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SOL (MSHA) V. AMAX CHEMICAL  
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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.

AMAX CHEMICAL CORPORATION,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. CENT 84-91-M  
A.C. No. 29-00174-05519

Amax Mine and Mill

Appearances: Jack F. Ostrander, Esq., Office of the Solicitor,  
U.S. Department of Labor, Dallas, Texas,  
for Petitioner;  
Charles C. High, Jr., Esq., Kemp, Smith, Duncan &  
Hammond, El Paso, Texas and James L. Dow, Esq., Dow,  
Feezer & Williams, Carlsbad, New Mexico,  
for Respondent.

DECISION

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by 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 six violations of regulatory standards. The general issues before me are whether the Amax Chemical Corporation (Amax) has violated the regulations as alleged and, if so, whether those violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, ie, whether the violations were "significant and substantial." If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation Numbers 2235657, 2235659 and 2235660 charge violations of the regulatory standard at 30 C.F.R. 57.3-22 and allege that certain areas of loose and drummy sounding roof had not been adequately roof bolted or supported. The cited standard reads as follows:

Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily

visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

It is not disputed that the cited roof areas were in fact "drummy" sounding. Amax contends however that the existence of a drummy sounding roof is not sufficient to prove that the roof or back is "loose" within the meaning of the cited standard and that without some additional evidence MSHA's case herein must fail. At hearing, Robert Kirby the Amax general mine superintendent and a graduate mining engineer conceded that a drummy sound does in fact indicate a separation in the roof strata but he maintained that even though the strata is separated the roof material is not necessarily "loose". Kirby pointed out that the ore in the Amax mine is composed of potassium chloride (potash) and sodium chloride and is "quite elastic". The mine roof can therefore bend before breaking. Kirby testified that it is nevertheless the practice at the Amax mine to roof bolt all drummy areas as "insurance" against roof falls.

According to Scresh Desai, the superintendent for production and safety at the Amax mine, a drummy sound indicates either loose top or lessened adhesion between strata because of the presence of carnallite or mud seams.(Footnote.1) Desai conceded that carnallite or mud seams in the roof strata presented the same hazard of roof falls as a physical separation in the strata. According to Desai, it is the practice at the Amax Mine to cut areas of carnallite out of the top in order to control it.

MSHA Inspector Clyde Bays testified that roof bolting is not specifically required by the regulations governing potash mining and roof bolting is not practiced in many areas of such mines. Bays observed however that it is the standard practice in the industry for miners to continuously check roof conditions by the sounding method, and where a drummy sound is detected, to insert supportive bolts into the drummy sounding roof area. Bays further noted that while not all drummy sounding roof areas constitute a hazard there is no other practical way to determine the soundness of roof conditions in the absence of visible fractures. It has accordingly been the industry practice and MSHA's requirement that

in the absence of visible fractures all drummy sounding areas be supported.

Where visible fractures are present in the drummy sounding area Bays said that further tests can be performed to determine whether the roof is hazardous. If a scaling bar cannot bring down the suspect area then, according to Bays, the roof is safe and no citation will be issued.

While Amax argues that the presence alone of drummy sounding roof or back is not sufficient to support a finding that the roof is "loose" within the meaning of the cited standard that argument is not supported by its own evidence. Even adopting its definition of "loose" as "not rigidly fastened or securely attached" or as "loosely cemented . . . material" it is clear that the violations have been proven as charged. The testimony of Amax witness Scresh Desai is alone sufficient to support the violations within those definitions. Desai testified that a drummy sounding roof is evidence of either a physical separation in roof strata or loosened adhesion between the strata because of the presence of carnallite or mud seams. See *Secretary v. Contract Mining Company*, 6 FMSHRC 2315 (1984).

*Secretary v. Magma Copper Company*, 3 FMSHRC 345 (1981) cited by Amax is inapposite. In that case evidence existed that the cited wall was not in fact hollow sounding. In addition, it is not known whether the physical characteristics of the mine wall there at issue were in any way similar to the roof conditions in the potash mine here at issue.

While Amax also attempts in its posthearing brief to reinstate a claim that the cited standard is unenforceably vague, that claim was clearly waived at hearing (T. 44). Moreover Respondent's own proffered definition of the term "loose" was applied in this case and it acknowledged that it was standard practice at the Amax mine to roof bolt drummy sounding areas as "insurance". This evidence corroborates the testimony of Inspector Bays that roof bolting drummy areas is and was at relevant times the accepted and standard practice of the potash mining industry. Thus in any event the standard has been interpreted in light of the "reasonably prudent person test" and can not be considered unconstitutionally vague. *Secretary v. U.S. Steel Corporation*, 5 FMSHRC 3 (1983).

I have also examined the studies conducted at the Amax mine to detect ground movement in alleged drummy areas. Essentially no movement was detected in any of the tested areas over nearly a four month period. However MSHA was apparently not asked to participate in or observe the studies and had no input as to the location of the test sites. The

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location of the sites is of course critical to the validity and reliability of any such tests. In any event, even assuming the sampled roof showed no movement over the testing period that fact does not in itself negate the seriousness of the separate and distinct conditions cited as hazardous in this case. Indeed Inspector Bays conceded that he could not predict when the cited areas would fall, if ever. He based his assessment of the hazard on his experience with drummy roof and the history of previous roof falls.

Violations are "significant and substantial" if: (1) there is an underlying violation of a mandatory safety standard, (2) there is a discrete safety hazard, (3) there is a reasonable likelihood that the hazard contributed to will result in injury, and (4) there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984). In this regard each of the cited conditions must be considered separately. With respect to Citation Number 2235657 I do not find the evidence to be sufficient to establish a "significant and substantial" violation. According to Inspector Bays the cited area had already been roof bolted and no effort was made to bar down the fractured area before additional roof bolts were inserted. Consistent with Bays' own testimony that this drummy sounding area would present no hazard if it could not be barred down, the gravity of this violation cannot be properly evaluated. Additional uncertainty exists from the testimony of both Kirby and Bays that drummy sounds may continue to emanate from areas such as this that have already been roof bolted. Under the circumstances I can attribute but little negligence to the operator for this violation.

Citation Number 2235659 involved two drummy roof areas each 8 to 10 feet in diameter. Foreman Young conceded that the areas were drummy and that the day shift had been working under the area. Indeed, the continuous miner was still in the cited entry at that time. Under the circumstances I find that fatal roof falls were reasonably likely. The violation was accordingly "significant and substantial". In light of Young's admissions the violation must also be attributed to operator negligence.

Citation Number 2235660 involved a drummy roof area 10 to 12 feet in diameter. There was no roof support in an area that was also in the direct path of shuttle cars traveling to and from the dumping location. There was accordingly a reasonable likelihood of serious or fatal injuries from roof falls. The violation was "significant and substantial". It may also reasonably be inferred from the failure of the operator to have detected these conditions during required examinations, that the violation was caused by its negligence.

