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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 84-26-M A.C. No. 05-00791-05510
v.	Schwartzwalder Mine
COTTER CORPORATION, RESPONDENT	

DECISION

Appearances: James H. Barkley, Esq., and Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Barry D. Lindgren, Esq., Denver, Colorado, for Respondent.

Before: Judge Carlson

BACKGROUND

This case arose out of an inspection of the Schwartzwalder underground uranium mine owned by Cotter Corporation (hereinafter "Cotter"). A representative of the Secretary of Labor (the Secretary) conducted the inspection on October 6, 1983 and issued the single citation which is the subject of this proceeding on the same day. A hearing on the merits was held on September 10, 1984 at Denver, Colorado, under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the Act). Cotter filed an extensive post-hearing brief; the Secretary ultimately elected not to do so.

The Secretary seeks a $180.00 civil penalty based upon his inspector's finding that Cotter violated the mandatory safety standard published at 30 C.F.R. 57.18-25. That standard provides:

> No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless his cries for help can be heard or he can be seen.

Richard Coon, federal mine inspector, testified for the Secretary. Three miners, as well as a shift boss and the mine's safety and training specialist, testified for Cotter.

REVIEW AND DISCUSSION OF THE EVIDENCE

I

The evidence shows that when Mr. Coon inspected the mine on November 6, 1983, he saw Romolo Lopez operating a jackleg drill in stope 17-3. Lopez was working without a partner in the stope which was about 5 feet wide and 10 to 12 feet high. Lopez told the inspector that he ordinarily worked with a partner, but that he did not have one that day. The nearest work station for other miners was stope 17-4, some 50 to 60 feet distant, where two miners, Paul Herrera and Bobby Varela were drilling and performing other tasks. Persons in 17-4 could not hear or see a miner in 17-3. The shift had begun at 8:00 a.m.; the inspector climbed up into stope 17-3 and observed Lopez sometime between 10:00 a.m. and 10:15 a.m. These facts are not in dispute.

The inspector regarded use of a jackleg drill as inherently hazardous. This perceived hazardous activity coupled with Lopez's isolation from fellow employees caused the inspector to issue a citation and withdrawal order (Footnote.1) alleging violation of the "working alone" standard.

Respondent presents multiple defenses. It contends that operation of a jackleg drill is not a "hazardous condition" within the meaning of the cited standard; that Lopez "could be heard or seen on a regular basis commensurate with the risk involved;" and that he was not "working alone" within the sense intended by the standard.

The first argument lacks merit. The undisputed evidence shows that the jackleg drill used by Lopez weighed about 100 pounds. Inspector Coon, relying on many years' experience as a miner and an inspector, described at length the mishaps that could befall a jackleg operator. The drill, Coon claimed, is basically unstable with its single support leg, and may fall over on the operator, pinning him against the floor or wall. Also, the drill steel may break, causing the drill to pitch forward unexpectedly; or the steel may become stuck during drilling and the entire drill may rotate, inflicting injuries upon the operator as he tries to control it.

His opinion was supported by computer-generated summaries of drilling accidents in underground metal and nonmetal mines for the calendar years 1981 through 1983 and part of 1984. Together, these reports show that injury accidents to jackleg operators are common.(FOOTNOTE.2)

A report (Footnote.3) compiled by MESA, MSHA's predecessor agency, fromfigures gathered in 1973 and 1974 (exhibit P-1), reached the conclusion that 31 percent of the injuries in underground metal and nonmetal mines involving machinery were caused by rock drills. Of these, 55 percent were produced by jackleg drills. The report described essentially the same types of hazards as those described by the inspector in this case.

Respondent suggests that the age of the report renders it invalid. In this regard, respondent specifically urges that the report does not and cannot show the effects of the rigorous training program for miners required under the subsequent 1977 Act. This may be true with respect to the weight to be accorded the numbers of accidents in 1973 and 1974. Absent evidence of any significant change in the design or use of jacklegs, however, the report's analysis of the basic hazard presented by the drills is entitled to evidentiary weight. The numbers of accidents reported from 1981 through 1984 show that despite training programs, use of jacklegs continues to cause accidents.

Beyond attacking the 1973-74 report, respondent presented evidence that jackleg drills in its Schwartzwalder mine had been involved in no significant accidents. This anecdotal approach does not rebut the solid evidence of hazard presented by the inspector and reflected the MSHA statistics. Where miners use a jackleg drill, a substantial possibility of injury is present. Nor is it significant that the evidence shows that the injuries most likely to result from jackleg drill accidents would not be life threatening or grievous. A condition which presents an opportunity for injuries of any magnitude involves a "hazard".

I hold that the area in which jackleg drilling takes place is one "where hazardous conditions exist," within the meaning of 30 C.F.R. 57.18-25.

II

Before considering respondent's remaining defenses, some additional factual background is necessary. The inspector agreed that Varela and Herrera, the two miners in stope 17-4, had told him that the shift boss had instructed Herrera to check on Lopez. His recollection however, was that the instruction was to check "every hour or so."

Redmond, the shift boss, and Herrera, Varela and Lopez, however, insisted that Herrera had been instructed to "bounce back-and-forth between Varela and Lopez." These witnesses were

sequestered during the presentation of the respondent's case, and their testimony was essentially consistent as to what each was doing on the morning of the inspection and the time that Lopez was alone and the time that he was not. Shift boss Redmond maintained that Herrera was to have alternated his presence between the 17-4 and 17-3 areas depending on what Varela and Lopez were doing at any given time in the mining cycle (Tr. 103). Lopez indicated that he had three holes to drill on the morning in question before loading and shooting explosives. Each hole, he said, should take about 10 minutes to drill. The shift began at 8:00 a.m. and he actually reached 17-3 at about 8:30 a.m. He performed non-drilling tasks until about 8:40 a.m. Herrera, he testified, arrived there about a half an hour after he did, or at about 9:00 a.m., and spent about 10 or 15 minutes with him. About 3 or 4 minutes later, according to Lopez, Redmond, the shift boss, climbed into the stope and stayed about 15 minutes. When Redmond left, Lopez, according to his own account, had about 2 minutes of drilling left. The MSHA inspector and Mr. Duffy, the company safety specialist, appeared 3 or 4 minutes after Redmond left, Lopez testified, and the inspector told him to shut down and go find Redmond. Lopez wore no watch on that day, and acknowledged that he estimated the times about which he testified. He further acknowledged that on other days he had sometimes drilled for as long as an hour by himself, and that while miners ordinarily did not work alone, it was not uncommon for them to do so (Tr. 116-117). On the day in question, however, his impression was that he spent no more than 10 minutes drilling alone (Tr. 119).

Herrera testified that he got to the 17-3 stope at about 9:00 a.m. and stayed there about 15 minutes, during which time Lopez drilled for about 10 minutes. As he walked along the manway after coming out of the stope, Herrera met Redmond coming toward 17-3. According to Herrera, Redmond had not told him how often he was to check Lopez; as a miner's helper, however, he knew what Lopez was assigned to do that day, and therefore knew that he should be with him about every half hour to help (Tr. 132-133).

Varela, the third man on the crew, testified that he spent most of the morning tramming. He stated that he was never up in stope 17-3, but that he twice walked down the manway to the opening of 17-3 and listened to the sound of Lopez's drill. Varela maintained that since he heard the drill starting and stopping, he knew that Lopez could not be in difficulty.

Randy Duffy, respondent's safety and training specialist, accompanied the federal inspector on his visit the morning of October 6th. Duffy testified that as he and the inspector proceeded toward the 17-3 stope, they met Mr. Redmond in the manway coming from 17-3. According to Duffy, when he and the

inspector reached Lopez he was drilling with approximately 4 feet of a 6-foot drill steel in the hole. The inspection party remained there for about 15 minutes while the inspector shut down the 17-3 area because Lopez was drilling without a partner. Lopez was sent to find Redmond, the shift boss. As he and the inspector departed, he testified, they met Herrera who said he was on his way to help Lopez load the explosive rounds for which he had been drilling.

According to notes Duffy took at the time of inspection, the alleged violation was abated at about 10:00 a.m. (According to the inspector's citation and testimony the violation was observed at 10:15 a.m.).

Mr. Duffy acknowledged that the "practice" at the Cotter mine was to use two-man crews, and that it was not "normal" for one miner to work by himself (Tr. 154-155). In his view, however, where manpower was short, a miner was not working "alone" if other miners were working on the same level to "check on him."

III

I reject the suggestion that Mr. Varela's two brief pauses to listen at the base of stope 17-3 contributed in any substantial way to the safety of the miner drilling above. No evidence indicated that Varela's presence there was other than desultory and momentary. Listening for "cries for help" (or the absence of drilling noise) on such a random and transient basis cannot satisfy the requirements of the standard.

Cotter's strongest argument centers on the part-time presence of Herrera and Redmond in stope 17-3. Lopez was not required to "work alone," the argument goes, because he was not alone for much of the morning, and because the standard imposes a less-than-absolute requirement that a co-worker be present at all times.

The Commission apparently has had no occasion to construe the "working alone" standard cited by the Secretary in this proceeding. It has, however, dealt with a virtually identical standard, 30 C.F.R. 77.1700, which applies to surface coal mines. That standard provides:

> No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen.

The only difference of substance between the surface standard and the underground standard is the addition of the phrase "unless he can communicate with others" in the former.

In Old Ben Coal Company, 4 FMSHRC 1800 (1982), the Commission defined the term "alone" as it appears in the surface mining standard. The Commission held:

> The term "alone," which is not defined in the regulation, refers in common usage to being separated or isolated from others. Webster's Third New International Dictionary (Unabridged), at 60 (1971). In our view, the standard is directed at situations where miners are effectively, or for practical purposes, working alone notwithstanding some occasional contact with others. Here, there is no dispute that Mitchell was working by himself on the coal pile. Old Ben argues that Mitchell was part of a "team," but the evidence shows that no one observed or had contact with him on a regular or continuing basis and Old Ben has conceded that no one was responsible for keeping in touch with him. Such interaction as Mitchell had with the preparation plant employee was sporadic and insubstantial.

Cotter, in the present case, maintains, in effect, that Lopez was a member of a three-man "team" or crew and that Herrera was "responsible" for contacting Lopez on a regular or continuing basis. Thus, Cotter relies heavily on Old Ben to show that Lopez was not working alone in the sense intended by the standard.

Before examining the validity of Cotter's contention, we must consider more of the Commission's reasoning in Old Ben. At the very core of that decision is the following construction laid upon the terms "communicate," "be heard," and "be seen." The Commission said this:

> In construing these terms we reject either an approach requiring constant communication or contact under all conditions, or an approach allowing any minimum level of communication or contact to satisfy the standard. Rather, we hold that the standard requires communication or contact of a regular and dependable nature commensurate with the risk present in a particular situation. As the hazard increases, the required level of communication increases. (Emphasis added.)

In applying this test to the facts in the present case, one must first decide whether the "communication (Footnote.4) and contact" provided by Cotter for Lopez were of a "regular and dependable nature." The facts in that regard are not as clear as they might be, but the preponderant evidence tends to show that Herrera was told that he was to divide his time between Varela and Lopez, and that based upon past experience and the nature of the mining cycle, Herrera understood that he was to be present with Lopez at approximately 30-minute intervals. In the most literal sense, the contacts may have been both "regular" and "dependable," but I have difficulty with the length of the visits. None of the three crew members wore a watch underground, and all testimony as to time was therefore estimated. Given the estimates most favorable to Cotter, Lopez's morning was as follows: He reached the 17-3 workplace at about 8:30 a.m. and after completing some preparatory work not involving the drill, he was ready to drill at 8:40 a.m. Herrera showed up at about 9:00 a.m. and stayed for 10 to 15 minutes (Tr. 110, 124). Redmond, the shift boss, arrived 3 or 4 minutes after the time Herrera left, and stayed about 10 or 12 minutes (according to Redmond himself) or 15 minutes (according to Lopez) (Tr. 90, 110, 111). Lopez estimated his actual drilling time while alone at 5 to 10 minutes (Tr. 119). He also insisted that the total drilling time should have taken no more than 10 minutes for each of the three holes (Tr. 108). Inspector Coon maintained that he arrived at the 17-3 stope at 10:15 a.m. and that Lopez was still drilling. Mr. Duffy insisted that the arrival time was 10:00 a.m.

Accepting the 8:40 a.m. beginning time for drilling, and the most favorable 10:00 a.m. time for the arrival of the inspection party, the respondent's versions of the sequence and length of the various visits to stope 17-3 do not square with the total elapsed times by the clock. Between 8:40 a.m. and 10:00 a.m. an hour and 20 minutes elapsed. Lopez admits that he began drilling at 8:40 a.m., and all witnesses agree that he was still drilling when the inspector arrived at the scene. No evidence suggests that Lopez performed any non-drilling tasks after 8:40 a.m. The most favorable estimates of Herrera's and Redmond's presence in stope 17-3 add up to but 30 minutes. Consequently, Lopez was alone for 50 out of the 80 minutes after the drilling began.

One may question why the drilling took 80 minutes when Lopez insisted that each of the three holes required but 10 minutes. Apart from the possibility that Lopez's estimates of drilling times were too optimistic, it is quite likely that he was speaking only of the time that the drill was actually penetrating rock. The evidence of record convinces me that the hazards attendant to use of the jackleg drill are not limited to those which occur when the drill is running. Accidents may occur when the drill is repositioned between holes, when the leg is being extended or retracted, when drill steels are being replaced, etc. This is especially so because of the weight and bulk of the drills.

The question thus becomes whether there was contact with Lopez of a "regular and dependable nature commensurate with the risk present" in drilling with a jackleg when he was in fact alone or isolated for 50 out of 80 minutes. For purposes of this decision, it will be assumed that general instruction for Herrera to be present to help Lopez from time-to-time, as the mining cycle required, meant that he would come to stope 17-3 on a reasonably regular and dependable basis. This is so even though the testimony made it abundantly clear that safety was never articulated as one of the reasons for the presence of a second man. The "regular and dependable" requirement is surely met whenever a second miner is present on a reliable basis, no matter what the motive. Regarding Mr. Redmond's presence, the situation is less clear. The shift boss testified that it was his custom to "periodically check on employees" (Tr. 89). There was no evidence that his visits to various worksites for the crew were regularized in any sense, or that they were coordinated with Herrera's visits, or indeed whether his actual presence at stope 17-3 sometime after Herrera left was a mere fortuity. It will also be noted that while Herrera suggested that he understood he should check on Lopez every 30 minutes, he in fact did not return to stope 17-3 until nearly an hour after his first visit. Nevertheless, for the purpose of this decision, since Herrera and Redmond together did in fact spend 30 minutes in stope 17-3, it will be held that their presence for those minutes was in general accord with a plan to provide periodic contact with Lopez on a regularized basis.

Concerning the second part of the question, however, I am unable to conclude that two 15-minute visits during an 80-minute span of drilling provided a contact with Lopez "commensurate with the risk present." In reaching this conclusion I acknowledge that the hazard presented in this case was of a lesser magnitude than that presented in Old Ben, supra. There, death or serious injury were likely in the event of an accident. In the present case the evidence from the inspector and the supporting accident

records tends to show that the overwhelming number of jackleg accidents are less than life-threatening. For that reason I would not and do not conclude that the full-time presence of another miner was necessary. On the other hand, Lopez worked in isolation for at least 50 minutes, given the reading of the evidence most favorable to Cotter. Since there was a reasonable possibility that during that time the heavy drill could have toppled on him rendering him unconscious, fracturing bones or causing lacerations leading to dangerous blood loss, I must hold that the two visits, spaced as they were, did not constitute a level of contact commensurate with the risk.

In this regard another consideration must be borne in mind. The Commission in Old Ben, supra, made this observation:

> [N]othing in the standard suggests that prevention is not a concern.... The standard has a dual purpose, to prevent accidents by timely warning when possible and to expedite rescue and minimize injury when an an accident does occur.

In the present case, because of the confined and secluded nature of the workplace, the preventive purpose of the standard could simply not be achieved without the presence of another miner.

I therefore conclude that in this case a miner was allowed to work alone in an area where hazardous conditions existed that endangered his safety. Moreover, the area was one from which his cries for help could not be heard and at which he could not be seen. I further conclude that the length and frequency of the periods of contact with the lone worker by other miners, including supervisory personnel, were not commensurate with the risk present.(Footnote.5)

IV

The Secretary charges that the violation in this case was "significant and substantial" under section 104(d)(1) of the Act. Such a violation exists where there is "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981). In the present case, I conclude that the violation does rise, by a small margin, to the "significant and substantial" level. The most likely injuries from a jackleg accident would range from minor to moderate in severity. There is a reasonable likelihood, nevertheless, that injuries could be reasonably serious. Therefore, the Secretary properly classified the violation as "significant and substantial."

V

The Secretary seeks a civil penalty of $180.00. Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the size of the operator's business, its negligence, its ability to continue in business, the gravity of the violation, and the operator's good faith in seeking rapid compliance. The record in this case contains no direct evidence bearing on any of these elements except for gravity and good faith. Owing to the nature of the hazard discussed earlier in this decision, the gravity of the violation should be considered moderate. Compliance was immediate. Given the lack of evidence on the other factors, none can be counted against Cotter. Upon the evidence before me, I conclude that $50.00 is an appropriate penalty.

CONCLUSIONS OF LAW

Based upon the entire record herein, and in accordance with the findings of fact contained in the narrative portions of this decision, the following conclusions of law are made:

(1) This Commission has the jurisdiction necessary to decide this case.

(2) The respondent, Cotter, violated the mandatory safety standard published at 30 C.F.R. 57.18-25 as alleged in the citation herein.

(3) The violation was "significant and substantial" within the meaning of section 104(d)(1) of the Act.

(4) The appropriate civil penalty for the violation is $50.00.

ORDER

Accordingly, the citation is ORDERED affirmed, and Cotter shall pay to the Secretary of Labor a civil penalty of $50.00 within 30 days of the date of this decision.

John A. Carlson
Administrative Law Judge

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Footnotes start here:-

~Footnote_one

1 The order is not at issue in this proceeding.

~Footnote_two

2 Respondent suggests that the reports are of doubtful relevance since many of the entries do not identify the type of drill involved except as "not [a] roof bolter." In the 1983 report (exhibit P-4), however, 40 out of 148 accident descriptions specify that the drill involved was a jackleg. Reports for the other years are similar.

~Footnote_three

3 "Analysis on Injuries Involving Jackleg Rock Drills Underground, 1973-1974," R.H. Oitto, Health Safety and Analysis Center, Denver, Colorado.

~Footnote_four

4 The concept of "communication" as used in the surface mining standard and dealt with by the Commission in Old Ben, is essentially a surplusage. It adds nothing to the mere notions of

seeing and hearing set out in the underground standard cited in the present proceeding.

~Footnote_five

5 In reaching this conclusion I have not overlooked Cotter's contention that the "working alone" standards have application only to hazards "outside normal conditions in the mining industry." Monterey Coal Company, 3 FMSHRC 439 (1981). Cotter asserts that this limiting definition was adopted by the Commission in Old Ben, supra, and hence must be followed. It is true that the administrative law judge whose result was affirmed in Old Ben used such a test. 3 FMSHRC at 1890-91. The Commission, however, assiduously avoided ratification of that part of the decision below, simply stating that under an "industry standards" test, or the "ordinary hazard" test urged by the Secretary, the hazard in question was a "hazard" within the meaning of the standard. Old Ben, 4 FMSHRC at 1802. I do not speculate on what the result would be in this case under an "industry standards" test. I find no hint in the standard that any specialized or esoteric meaning of hazard was intended. I construe the standard to call for an ordinary interpretation of the phrase "hazardous conditions," and I am convinced that an objective factual showing that a hazard exists is sufficient.