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SOL (MSHA) v. SAHARA 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

v.

SAHARA COAL COMPANY, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. LAKE 85-28
A.C. No. 11-00784-03553

Docket No. Lake 85-43
A.C. No. 11-00784-03557

Mine No. 21

Appearances: Miguel J. Carmona, Esq., Office of the
Solicitor, U.S. Department of Labor, Chicago,
Illinois, for Petitioner;
Charles N. Wheatley, Esq., Sahara Coal Company,
Inc., Chicago, Illinois, for Respondent.

DECISION

Before: Judge Melick

These cases are before me upon the petitions for 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 two violations of regulatory standards. The general issues before me are whether Sahara Coal Company, Inc. (Sahara) 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, i.e. 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.

DOCKET NO. LAKE 85-28

The one citation at issue in this case (Number 2322574) alleges a significant and substantial violation of the standard at 30 C.F.R. 75.1710-1 and charges as follows:

The canopy on the continuous mining machine in working section ID003-0 was not located and installed in such a manner that the operator, when at the tram controls would have been protected from falls of roof. The machine however was being operated by remote control and the operator was positioned outside the canopy approximately 8 feet from the canopy. This

condition existed at the time of a fatal roof fall accident.

It is not disputed that the cited standard required that the continuous mining machine "be equipped with substantially constructed canopies or cabs, located and installed in such a manner that when the operator is at the . . . controls . . . [he is] protected from falls of roof, face, or rib, or from rib and face rolls." The Secretary acknowledges, however, that prior to the alleged violation he had authorized Sahara to operate its continuous mining machines by remote control so long as those controls were "located so that the operator would not be in danger by roof falls that may occur near the equipment." The Secretary is now claiming that Sahara violated this policy exception in that the operator of the continuous mining machine was purportedly operating this machine in an area endangered by a roof fall.

The Secretarial policy exception herein is similar to the attempted modification of a standard discussed in *Secretary v. King Knob Coal Company, Inc.*, 6 FMSHRC 1417 (1981). The Commission held in *King Knob* that the Secretary's attempted modification of a regulatory standard lacked the force and effect of law. The standard cited therein was accordingly construed without reference to the Secretarial policy. Within this legal framework and considering the undisputed evidence that the continuous mining machine cited in this case was being operated outside the protective canopy, it is apparent that there was a violation of the cited standard.

Reliance by Sahara on Secretarial policy may however affect the negligence chargeable and thereby the amount of penalty to be imposed in this case. Accordingly the fact that the continuous mining machine operator was using the remote control unit outside the protective canopy would not in itself demonstrate negligence in light of Secretarial policy permitting the use of such controls under certain circumstances. The issue is whether the remote controls were used by the machine operator in an area endangered by roof falls.

On the basis of the evidence discussed *infra* in connection with Citation Number 2201537, I find that section foreman Tom Killman indeed had knowledge that the subject work area was in fact endangered by roof falls. It was undisputed that the miner operator was working near and under drummy roof and that he was told by Killman to do so. The mine operator was accordingly negligent and the use of the remote control device in such close proximity to drummy and fractured roof was a serious and a "significant and substantial"

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violation. See Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

In determining the amount of penalty to be assessed herein I have also considered that the operator is moderately large and has a moderate history of violations. Inasmuch as this violation is included within and merges with the violation charged in Citation No. 2201537, a reduced penalty of \$300 is warranted and is accordingly assessed.

DOCKET NUMBER LAKE 85-43

The one citation in this case (Number 2201537) alleges a violation of the regulatory standard at 30 C.F.R. 75.200 and charges as follows:

Subnormal roof conditions, a separation of the roof strata at about 30 inches and drummy roof, were encountered in the face of the 27 northwest entry outby for about 30 feet and no supplemental support was installed. The approved roof control plan stipulates that where subnormal roof conditions are encountered, supplemental support such as longer bolts, post or crossbars will be installed. This condition was discovered during a fatal roof fall investigation that occurred at the mine.

The operator's roof control plan provides that "in active working areas, where subnormal roof conditions are encountered, the minimum roof-control method will be supplemented with either longer and/or additional roof bolts, posts, or cross bars."

Much of the essential evidence is not in dispute. Richard Thompson, a continuous miner operator was warned at the beginning of his shift on August 28, 1984, by the miner operator from the previous shift about a crack 30 inches into the roof in the Number 2 Entry. Thompson related this information to co-workers Kane and Hanna and to his section foreman Tom Killman.

Upon Killman's return from his preliminary inspection of the working places the work crew proceeded to the suspect entry to check the roof. There is no dispute that the roof sounded drummy in the area near the face. Thompson also observed a crack in the roof running parallel to the entry and nearby there was an 18 inch drop in the coal seam. Thompson found the roof in the area to be "rough" and noted that this too was an indication of poor roof conditions. In spite of these conditions Foreman Killman decided to take a ten foot cut in the entry that would allow them to clear the next crosscut. He apparently intended to later return to the

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bad roof and insert longer 48 inch roof bolts into the drummy area. Before Killman left he told the crew to "be careful" and "watch the top for movement or falling".

Another continuous miner operator, Larry Kane, then took one 10 foot cut on the right side of the entry, backed the miner up, and took another two loads of coal. The rock at the face then suddenly broke off crushing parts of the continuous miner. Kane moved further back with the remote box as he tried to work the continuous miner free. At this point Thompson saw dust begin falling from the vertical crack. He yelled, then turned and ran toward the cross-cut. Kane was unable to escape and was crushed and killed by the falling roof.

Loreen Hanna, an experienced roof bolter, confirmed that Thompson had warned the crew about the crack 30 inches into the roof. Killman and the work crew then checked the roof and found it to be drummy and visually abnormal. According to Hanna the roof was indeed subnormal and dangerous to work under. Since Hanna then had only 30 inch bolts available Killman sent for 48 inch bolts. Mining nevertheless proceeded without the 48 inch bolts and the fatal roof fall occurred before they were installed.

Based on this testimony, MSHA Special Investigator Edward Richie opined that subnormal roof conditions did in fact exist at least 30 feet from the face of the Number 2 Entry prior to the first roof fall and, in accordance with the roof control plan, supplemental support should have been installed before mining progressed.

According to mine superintendant James Teal, drummy sounding roof, the existence of a crack 30 inches into the roof and a visible crack running parallel to the entry did not indicate subnormal roof and, therefore, supplemental roof support was not in fact required by the roof control plan. In this regard Teal notes that the union mine examiner did not cite any subnormal conditions in the mine examiner's book during the preceding preshift examination. The relevant entry in the preshift examiner book indicates however that the Number 2 Entry could have been examined as early as 7 o'clock the previous evening so that conditions arising in the entry thereafter would not have been observed. Moreover since it appears reasonably likely that the drummy roof conditions were discovered only late in the second shift, the preshift examiner could very well have been unaware of the deficiencies in the Number 2 Entry at the time he made his entry in the preshift books.

In any event, in light of the convincing and credible testimony of the experienced miners who observed the roof

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conditions firsthand and the equally convincing expert testimony of MSHA Special Investigator Edward Ritchie, I reject the self-serving testimony of Superintendant Teal. Indeed, according to the undisputed evidence even Foreman Tom Killman recognized that drummy sounding roof, visible fractures in the roof running down the length of an entry, and evidence of gaps and fractures 30 inches up into the roof were evidence of dangerous subnormal roof conditions. In obvious recognition of the problem, Killman directed one of the miners to bring up longer 48 inch roof bolts for supplemental support. The failure of Killman to have required installation of such supplemental roof support before allowing mining to continue under the circumstances was serious and a "significant and substantial" violation of the operator's roof control plan and the cited standard.

Since it is not disputed that Foreman Killman knew of the hazardous roof conditions there can be no question but that he was grossly negligent in ordering his work crew to continue mining in close proximity to that hazardous roof. That gross negligence is attributable to the mine operator. Secretary v. Ace Drilling Company, 2 FMSHRC 790 (1980). The evidence indicates that after recovering the buried continuous miner the operator abated the violation by abandoning the cited entry. Considering the extreme hazard presented by the violative conditions and the gross negligence exhibited I find that a penalty of \$10,000 is appropriate.

ORDER

Sahara Coal Company, Inc., is hereby directed to pay civil penalties of \$10,300 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge