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SOL (MSHA) v. U.S. STEEL 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.

U.S. STEEL MINING COMPANY,
INC.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. PENN 83-129
A.C. No. 36-03425-03522

Maple Creek No. 2 Mine

SUPPLEMENTAL DECISION

Before: Judge Koutras

Statement of the Case

On August 5, 1985, the Commission remanded this matter to me for further consideration and findings consistent with its decision and remand. With regard to Citation No. 2102619, concerning a violation of mandatory safety standard 30 C.F.R. 75.316, the Commission reversed my finding that the violation was not significant and substantial (S & S), and remanded the matter for an assessment of an appropriate penalty. In my original decision of July 11, 1984, although I affirmed the violation, I vacated the inspector's "S & S" finding and concluded that the violation was not "S & S." On the basis of these findings, and taking into account the civil penalty criteria found in section 110(i) of the Act, I assessed a civil penalty in the amount of \$75, for the citation in question.

With regard to Citation No. 2102609, concerning a violation of mandatory safety standard 30 C.F.R. 75.200, although I concluded in my original decision that the respondent had not violated its roof-control plan, I nonetheless found that MSHA had established a violation of section 75.200, in that the evidence presented established that one of the two miners who simultaneously installed the two roof jacks in question within the full view of the inspector was under unsupported roof when he proceeded to install one of

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the jacks. My finding in this regard was based on the prohibition found in section 75.200, that "no person shall proceed beyond the last permanent support unless adequate temporary support is provided."

The Commission vacated my conclusion that section 75.200 was violated, and remanded the citation with the following comments:

The citation issued by the inspector asserted that the roof-control plan was violated in that the temporary jacks were not installed in accordance with the approved plan. According to the inspector, the plan was violated when temporary jacks were set out of sequence and two temporary jacks were set simultaneously. The inspector testified that the roof-control plan requires that temporary jacks be set from rib to rib, one jack at a time. On the other hand, U.S. Steel's chief mine inspector, who participated in the roof-control plan adoption/approval process, testified that the plan requires that the temporary jacks be set by rows, but does not require that they be set sequentially.

The judge's decision does not resolve this conflict as to the meaning of the roof-control plan. Instead, after setting forth the conflicting evidence in great detail, the judge simply labelled it "confusing" and summarily concluded that a violation of the plan had not been established.

The statute and the standard require the parties to agree on a roof-control plan. Once the operator has adopted and MSHA has approved the plan, its provisions are enforceable as though they were mandatory standards. *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C.Cir.1976). Thus, a question concerning the parties' intent and understanding as expressed in an approved plan is an important one. Before we can undertake to determine whether a plan was violated, we first need findings as to what the plan requires. *Shamrock Coal Co.*, 5 FMSHRC 845, 848-52 (May 1983); *Penn Allegh Coal Co.*, 3 FMSHRC 2757, 2769-70 (December 1981). Only after this is determined can those requirements be applied to particular facts to resolve whether a violation of the plan has occurred. *Id.*

We therefore vacate the judge's conclusion that section 75.200 was violated even though the roof-control plan was not. We remand this citation so that the judge may make the necessary further findings regarding whether the roof-control plan imposes specific requirements as to the sequence in which temporary jacks must be set and, if so, whether such requirements were violated here.

(Emphasis added).

Discussion

Inspector Shade first testified on direct examination that he observed two men actually install jacks 4 and 6 (Tr. 109). On cross-examination he testified that the jacks were never actually installed. He explained that he observed the men walk out under the roof with the jacks in hand and their intent was to install them at locations 4 and 6 as shown on the drawing. However, he advised them that they were out of compliance with the roof-control plan and called them back. The two men then came back with the jacks (Tr. 138-139). Mine foreman Skompski believed that the two men intended to install jacks 1 and 3, and that jack No. 2 was in place. He confirmed that Mr. Shade ordered the men to come back with the jacks, and that he issued the citation because they intended to install the jacks simultaneously rather than one at a time (Tr. 184-185).

When asked about the conflict in their testimony regarding which jacks were about to be set, Mr. Shade stated as follows (Tr. 277-278):

THE WITNESS: Well, he might have seen it that way, but I know they were in further than that. They were in for the next two jacks and I even lectured them on it. I told them, "You can't set those jacks until you set the first row of jacks," and the foreman, he had went over the plan with them and told them the procedure to put the jacks in.

Inspector Shade testified that after the two men were called back and instructed as to the proper sequence for installing the jacks, they proceeded to install jacks 1 and 3, and then installed jacks 4, 5, and 6. Since this constituted abatement, the citation was terminated (Tr. 162).

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Although the citation issued by Inspector Shade did not specify the specific part of the roof-control plan which was allegedly violated, Mr. Shade testified that it was Drawing No. 2 (hearing exhibit P-3). That drawing is identified as the Minimum Temporary and Minimum Permanent Roof Support Plan. The drawing is included as part of the plan as required by paragraph Q, pg. 4, of the overall plan, and MSHA asserts that the drawing is intended to show the sequence of installation of temporary roof support. The drawing identifies the location of roof bolts and temporary supports (posts or 10 ton hydraulic jacks). Although roof bolts are required to be installed first laterally then longitudinally as depicted on the drawing, no such requirement is stated for temporary jacks. The only instructions concerning temporary supports or jacks are the following:

The first row of temporary supports will be installed to suit drill head clearance not to exceed 5 1/2 feet from the last row of permanent supports. Subsequent rows on 4 feet centers.

Jacks A, B, C, D, 1, 4, 7 installed during mining per Drawing No. 8-F 132 MC (F). Temporary supports 2, 3, 5, 6, and 8 are set as shown. Jack A may be used in first row of temporary supports.

When their respective rows of three temporary supports is complete, jacks B, C, and D may be removed and reset as temporary supports in a succeeding row.

Lateral jack spacing not to exceed 5 feet.

Inspector Shade testified that under Drawing No. 2, a person may go 5 1/2 feet beyond or inby permanent roof support for the purpose of installing the first row of temporary jacks. After that, the person may not go more than 4 feet inby or beyond that row of temporary jacks to install the second row of jacks, and he must not go more than 4 feet to install the third row. The maximum allowable lateral distance between jacks is 5 feet (Tr. 258). Conceding that the roof-control plan does not specifically prohibit the installation of two jacks simultaneously, Mr. Shade nonetheless insisted that the plan does provide for a particular sequence for roof jack installation. In his view, the jacks should be installed in numerical sequence starting with jack No. 1, but he conceded that MSHA has permitted the operator

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to reverse the order of installation in any given row of jacks, i.e., No. 3, No. 2, and No. 1 (Tr. 106-107).

Assistant Mine Foreman Joseph Skompski testified that standard good mining practice calls for the installation of the temporary roof supports from rib-to-rib (Tr. 183). According to his interpretation of the roof-control plan, roof jacks are to be installed in sequence, row-by-row (Tr. 178). The only exception noted by Mr. Skompski concerned loose or drummy roof areas which may have to be supported by jacks installed out of sequence.

Respondent's safety director Samuel Cortis indicated that once the mining phase is completed, the temporary roof support plan depicted by Drawing No. 2 comes into play. While Mr. Cortis did not personally draft Drawing No. 2, he indicated that he reviewed it and made corrections, and that "it's very close to what I wanted" (Tr. 238). He explained that the plan calls for the installation of eight units of roof supports (jacks) placed in three rows across the work place. He indicated that the numbers 1 through 8 as shown on the drawing simply identify eight units of temporary roof support. The first row of jacks is set 5 1/2 feet ahead of the last row of permanent roof supports, and the second row is set 4 feet in by that point (Tr. 215-216).

Mr. Cortis stated that jacks 1, 4, and 7 are interchangeable with the roof support plan used on the bolting cycle. He also indicated that once a row of three numbered jacks are installed, the alphabetically labeled ventilation canvass jacks can be removed and set in the next row (Tr. 216). He also stated that under MSHA's interpretation of the drawing, once the first row of roof bolts is installed, any one of the jacks labeled 1, 2, and 3 may be removed and placed in the area shown as a "dotted 1" between jacks 7 and 8 as shown on the drawing. In his opinion, the intent of the drawing is that the jacks are set row-by-row (Tr. 217).

Mr. Cortis was of the view that Drawing No. 2 does not require that the jacks be installed in any particular numerical sequence. As an example, he stated that assuming that jacks 1, 2, and 3 were in place, the next row of jacks may be installed by starting with jack 6, and then going to 5 and 4 (Tr. 222). Assuming that there was permanent or temporary roof support within the required 5 or 5 1/2 feet, a person starting the installation of the first row of jacks by beginning with the center jack No. 2 would not be in violation of the drawing (Tr. 218). However, if that person went out and first installed Jack No. 5 instead of No. 2, he

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would be in violation because he would not be within the 5 to 5 1/2 feet of either permanent or temporary roof protection (Tr. 219). Assuming that jacks 1, 2, and 3 are in place, Mr. Cortis believed that drawing 2 would not prohibit anyone from next installing jack 5, rather than 6, as long as jack 2 was within 5 feet of him for protection (Tr. 223). In his view, the key lies in how far one ventures out from under permanent or temporary roof support (Tr. 241).

Findings and Conclusions

Citation No. 2102609, 30 C.F.R. 75.200

I take note of the fact that when this case was before me for adjudication, MSHA's counsel did not file a posthearing brief explaining MSHA's interpretation of the roof-control plan. One possible explanation for this is that trial counsel was just as confused as I was with respect to the inspector's interpretation and application of the plan. Upon reexamination of the roof-control plan, I am still not convinced that Drawing No. 2 is clear as to the sequence for installing temporary roof support, nor am I convinced that it specifically prohibits the simultaneous installation of such support.

I believe that Inspector Shade was particularly concerned over the fact that two men proceeded to install two jacks simultaneously, and that this exposed more men than was necessary to unsupported roof. The record reflects that when he arrived on the scene, jack No. 2 was in place. He testified that the two men intended to install jacks No. 4 and No. 6. After he called the men back, and before any installation could be done, he instructed them as to the proper installation sequence, and they then proceeded to install jacks No. 1 and No. 3, and then installed jacks No. 4, No. 5, and No. 6. He believed that this was the proper installation sequence. At the same time, he conceded that the roof plan does not prohibit the simultaneous installation of temporary support, and that MSHA has permitted U.S. Steel to reverse the numerical order of installation in any given row of roof jacks.

Assistant Mine Foreman Skompski's interpretation of Drawing No. 2, is that temporary roof support is normally installed in sequence, row-by-row. Safety Director Cortis was of the opinion that the intent of the drawing is that the jacks be installed row-by-row, but in no particular numerical sequence in any given row. Since the evidence establishes that the two men in question were about to

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install jacks No. 4 and No. 6 when called back by Inspector Shade, I conclude and find that they did not intend to install the jacks row-by-row. I accept the interpretation of the drawing by Mr. Skompski and Mr. Cortis as reasonable, and since the two men cited were not in compliance with that interpretation, I now conclude and find that the respondent violated this row-by-row installation requirement of Drawing No. 2. To that extent, my previous decision of July 11, 1984, is supplemented to include these additional findings. The original findings and conclusions concerning a violation of section 75.200, are reaffirmed as issued.

I note that on page 52 of my decision of July 11, 1984, section 75.503, is listed as the standard violated in connection with Citation No. 2102609. That is in error. The correct section number is 75.200, and my decision is amended to reflect this correction.

Page one of my decision of July 11, 1984, reflects that petitioner MSHA filed posthearing arguments, and that the respondent did not. This is in error. U.S. Steel filed a brief, but MSHA did not. My decision is amended to reflect this fact.

ORDER

Citation No. 2102619, 30 C.F.R. 75.316

In view of the Commission's reversal of my original non-"S & S" finding for this violation, my original civil penalty in the amount of \$75 is amended, and I conclude that a civil penalty in the amount of \$125 is appropriate and reasonable for the violation. Respondent IS ORDERED to pay this civil penalty within thirty (30) days of the date of this supplemental decision and order.

George A. Koutras
Administrative Law Judge