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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
 V.
RUSHTON MINING COMPANY,
 RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. PENN 83-28
A.C. No. 36-00856-03504

Rushton Mine

DECISION

Appearances: Mark V. Swirsky, Esq., Office of the Solicitor,
 U.S. Department of Labor, Philadelphia, Penn-
 sylvania, for Petitioner; Joseph T. Kosek, Jr.,
 Esq., Rushton Mining Company, Ebensburg,
 Pennsylvania, for Respondent.

Before: Judge Melick

Hearings were held in this case on November 15, 1983, in
Philipsburg, Pennsylvania. A bench decision was thereafter
rendered and appears below with only non-substantive changes.
That decision is now affirmed.

This case was of course presented 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 for one
violation of the regulatory standard at 30 CFR Section
75.201. The general issue is whether the Rushton Mining
Company, which I will refer to as Rushton, has violated
the cited regulatory standard and, if so, what is the
appropriate penalty to be assessed.

The order before me (No. 1150256) was issued pursuant
to Section 104(d)(2) of the Act by MSHA Inspector
Donald Klemick on May 7, 1982, and reads as follows:

"The method of mining that was followed in the F-butt
008 section during the 12:00 to 8:00 a.m. shift under
the supervision of Ed Snyder, section foreman, exposed
the miners to unusual danger from roof falls due to
faulty recovery of

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the pillar between the number 25 and 26 rooms in that the right side final pushout stump was mined, recovered first head-on and the continuous miner continued to mine toward the caved area, almost removing the entire right side fender."

I should note that the order was amended at the beginning of this hearing and that amendment was subsequently modified. As finally agreed to by the parties, the modification to the order added that the method of mining also violated the roof control plan drawing 7(a).

The standard cited, 30 CFR 75.201, reads as follows: "The method of mining followed in any coal mine shall not expose the miner to unusual dangers from roof falls caused by excessive widths of rooms and entries or faulty pillar recovery methods."

Now, the determinative issue in this case, as both parties have stipulated in essence, is whether, in taking the right side final pushout of the cited stump, the continuous miner operator placed himself under unsupported roof. If the continuous miner operator did indeed place himself under unsupported roof, it is conceded that the operator would have been exposed to unusual dangers from a potential roof fall in violation of the cited standard. On the other hand, if he did not proceed beyond unsupported roof, then it is recognized and conceded that there was no violation.

In this regard, there is evidence on the one hand from the government through the testimony of MSHA Inspector Klemick, based on his observations of the number of support posts placed adjacent to the pushout area and an estimate of the distance between these posts, that the final pushout was cut to a depth of some 24 to 30 feet. I observe at this point that this estimate was itself given with a six foot margin of error, thereby in itself raising some question as to its accuracy.

Since it is undisputed that the miner operator would have been under unsupported roof because of his position on the machine if he cut to a depth of 15 feet or more, according to the testimony of Inspector Klemick the miner operator would have been some 11 to 15 feet beyond supported roof.

I note, however, that even though the inspector had a cloth tape measure with him at the time of his inspection, he did not use it to obtain a more precise measurement. I also note that it is a well established practice for MSHA inspectors to throw such tapes with a weighted object attached into an area too dangerous to enter personally in order to obtain a more precise measurement. This procedure is ordinarily followed in the presence of a representative of the mine operator, and that under those circumstances there can be little dispute over the distance. You have then an objective basis on which you can establish the distance. As I say, this procedure was not followed in this case.

Moreover, according to Mark Naylor, the representative of the mine operator who accompanied Inspector Klemick, he told Inspector Klemick that he thought the cut was only 13 to 14 feet deep. While Mr. Klemick apparently disagreed with this estimate, stating something to the effect that he felt the cut was deeper than that, I note that even then, in spite of the knowledge at that point that his estimate was being questioned and would indeed undoubtedly be questioned and challenged at future proceedings, the inspector nevertheless did not even at that point take a more precise measurement or receive some sort of concurrence as to the depth of the cut from the representative of the operator.

I must point out also that the government's evidence is also tempered by the testimony of the operator's witnesses-miners who were present when the cut was taken-namely, roof bolter Lemuel Hollen; the continuous miner operator, Donald Baker; and the section foreman, Ed Snyder. In addition, there was the testimony of Mr. Naylor, who accompanied Klemick during his inspection. All of these witnesses confirmed that the cut in the final pushout on the right side of this stump did not place the continuous miner operator under unsupported roof.

I find with respect to the operator's witnesses, that the testimony of Don Baker, the continuous miner operator, is particularly significant.

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He had only moments before working on the final pushout on the right side been working on the final pushout on the left side. According to his undisputed testimony, some material from the roof had begun falling on him, or falling on the continuous miner, while he was working on the final pushout on the left side. Around the same time he along with the other gentlemen on the scene observed serious roof problems further up. Mr. Baker was, as he testified, also quite aware at that time of other roof falls that had occurred in this mine in which continuous miners had been buried. He was, in fact, in my opinion freshly aware of his mortality at that time and, under the circumstances, would certainly be the last person to work under unsupported roof. I therefore give his testimony that he was not working under unsupported roof special credence.

Under the circumstances, I am compelled to find that the government has just not been able to sustain its burden of proof of the violation. By so finding, this does not mean that I do not believe in the veracity of the government's testimony. Nothing could be further from the truth. I am convinced that the inspector testified truthfully to the best of his ability. I am absolutely convinced of that. I am just compelled to find, for the reasons stated, that I am not convinced that his observations have been sufficiently corroborated by any objective measure and particularly in light of the opposing credible testimony, I just cannot sustain the government's case. I cannot find based on the credible evidence that the continuous miner operator had cut the final pushout to a depth that would have exposed him to unsupported roof.

Accordingly, I find that the violation has not been committed. The order is therefore vacated, and this case is dismissed.

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ORDER

Order No. 1150256 is vacated and this case is dismissed.

Gary Melick
Assistant Chief Administrative Law Judge