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SOL (MSHA) V. TODILTO EXPLORATION & DEV.
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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. CENT 82-101-M
A.C. No. 29-01869-05001 H QU4

v.

St. Cloud Mine

TODILTO EXPLORATION & DEVELOPMENT
CORPORATION,
RESPONDENT

DECISION

Appearances: Richard L. Collier, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner
George F. Warnock, President, Todilto Exploration and Development Corporation, Albuquerque, New Mexico, for Respondent

Before: Judge Melick

This case is before me upon the petition for assessment of civil penalty filed by the Secretary of Labor, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act" for one violation of the regulatory standard at 30 C.F.R. 57.3-22. The general issue before me is whether the Todilto Exploration & Development Corporation (Todilto) has violated the cited regulatory standard and, if so, whether that violation was "significant and substantial" as defined in the Act and as interpreted by the Commission in Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981). If it is determined that a violation has occurred, it will also be necessary to determine the appropriate penalty to be assessed.

On February 23, 1982, MSHA inspector William Tanner Jr., issued a combined withdrawal order and citation under sections 107(a) and 104(a) of the Act respectively. The validity of the order is not in itself at issue in this civil penalty proceeding. See Secretary v. Wolf Creek Collieries Co., PIKE 78-70-P (March 26, 1979); Pontiki Coal Corporation v. Secretary, 1 FMSHRC 1476 (October 1979). The order/citation alleged as follows:

Loose material was hanging on the ribs and back from the No. 1 crosscut to the face which is 230 feet. The back where the loose was hanging ranges between 9 to 16 feet high. Four men working for the contractor and three men of the operator's were in this immediate area.

The cited standard provides in relevant part as follows:

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.

The essential facts are not in substantial dispute. It is the conclusion to be drawn from the facts primarily concerning the gravity of the violation that is at issue. Todilto admits that a violation occurred but contends that it was a minor violation of loose rock on the back and ribs and argues accordingly that the hazard was low in gravity not warranting even the \$500 penalty proposed by MSHA.

In February 1982, Todilto was the primary contractor for the development of the St. Cloud Mine. At the time of the inspection at issue it had developed a decline tunnel to a length of approximately 1,650 feet. According to Inspector Tanner, he and Inspector Dennis Heater arrived at the mine at around 9:30 or 10:00 on the morning of February 23rd, 1982. They were met about 30 minutes later by Todilto president George Warnock and mine superintendent Ron Ingimundson. The group proceeded to inspect the mine. Around 1400 to 1500 feet into the mine, they observed a piece of rock about one cubic foot in size and weighing about 140 pounds protruding from the "back" or roof. Warnock directed a workman to bring the rock down and it was done. Further into the tunnel, Tanner saw another rock protruding from the roof. This one was about 6 inches thick and 18 inches in diameter located some 210 to 230 feet from the face. Within this general area Tanner found seven places on the roof and nine on the ribs that consisted of sharp, abrasive and loose rock. It was all located at least 9 feet from the floor.

According to Tanner, eight employees were working in the general vicinity of these loose rocks. He opined that if such rock material should fall it could cause serious injuries or death. Indeed he cited an incident that had recently occurred at the St. Cloud Mine in which a rock only the size of a baseball struck a miner on the back of a hand cutting two tendons. In an incident at another mine a rock only about 18 to 20 inches in diameter and 6 inches thick slid off a rib severing a miner's leg.

Todilto President Warnock conceded that the first piece of rock seen by the inspection party was of the size described by Tanner. The 8 inch by 5 foot by 3 foot piece located some 20 to 25 feet to the rear of the "jumbo" was also as described by the inspector. Warnock testified that he personally barred down a small piece of that loose that hit the jumbo track. Warnock further admitted that there was "another big piece on the rib at the corner of the pillar" which he also thought "very definitely should have been brought down." This was located about 20 to 30 feet from the face. In an attempt to dispute the seriousness of the violation, Mr. Warnock also stated in a letter dated May 10, 1982, that, among other things, the piece on the right side of the track "was loose enough to be barred down and should have been" and that "this piece was, at the most, 50 pounds, and while

it could have injured someone, it would not have been fatal."
Warnock further admitted that "several larger pieces were barred
off of the rib at two

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different corners [and] they needed to be barred down and should have been." He argued only that they were not high enough on the rib to create a fatality."

Mine superintendent Ronald Ingimundson agreed with the other witnesses concerning the dimensions of the cited rock material. He agreed with Inspector Tanner that even a small rock weighing only 10 to 15 pounds falling from the roof of the mine could cause serious injuries.

Within this framework of essentially undisputed evidence, I have no difficulty in concluding that the violation cited was indeed quite serious. There indeed existed a reasonable likelihood that the hazard of a rock fall would occur resulting in injuries of a serious nature. The violation was accordingly "significant and substantial" and of high gravity. Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981).

Mr. Warnock claims, in response to the allegations of negligence, that supervisory personnel did in fact instruct the miners at the beginning of the 8 a.m. shift to bar down the loose rock and that such work had commenced before other work in the mine. While there is no dispute that some rock had indeed been barred down before commencement of other work the undisputed evidence in this case also shows that much loose material still remained after supervisory personnel allowed other work to be performed. Accordingly, the operator was negligent.

In determining the appropriate penalty to be assessed in this case, I have also taken into consideration the evidence that the operator herein is small in size and had no prior violations. Indeed the record shows that Todilto had received several awards from the State of New Mexico in 1982 recognizing its "superior performance in promoting safety in the mining industry by achieving a zero frequency rate in their operations". In further mitigation Mr. Warnock pointed out that Todilto has never been cited for any violation since the citation and order at issue. However, because of the seriousness of this violation and the clear negligence of the operator, I find that a penalty of \$350 is appropriate.

ORDER

The Todilto Exploration & Development Corporation is hereby ordered to pay a civil penalty of \$350 within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge