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SOL (MSHA) V. RUSHTON MINING  
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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 PROCEEDINGS

Docket No. PENN 83-5  
A.C. No. 36-00856-03503

v.

Rushton Mine

RUSHTON MINING COMPANY,  
RESPONDENT

DECISION

Appearances: Agnes Johnson-Wilson, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia, Pennsylvania,  
for Petitioner Joseph T. Kosek, Jr., Esq., Ebensburg,  
Pennsylvania, 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 CFR 75.202. The general issue before me is whether the Rushton Mining Company (Rushton) 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 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. Evidentiary hearings on these issues were held in Philipsburg, Pennsylvania.

On April 15, 1982, MSHA Inspector Donald Klemick 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 Company, PIKE 78-70-P (March 26, 1979); Pontiki Coal Corporation v. Secretary, 1 FMSHRC 1476 (October 1979). The Order/Citation alleged as follows:

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Loose, unsupported and drummy ribs, and in several areas, loose overhanging ribs, were present throughout the number thirteen, fourteen, fifteen, and sixteen left side rooms, and adjacent number seventeen room being mined off the first left north mains 013 section under the supervision of Tom Smith, section foreman. The ribs had sloughed in several areas and was [sic] on the mine floor, a heavy slate binder varying in width was present near the roof which would fall or had fallen when the ribs bump or roll-out, a violation of section 75.202.

The cited standard provides in relevant part that "[l]oose roof and overhanging or loose faces and ribs shall be taken down or supported."

The expertise of MSHA Inspector Donald Klemick in mine safety is not disputed. He has twelve years experience as a coal mine inspector for MSHA, he conducts frequent underground coal mine inspections of roof and rib conditions and he has had periodic training in roof and rib control. Inspector Klemick also has had six years experience as a coal mine owner and in that capacity performed his own roof and rib examinations on a daily basis. According to Klemick, the determination of the soundness of roof and ribs in a coal mine is more of an art than a science. In this regard, an important technique recognized in the mining industry for determining the safety of roof and ribs is known as "sounding". A "drummy" sound emitted from roof or ribs upon tapping by a wooden handled or other similar implement signals a hollowness, separation, or fracturing that may not be visible. These are indications of potentially dangerous roof or rib conditions.

During the course of his regular inspection of the Rushton Mine on April 15, 1982, Inspector Klemick observed that the ribs were slabbing throughout the Number 13, 14, 15, 16, and 17 rooms in the first left north mains, 013 section of the mine. The upper ten to eighteen inches of the rib consisted of a fractured rock "binder" and "bony" coal which was overhanging up to twenty inches in some places. There were about two hundred feet of ribs with such overhangs and some were visibly cracked and loose. Many of the ribs also sounded "drummy", indicating a separation, fracture, and lack of adhesion in the ribs. More than half of the ribs had also sloughed in the area cited. According to Klemick, some of this overhanging material can be seen in the photographic evidence (Operator's exhibits 0-1, 0-11, and 0-16).  
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particular, because of the fracturing in the overhanging "binder", he thought it was highly likely that such material could fall on the miners working in the area, resulting in serious and possibly fatal injuries. He observed that mining equipment was operating in the cited area continuously over three shifts. Under the circumstances, the inspector concluded that an imminent danger of death or great bodily harm existed.

There is no dispute that ribs in the cited area were protruding from the vertical and that some were visibly fractured and drummy sounding. Mine Superintendent Raymond Roeder accompanied Inspector Klemick during this inspection and agreed with Klemick that the ribs sounded drummy and that protrusions did exist in some locations. Roeder does not, however, consider such "protrusions" to be "overhanging ribs" within the meaning of the cited standard unless they protrude from the vertical more than six or eight inches. Rushton's safety inspector, Robert Crain, also agreed that some of the ribs were fractured and produced a drummy sound. He also saw one protrusion of more than eight inches.

Within this framework of essentially undisputed evidence, it is clear that the violation is proven as charged. Ribs in the cited area were clearly protruding from the vertical or "overhanging" and were admittedly loose and drummy in many locations. There was also a reasonable likelihood that the hazard of a rib or roof fall would occur under the circumstances, resulting in death or injuries of a serious nature. The violation was, accordingly, "significant and substantial" and of high gravity. National Gypsum, supra.

Klemick also concluded that the operator was negligent for allowing the condition to exist. He observed that the operator was required to perform three onshift and three preshift examinations each day and that Mine Superintendent Roeder and the mine foreman, Mike Rapaski, concurred that the ribs were in fact loose in the cited area. The cited conditions were abated after the operator provided additional roof and rib support by adding timbers in some areas and by abandoning other areas.

The operator maintains that in spite of the described conditions, the cited area was nevertheless a safe place to work. In particular, it points to the evidence that Inspector Klemick was in the cited mine section only two days before the withdrawal order under essentially the same conditions and Klemick not only failed to cite the conditions but did not see fit to even mention them. It is not disputed that Klemick was indeed present in the same mine section two days before, as alleged, but he claims not

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to have noticed the rib conditions because he was concentrating on another violation. I find it difficult to believe, however, that an experienced miner and mine safety inspector would be so oblivious to conditions he characterized as "an imminent danger" if they were as obvious and dangerous as he alleges. Thus while there is no doubt that overhanging rib conditions did exist with detectable fractures, I do not find that the conditions were as obvious as now alleged by MSHA. Accordingly, while I find the operator to have been negligent in allowing the cited conditions to exist, I do not find it to have been grossly negligent.

In determining the appropriate penalty to be assessed in this case, I have also taken into consideration the evidence herein that the operator is medium in size and has a modest history of prior violations. Under the circumstances, I find that a penalty of \$500 is appropriate.

ORDER

The Rushton Mining Company is hereby ordered to pay a civil penalty of \$500 within 30 days of the date of this decision.

Gary Melick  
Assistant Chief Administrative Law Judge