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SOL (MSHA) V. ELK RIVER SEWELL 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 Docket No. WEVA 82-307 A.C. No. 46-06306-03005 F
v.	Stillhouse Run No. 1 Mine
ELK RIVER SEWELL COAL COMPANY, INC., RESPONDENT	

DECISION

Appearances: Janine C. Gismondi, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner Charles A. Sinsel, Esq., Sinsel & Warder, Clarksburg, West Virginia, 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. section 801 et seq., the "Act" for one violation of the operator's roof control plan under the regulatory standard at 30 C.F.R. 75.200. The general issue before me is whether the Elk River Sewell Coal Company (Elk River) has violated the cited regulatory standard and, if so, whether that violation was "significant and substantial" as defined in the Act as interpreted by the Commission in Secretary v. Cement Division, National Gypsum Company, 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. Hearings on these issues were held in Morgantown, West Virginia, on August 3, 1983.

As amended at hearing, the citation at bar alleges a violation of page 15, paragraph 4 of the operator's roof control plan and reads in relevant part as follows:

> The approved Roof Control Plan ... was not complied with in the active working place in No. 2 entry on the third left section ... in that only approximately 50% of the length of the 4 foot rods which [were]

> permanent roof support [were] grouted and additional supports were not provided. The approved roof control plan requires that 80% of the length of each bolt be grouted ...
>
> The roof control plan provides in relevant part as follows:
>
> > The minimum length of rods shall be 4 feet, and the proper quantity of resin specified for proper installation shall be used. When it is determined that less than 80% of each bolt is grouted, additional support shall be installed. All resin bolts shall be installed with approved bearing plates installed firmly against the roof. (Ex. G-3, p.4)

On December 3, 1981, at approximately 9:20 p.m., a 6 foot thick section of roof measuring 20 feet by 40 feet fell in the intersection of the No. 2 entry 3 left panel of the Elk River Stillhouse Run No. 1 Mine, resulting in the deaths of three miners and injuries to a fourth. The fall was attributed to undetected fractures in the roof several feet above previously installed 4 foot resin-grouted roof bolts.

MSHA Inspector Homer Grose was at the scene of the roof fall shortly after it occurred and participated in recovery operations. He observed that of the fifteen to twenty roof bolts that were exposed by the fall, none had been grouted as required by the roof control plan. The plan required that 80% of each bolt be grouted, whereas none of these bolts had been grouted more than 50% of their length. This evidence is not disputed. Moreover, it is conceded that in the area of the fall, the only additional roof support was that provided by temporary "turnposts" installed in accordance with a State approved roof control plan. These posts were admittedly not "additional supports" within the meaning of paragraph 4, page 15 of the MSHA approved plan.

Within this framework of undisputed evidence, it is apparent that there was in fact a violation of the roof control plan as alleged. Whether that violation was "significant and substantial", however, depends on whether, based on the particulars surrounding the violation, there existed a reasonable likelihood that the hazard contributed to would have resulted in an injury of a reasonably serious nature. Secretary v. Cement Division, National Gypsum Co., supra. The test essentially involves two considerations, (1) the probability of resulting injury, and (2) the seriousness of the resulting injury. MSHA readily acknowledges in this case that there was no direct causal relation between the roof fall on December 3rd and the inadequately grouted

roof bolts cited herein. Inspector Grose observed that the fracture in the roof that caused the fall in this case occurred some 2 feet beyond the reach of the required 4 foot roof bolts and opined that even if the bolts had been grouted to 80% of their length as required by the plan, the roof fall would not have been avoided. Grose did suggest, however, that if the insufficient grouting had been discovered by the operator and the operator had provided the additional roof support required by the roof control plan, then it "might have helped".

The violation in this case was, in any event, quite serious. Mine Foreman and Safety Director of Elk River, R. Nat Williams, admittedly knew that this mine had a "checkerboard" top fraught with vertical and horizontal hairline cracks. J.W. Post, Elk River's president, was also aware of the cracks and fissures in the roof and had experienced particular problems because of this in supporting the roof. Inspector Grose concluded that, particularly under these poor roof conditions, the insufficient grouting of the roof bolts without additional permanent support would reasonably likely contribute to a roof fall and thereby lead to serious injuries and death. The Inspector's conclusions are not disputed and, based upon my own independent appraisal of the circumstances, I conclude that this violation indeed was "significant and substantial". For the same reasons, I find that the violation reflected a high level of gravity.

In determining whether the operator was negligent, however, it is necessary to look at the history of the provision in the roof control plan calling for only 80% grouting of the roof bolts in this mine. It is not disputed that when the operator first submitted its plan to MSHA, it provided for 100% grouting of its four foot resin roof bolts. When 100% grouting is required, compliance may readily be determined by observing during the insertion of the bolt whether some of the resin oozes out around the head of the bolt. In recognition of the "checkerboard" fractured roof at the Stillhouse Run No. 1 Mine, into which much of the inserted resin would often dissipate, MSHA proposed the 80% grouting specification.

Unfortunately, no completely satisfactory or reliable method apparently exists to determine whether roof bolts have been grouted to less than 80% of their length. While MSHA maintained at hearing that a piece of coathanger or similar wire may in some limited situations be inserted around the bearing plate and roof-bolt head into the hole adjacent to the bolt in order to estimate the length of roof bolt that is not grouted, MSHA apparently failed to inform the mine operator of even this limited technique. The mine operator, on the other hand, agreed to the 80% grouting

provision in its roof control plan while apparently not knowing how to determine whether less than 80% of roof bolt was grouted.

According to Elk River's Mine Foreman and Safety Director Arnett Williams, they were using enough resin with their 4 foot bolts that was sufficient by manufacturer's specifications for five foot bolts. Williams nevertheless knew that even that amount of resin could "leak out" through the fissures. He had heard of the so-called "wire test" but had never seen it done. The president of Elk River, J. W. Post, had not even heard of the "wire test" before the citation herein and did not in any event believe the test was feasible. There was insufficient clearance to insert coat hanger wire into a roof bolt hole and, in most cases, the bearing plate would be flush against the roof, thereby preventing the insertion of any wire. He had tried to perform such tests but found it impossible.

Mine Foreman John Cochran knew of no method to determine whether the 80% grouting requirement had been met, except through the use of a torque wrench. Cochran noted that if the bolt has been insufficiently grouted, you may get a "springy" sensation upon torque testing. There is no evidence in this case that Elk River had not been performing required torque tests on the roof bolts and there is similarly no evidence that any of the deficient roof bolts in the fall area had been detected during the torque tests. Cochran thought the "wire test" could, in any event, only rarely be used because, in most cases, the bearing plate is flush against the roof, leaving no room to insert anything adjacent to the roof bolt.

Within this framework, I conclude that the operator was not free from negligence. It was incumbent upon the operator in accepting a less than 100% grouting requirement in its roof control plan to have determined whether or not it could comply with that requirement. In this case, the operator admittedly believed there was no satisfactory or reliable way to determine whether it was complying with that requirement and apparently made little effort to determine whether there was in fact such a test.

In determining an appropriate civil penalty, I consider that the operator is relatively small in size, that it has a minimal history of violations and that the penalty here imposed would not affect its ability to stay in business. Within this framework, I find that a penalty of $1,000 is appropriate.

ORDER

Citation No. 886891 is affirmed. A civil penalty of $1,000 shall be paid by the Elk River Sewell Coal Company, Inc. within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge