, caps that were cracked and roof bolts being stripped of their plates.

Pearson, respondent's safety superintendent, testified that he accompanied Beason underground on the January 29 inspection and observed a cap on a post cracked and caps compressed on posts in the 13 North 4 East area, the cave in the 13 North 7 West area which he hadn't seen before, roof bolts with plates stripped in the 13 North 6 West area, and split sets stripped of their plates in the 13 North 7 West area (Tr. 153-158). Pearson admitted that he withdrew miners from the 1 and 11 contract areas on January 25 because he was concerned about the difficulty that could be encountered evacuating an injured person due to the fall at the 911 shop and also because of the ground movement in the area (Tr. at 164).

In light of the foregoing, I am persuaded that the conditions observed by Beason on January 29 and Pearson on January 25 indicated there was unstable ground conditions in the area cited which indicated additional support was needed in the travelways and haulageways. I have considered the testimony of respondent's witness Lawton wherein he testified that the conditions observed by Beason involving a "bent" cap or the cracked cap did not indicate the area was taking excessive weight or had he observed any roof bolts on split sets stripped of their plates or deflected caps along the route he traveled on January 24. Also, Lawton stated that the first roof fall had nothing to do with the second fall discovered on January 29 (Tr. 361-382). From a review of this conflicting testimony, I find that the conditions observed and described by Beason on January 29 and Pearson on January 25 are more credible as to the conditions in the area involved in this citation.

Respondent contends that the conditions observed by Beason on January 29 should not be controlling as the miners had been withdrawn on January 25 and mining discontinued in the cited area. Admittedly, Beason was not in the mine on January 24 when the first fall occurred or January 25. However, I am convinced that the more credible evidence in this case supports the basis upon which the inspector issued the citation involved herein. Beason had prior experience inspecting this area and had previously issued citations and warnings for ground control. He had conversations with members of management as to the conditions existing on January 24 and 25 and the opportunity on January 29

to personally observe the conditions of the ground support in the area including the caps that were cracked and the plates stripped from the roof bolts.

The specific question is whether the travelways and haulageways in the cited area were adequately supported between January 24 at 10:30 a.m., when the first roof fall occurred at the 911 shop, and January 25 at 10:00 a.m. when Pearson ordered the miners withdrawn from the area. This was a period of time when miners continued working in the area in an attempt to cut through a drift in 13 West and also to remove tools and equipment from the 911 shop area. Several of respondent's witnesses testified that they were of the opinion that the area was properly supported during this period. However, I find that the most credible evidence shows that two reasons existed for the miners to continue to work in the area following the fall at the 911 shop. First, management wanted to complete the mining cycle in the 13 North drift to meet the miners who were drilling through from the other side (Tr. 340). Second, management wanted to remove the 911 machine and other equipment from the 911 shop area. Assuming, that there is some merit to respondent's contention that the area was closed by the operator on January 25 for the reason that there was inadequate access routes for removing an injured miner on a stretcher should an accident occur, the fact remains that for 24 hours men were permitted to work in an area where an unexpected roof fall had occurred in a travelway and where previous warnings and citations had been issued because of ground movement. Also, four days later, a second fall was discovered as well as other evidence involving unsafe roof bolts and caps on posts in the area indicating ground movement. From the above circumstances, I conclude that from January 24 through 25, ground conditions along haulageways and travelways were not supported as necessary and the area presented the potential of an injury or death to miners working there. Respondent argues that because the area had been closed on January 25, the locations cited were not haulageways and travelways on January 29, the day of the inspection. The fact is though that for the period from January 24 through 25, the cited areas were being used for this purpose and that is the time period pertinent to this violation.

Supporting its case for vacating this citation, respondent cites the decision of Judge Boltz in Secretary of Labor v. Homestake Mining Company, 2 FMSHRC 3630 (December 1980)(ALJ). In that case, it was found that the operator had taken steps to provide adequate ground support in the normal sequence of its mining operation and that the Secretary had failed to sustain the burden of proof to support a violation. I do not find any discrepancy between that decision and the findings made in this case. The question is one of weight of evidence and proof. In the Homestake case, the post that showed a crack was a "tie" and not used to support weight. In the present case, the timbers involved that showed evidence of taking weight were designed and installed as support and not as a "tie."

I find no merit in respondent's argument that a citation should not be issued for a condition that existed during a period of time prior to the day of inspection. In this case, respondent argues that the conditions observed by the inspector on January 29 were different from those that existed four days earlier as the area had been closed and not maintained during this period.

This argument, if strictly followed, would preclude much of the enforcement effect of the Act. As an analogy, often the determination of the

cause of an accident, such as an explosion in a mine, is predicated upon the reconstruction of events that led up to the occurrence in question. To do this, it is necessary to rely upon known facts and testimony of witnesses whose knowledge is based upon an expertise in the matter involved. In this case, the knowledge, observations, and opinion of inspector Beason are believed to be most credible as to the alleged violation. In Old Ben Coal Company v. Interior Board of Mine Operation Appeals, 523 F. 2d 25 (7th Cir. 1975), the Court held that an inspector is entrusted with the safety of miners lives, and he must ensure that the statute is enforced for the protection of these lives. The decisions of the inspector, unless there is evidence that he has abused his discretion or authority, should be supported. In this case, I find no evidence that the inspector either abused his discretion or authority and find that the respondent violated the cited standard.

PENALTY

Petitioner argued at the hearing and in his brief that the penalty originally proposed by the assessment office in the sum of $445.00 should be increased to $4,450.00. As a basis for this, petitioner argued that the respondent had received verbal and written warnings from the inspector prior to the first cave-in and still continued working the miners in a hazardous area following said roof fall.

Section 110(i) recites that the Commission shall have the authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, we shall consider the operator's history or 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 the violation.

History

The history of prior violations in this case involve the citations and warnings that had been given to the respondent prior to the unexpected roof fall that occurred on January 24 (See Finding No. 11). Also, a citation was issued to respondent for failure to report the above roof fall which was not a part of this contested citation. Also, consideration must be given to the fact that the area involved had a good safety record, having one injury involving a broken leg reported in 1978 and no other lost time accident since that date (Tr. 219-222).

Size

The respondent employs approximately 120 miners at the mine which included supervisory personnel (Tr. 12 and Finding No. 2). I would consider this a medium sized mining operation.

Effect On Operator's Ability to Continue in Business

The record does not reveal that the imposition of a reasonable penalty in this case would cause a hardshop on the operator's ability to continue in business and in the absence of such proof, it is presumed it would not.

Negligence

I am convinced that the respondent was negligent in this case in allowing miners to continue to work in the area cited following the roof fall on January 24. Respondent's witnesses testified that they did not believe there was a danger here following the first fall at the 911 shop and that they had monitored the area during this time. Also, that the reason for the respondent withdrawing the miners on January 25 was the lack of a proper access for removing an injured man should an accident occur and not because of the condition of the roof in the area. I will not recite In Haec Verba, the statements of respondent's witnesses on this matter, but find these statements to be at odds with the statements of Beason and Pearson. I find that the history of the area, the prior violations and warnings, the first roof fall on January 24, and conditions of the roof support as described by Beason to be evidence of negligence on the part of respondent. Also, in continuing to require the miners to work in the area to extricate equipment and tools and to continue drilling in 13 North drift is further evidence of a negligent attitude on the part of respondent.

Gravity

The gravity of the violation in this case involved the respondent's working miners for a period of 24 hours following a roof fall on January 24. Also, the area that the miners worked in had only two possible escape routes, one involving the fall at the 911 shop area which blocked most of the drift and a second route through areas earlier described in the citation as showing ground movement and where a subsequent roof fall was discovered on January 29 (Tr. 167). I find that these practices were serious and posed a grave risk to these employees.

Good Faith Compliance

The record shows that the area had been closed and miners withdrawn on January 25, four days prior to the inspector issuing the withdrawal order/citation involved in this case. The question of good faith compliance is not involved here as the respondent did not reopen the area for several months thereafter.

I reject the petitioner's recommendation as to the amount of the proposed penalty. Commission Rule of Procedure 29(b) provides:

> In determining the amount of the penalty neither the judge nor the Commission shall be bound by a penalty recommended by the Secretary . . . .

29 C.F.R. 2700.29(b). Thus, in a contested case the Commission and its judges are not bound by the penalty assessment regulations adopted by the Secretary. Rather, in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based on the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 3 FMSHRC 291 (March 1983). Although, I reject the amount of increase in the penalty suggested by the Secretary in this case, I find from the facts developed during the hearing that some increase in the amount of the penalty over that originally proposed by the administration is warranted. I am persuaded by the evidence of record that some members of respondent's management evidenced a lack of proper concern for the health and safety of miners required to continue working in the cited area for a 24 hour period following the roof fall at the 911 shop area. This area had been cited by MSHA on several previous occasions as showing evidence of an unstable roof and some ground movement. The unexpected roof fall occurred in a travelway regularly used by miners going to and working around the 911 shop area. Also, management had the opportunity to observe the roof in this area immediately prior to the fall and failed to perceive its potential for collapse, in spite of the support that had been installed to control it. This fall should have been a warning of the general conditions that existed throughout the 1 and 11 contract areas. However, management ignored this situation and continued to work miners in the area both in attempting to complete the mining cycle in the 13 North drift and in removing equipment and tools from the 911 shop. This work continued until the respondent's safety superintendent arrived underground to investigate the fall and determined the area should be closed and the miners withdrawn. I find that working miners in the area following the roof fall was gross negligence on the part of the respondent and is the basis for an increase in the amount of the penalty over that originally assessed in this case.

Based on the above findings and discussion, I conclude that the appropriate penalty for the violation found is $800.00

CONCLUSIONS OF LAW

1. I have jurisdiction over the subject matter and the parties to this proceeding.

2. Respondent violated 30 C.F.R. 57.3-22 as alleged by the Secretary of Labor.

3. The appropriate penalty for the violation is $800.00.

ORDER

Respondent is ORDERED to pay the sum of $800.00 within 40 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

FOOTNOTES START HERE-

1 Mandatory. 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.

2 All dates are in 1979.

3 These areas were located on Petitioner's Exhibit No. 1 as follows:

"A" 13 North 4 East pillar (Tr. at 41).
"B" 13 North 6 West (Tr. at 43).
"C" 13 North 7 West (Tr. at 46).
"D" 13 North 7 West through 4 West (Tr. at 50).