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SOL (MSHA) V. AMERICAN BORATE
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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 81-301-M
A.C. No. 04-04218-05014 F

v.

MINE: Billie

AMERICAN BORATE COMPANY,
RESPONDENT

DECISION

Appearances: Theresa Kalaski, Esq., Office of the Solicitor
U. S. Department of Labor, Los Angeles, California,
for Petitioner Stephen G. Saleson, Esq., San
Bernardino, California, for Respondent

Before: Judge Vail

STATEMENT OF CASE

On December 2, 1980, a miner at American Borate's Billie mine was killed when struck by a slab of rock that fell from the roof. The Secretary of Labor, after investigating the accident, issued to American Borate a 107(a) imminent danger withdrawal order. The Secretary also alleged American Borate violated 30 C.F.R. 57.3-20 which reads:

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.

In this proceeding, American Borate contests both the Secretary's finding of a violation and the proposed penalty based upon it.

A hearing was held, pursuant to notice, in Las Vegas, Nevada, on March 2, 1982. Witness for the Secretary was Vaughn Duaine Cowley, official of the Mine Safety and Health Administration (MSHA), who investigated the accident. Witnesses for American Borate were Dale Parson Bess, shift superintendent in charge on the day the fatality occurred, Charles Garrett, mine manager at the Billie mine, Lupe Regalado, employed in the safety department to provide employees the forty hours and annual refresher training, Henry McIntire,

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associate safety engineer for mining for the Division of Industrial Safety, State of California, and Richard Russel Renner, Chief Criminologist for the Las Vegas Metropolitan Police Department, Las Vegas, Nevada.

Both parties were afforded the opportunity to file post-hearing briefs but only American Borate chose to do so. Having considered American Borate's brief and contentions of the parties, and the whole record, I make the following decision. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

FINDINGS OF FACT

1. American Borate's Billie mine is an underground borate minerals, primarily colemanite, mine near Death Valley, California. Mining proceeds by cut and fill using room and pillar method. Drifts are cut with a continuous mining machine followed by roof bolting using mats with five foot roof bolts on four foot centers.

2. On December 2, 1980, miners Donald Pribbenow and Orval Duncan were assigned the task of rock bolting in the No. 1 south cross cut off the No. 1 drift west of the 1160 level. Immediately prior to the fatal accident that occurred this day, they had installed approximately twenty bolts, four or five mats, and one roll of wire across the back near the face. When Pete Quick, the shift foreman left this area of the mine, Pribbenow and Duncan had approximately two more bolts to put in with the existing mat in place. Shortly thereafter, a slab of rock fell from the roof striking Duncan and causing his death.

3. The process used in the Billie mine for roof bolting consisted of securing steel mats onto the back of the drift with a split set roof bolt with a ring and six by six inch or eight by eight inch plate on the bottom to hold the mat against the roof. Mats are steel straps five to eight feet long with holes drilled for the roof bolts. These mats are placed over the wire mesh used to control the roof (Tr. 20-21).

4. Duncan and Pribbenow had both received the required forty hour training course in mine safety followed by an eight hour refresher course. Both miners had worked for American Borate approximately 12 months (Tr. 119-120).

5. At approximately 5:45 a.m., Duncan and Pribbenow drove a Young buggy to a point where the back railing on the work platform was approximately 2 to 2 1/2 feet from the face of the drift. The roof bolts and steel mats had been installed on the roof up to a point 4 to 6 feet from the face. Duncan and Pribbenow were standing on the work platform of the Young buggy operating a jackleg used to drill holes in the roof for the bolts. The two miners were approximately two to three feet back of the back railing of the Young buggy drilling a hole in the roof two feet back from the face. This hole was drilled at a seventy degree angle. While standing in this position, Duncan

and Pribbenow were under supported roof (Tr. 51-59, and Resp. Ex. R4). A

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slab of rock fell striking the Young buggy on the left side rail and tipping onto the platform hitting Duncan.

6. Vaughan Duaine Cowley, investigating the accident for MSHA, issued a 107(a) imminent danger withdrawal order to American Borate on December 4, 1980, which is the subject of this case. In the order, American Borate is cited for an alleged violation of "57.3-20" and, under "condition or practice" reads,

A ground fall fatality occurred in the underground workings. The ground support used was not consistent with the nature of the ground and mining method because temporary support was not used to protect miners working ahead of permanent supported ground. The mine operator shall immediately institute a program of temporary ground support to protect mine workers working under ground not permanently supported and shall develop and institute standardized ground support plans for each type of mine opening. The ground support plan shall be submitted to an authorized representative of the Secretary for review and shall be updated as mining conditions change.

ISSUES

1. Was American Borate properly charged with a violation of the ground support requirements under the standard cited?

2. Did the violation occur as alleged and, if so, what is the appropriate penalty?

DISCUSSION

The Secretary has the burden in this case to prove that a violation of the cited standard occurred. Based upon a careful review of all of the evidence of record, I find that the alleged violation was not proven and that the citation should be vacated. This conclusion is based principally on the testimony of the Secretary's only witness. Inspector Cowley testified that upon arriving at the Billie mine after notification of the fatal accident, he went underground to investigate. Upon arriving at the location in the mine where the fall had occurred, he discovered that the Young buggy on which the miners had been standing and working had been moved to allow the deceased miner to be removed. Cowley was able to determine where the Young buggy had previously been standing from the tire tracks in the wet ground. Cowley was given information surrounding the facts of the accident by Pribbenow who had been working with Duncan when the roof fall occurred. Pribbenow told Cowley that after Quick, the shift foreman left, he and Duncan decided to put up two more mats between the last existing mat and the face. They backed the Young buggy up to the face and started to drill a hole for a roof bolt. Duncan had just changed the starter drill on the jackleg drill to a four foot steel and Pribbenow started drilling in the hole again when the slab fell hitting on the left side rail of the Young buggy and bouncing into the flatbed area

striking Duncan.

Cowley testified that during the first day's investigation he determined that the back of the buggy was approximately two feet from the face but that he did not locate the hole in the roof where the drill had been placed. The next day, after a conversation with Pribbenow, Cowley went back to the scene and located the drill hole. On direct examination, Cowley stated that after finding the drill hole, he put a tamping stick or scaling bar in the hole and ran an imaginary line down to where he thought the jackleg drill would be and concluded that the two miners were under unprotected roof (Tr. 33). Based upon this, Cowley concluded the miners should have used temporary support, either steel hydraulic jacks or wooden timber stalls, to continue the roof bolting in this area. Several days later, on December 4, 1980, Cowley issued the 107(a) order and indicated that when American Borate came up with a positive plan for ground control, he would modify the order (Tr. 37).

The record shows that American Borate had an approved roof control plan which had been in existence for sometime. The method of roof control being used at the time of the accident was consistent with the roof control plan and in compliance with its requirements. Cowley stated that he did not cite American Borate for a violation of their roof control plan but rather to improve on the plan by incorporating temporary ground control methods along with what already was required (Tr. 74).

At the hearing, Cowley testified on cross-examination that the back of the Young buggy was approximately 2 to 2 1/2 feet from the face of the drift and that the hole which was being drilled was also approximately 2 1/2 feet from the face. He also stated that the last row of mats supporting the roof was 4 to 6 feet from the face, and that he determined the hole being drilled was at a 70 degree angle to the vertical. He determined that the jackleg drill was most likely located in the middle of the flat bed of the Young buggy and probably four feet from the back railing. In response to questions by counsel for American Borate, Cowley testified as follows (Tr. 58-60):

Q. Apparently, Mr. Cowley, perhaps I am wrong but apparently based on what we have drawn here from your facts and figures it appears that the person at the time the drilling was done would have been standing under supported ground, is that correct, sir?

A. It shows that, yes.

Q. Do you wish to change your opinion now as to whether at the time of the accident Mr. Duncan was standing under supported or unsupported ground?

A. No, my figures is wrong.

Q. Your figures?

A. On that distances.

Q. Well, what I am saying is do you think that what we have

drawn here today as respondent's four is more accurate based on all the statements, and measurements, and photographs that were taken than perhaps the measurements that you made that morning, the 4th.

A. Yes.

Q. Thank you, sir. You may resume the witness stand.

(Witness resumed the witness stand)

Q. So as of today then it is your belief that in fact based on representations as we have gone through them today that Mr. Duncan was standing under supported ground at the time of the accident rather than unsupported ground?

A. I guess.

Q. And if he was standing under unsupported ground then the fact as to whether there had been temporary ground support placed or not would have no bearing on the accident, isn't that true?

A. On those measurements, yes.

Q. Would it not be correct, sir, based on our drawing today and the accuracy of it that in fact a violation did not occur on the morning of December 2nd, 1980?

A. According to that diagram there was no violation.

Cowley was asked the following questions by this writer (Tr. 76-79).

Q. Now, is it your contention that Duncan was standing under unsupported roof when he was standing there by A?

A. Not according to that, sir.

Q. Well, what is your contention then as far as what you stated here as far as the violation is concerned there?

A. My measurements was lousy.

Q. If Duncan were standing under supported roof do you still feel that there was a violation by the Company of the Section fifty-seven point three dash twenty?

A. If he was standing under supported ground there was none.

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I conclude from the testimony above and other evidence presented in this case, that the Secretary failed to prove by a preponderance thereof a violation of the cited regulation. In the course of the inspector's testimony, he has stated that if the miners were not working under unsupported roof, there was no violation. The most credible evidence indicates that the miners were under supported roof when the fall occurred.

The procedure used in the mining process by American Borate in this instance was in compliance with the approved roof control plan and what had been successful in the past and was considered by management as proper procedure for the area Duncan and Pribbenow were working in. In the normal sequence of its mining operations American Borate has taken steps to provide adequate support consistent with the nature of the ground in compliance with the cited regulation and thus, the Secretary has failed to sustain the burden of proof by a preponderance of the evidence that the regulation was violated.

ORDER

Citation No. 380358 and the proposed penalty therefore are VACATED.

Virgil E. Vail
Administrative Law Judge