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SOL (MSHA) v. EMERY 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)	CIVIL PENALTY PROCEEDING Docket No. WEST 82-167 A.C. No. 42-00080-03092
v.	Wilberg Mine
EMERY MINING CORPORATION, RESPONDENT	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;

Adrienne J. Davis, Esq., Crowell & Moring, Washington, D.C., for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating a regulation promulgated under the Federal Mine Safety and Health Act, 30, U.S.C. 801 et seq., (the Act).

After notice to the parties a hearing on the merits was held on November 14, 1984 in Salt Lake City, Utah.

The parties waived the filing of post-trial briefs and, in lieu thereof, orally argued their views.

Issues

The issues are whether the evidence establishes that an accident occurred within the meaning of the MSHA regulations. If an accident occurred, then the operator was obliged to report the event to MSHA.

Citation 1237680

This citation alleges respondent violated 30 C.F.R. 50.10, which provides as follows:

> 50.10 Immediate notification. If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, toll free at (202) 783-5582.

Stipulation

At the commencement of the hearing the parties stipulated that there was coverage under the Act. In addition, Emery, a large operator, produced 3,938,101 tons of coal. The mine involved here produced 1,130, 824 tons for the year applicable to the citation. The mine's history is average and respondent's good faith is established by its abatement of the citation (Tr. 5, 6).

Summary of the Evidence

Dick Kourtney Jones, a federal coal mine inspector, inspected Emery's Wilberg mine in February, 1982. (Tr. 13-16).

When the inspection party arrived at First Right the inspector found that there had been a massive fall on top of a continuous miner (CM). Workers were setting timbers to support the top which was still loose and dribbling (Tr. 16).

The CM, 10 feet wide and 40 feet long, was half buried in rock. The fall extended from the cutter bits on the head back to approximately a foot inby the cab. The rock directly over the cab was fractured and broken (Tr. 17, 18). The fall of the rock had broken the hydraulic system. As a result, the passage of the CM was impeded (Tr. 19); further, it was hazardous for the CM operator when he exited the machine (Tr. 18).

The portion of the definition that discusses the anchorage zone in active workings applies in this situation. The Emery plan prohibits anchoring below three feet. In this section they were using five foot roof bolts (Tr. 19, 20). The cave-in portion affected the zone where the bolts were anchored but no roof bolts had caved out. However, there were no bolts in the area where the equipment was removing the pillar. This is where the CM was making its cut (Tr. 21).

The inspector did not measure the ventilation but, in his opinion, the ventilation was impaired to some extent because four feet of rock caved on a four-foot CM in an eight-foot entry (Tr. 21, 22).

It is MSHA's duty to evaluate an operator's roof control plan. Accordingly, it was necessary for MSHA to know about any unplanned roof falls over equipment operated by miners (Tr. 22). A month before this incident Emery reported, as a roof fall, an event similar to this situation (Tr. 23).

Dixon Peacock and Jay Butterfield testified for Emery.

Witness Peacock, Emery's safety director, was familiar with the room and pillar retreat mining at this location (Tr. 45, 47).

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The witness described in detail how the area was mined (Tr. 49-54). Retreat mining removes pillars of coal, about 80 foot square, in sequence. As the pillars are removed the roof caves; this release of pressure makes further extraction safer (Tr. 50, 51). Emery's roof control plan in effect on the date of this incident contains a drawing depicting the sequence of the coal removal (Tr. 52; Joint Exhibit 1). The cut made through the middle of a pillar is known as a split. After a split is made breaker rolls are set. Breaker rolls are straight grain timber set on four-foot centers. Double rows are placed across an entry. All but the last ten-feet of the cut is roof bolted (Tr. 54).

Each diagonal cut is known as a lift. The procedure is to establish a split and then begin to extract the left or right side of the pillar (Tr. 55, 56). The roof caves in when it is no longer supported (Tr. 56).

Peacock visited the area after the roof fall occurred. The roof had fallen in the area where retreat mining was being conducted. The area of the roof fall was not a traffic way, entry or escapeway (Tr. 59). Only the CM is allowed in the area while it is cutting. Further, Emery expected that the unsupported pillared out area would fall (Tr. 59, 60).

The roof above the miner was not roof bolted because the area was in a lift section where roof bolting was not required (Tr. 61). During retreat mining it is not uncommon to get some material on the head of the miner when you break through the end wall (Tr. 61). When working on a particular pillar it's common for a previously extracted roof to fall (Tr. 61). The size of a roof fall varies; it is not straight and rectangular but it can range from small to massive pieces; or it can dribble, and it may last for sometime (Tr. 62).

The witness felt that the roof fall was not a reportable accident because it did not impede passage of any person or ventilation. Nor did it affect the anchorage (Tr. 63, 64). However, the witness agreed that the company did not plan to have the roof fall on its equipment (Tr. 66).

Jay Butterfield, the CM operator, testified concerning his operation of the CM at the time of the roof fall (Tr. 82-88). A hand drawn exhibit also illustrated his testimony (Tr. 84; Exhibit R3). Before this particular roof fall occurred portions of another extracted pillar had fallen (Tr. 85, 86; Exhibit R3).

When this roof fell the CM had broken through the end wall of the lift. The roof itself was not roof bolted at that point (Tr. 87).

Timbers were set at the crosscuts. The area of the roof fall was not a travelway, escapeway or entry (Tr. 90). No miners were inby the CM; nor were any miners allowed to proceed into the area that was eventually covered by the roof fall. In addition, the area had been "dangered off" (Tr. 90, 91).

Butterfield did not observe any rock fall in the area of the roof bolts (Tr. 91). There were no roof bolts above the CM (Tr. 91). After the fall the CM backed up until the head dropped to the ground due to the loss of hydraulic pressure (Tr. 92). If the hydraulic system had not been damaged the CM could have backed out (Tr. 92, 93).

The roof was secured after the fall. In the process additional roof material was pulled down on the CM (Tr. 93, 94).

If the CM had been operative Butterfield would have backed it out, cleaned it and checked for permissibility. Next, they would have set the roller timbers and started another lift (Tr. 95, 96, 107). He would not have re-entered the area in an attempt to clean it out (Tr. 95).

After the roof fall ventilation of the section was not impaired (Tr. 97). Even in a planned roof fall it is not uncommon for roof material to land on the CM (Tr. 98, 99, 108). But they didn't plan to have rock fall on the vehicle. However, it can happen at any time because nothing is supporting the top (Tr. 108).

Discussion

The parties agree that the operator's obligation to report under 30 C.F.R. 50.10 is, in turn, dependent on the construction of the definition as contained in 30 C.F.R. 50.2(h)(8).

I agree that the latter section, in this case, defines the factual perimeters of whether a reportable accident occurred. The section provides as follows:

> (8)--An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or a roof or rib fall on active workings which impairs ventilation or impedes passage.

The foregoing definition of an accident encompasses two basic situations. At the outset an accident is reportable if the unplanned roof fall occurs at or above the anchorage zone in active workings where roof bolts are in use. This portion is not applicable here simply because there were no roof bolts in use above the miner. While roof bolts were in use at some location in the mine no bolts were in use nor were they required in this immediate area.

A portion of the testimony as well as MSHA's arguments deal with whether the roof fall was "at or above the anchorage zone." (Tr. 29, 31). I do not find that evidence to be relevant since the anchorage zone only becomes a factor where roof bolts are in use. All of the witnesses agree that there were no roof bolts in use where the CM was making its cut (Tr. 21, 71, 72).

The second definition in the section requires that an accident should be reported if the fall "impairs ventilation or impedes passage." The inspector expressed the view that the ventilation was impaired "to some extent" (Tr. 21). He based his opinion on the fact that four feet of rock had caved on a four-foot miner in an eight-foot entry (Tr. 22).

I am not persuaded that the facts support the inspector's opinion. Ventilation efficiency is a measurable quantity. A recognized authority, A Dictionary of Mining, Mineral, and Related Terms, published by U.S. Department of Interior, 1968 at page 120 states:

> ventilation efficiency. One measure of the efficiency of a mine ventilation system is the ratio of the total amount (volume in cubic feet per minute) of air handled by the fan to the total amount of air actually getting to the working faces. If 200,000 cubic feet per minute are handled by the fan and only 100,000 get to the working faces, the efficiency is only 50 percent. Kentucky, p. 85. See also overall ventilation efficiency; thermometric fan test; ventilation standards; volumetric efficiency. Nelson.

I accordingly reject the inspector's opinion and I credit Emery's contrary evidence to the effect that the roof fall did not impair the ventilation (Tr. 63, 97). Emery's miners had not measured the ventilation; however, miners working in ventilated passages before and after a roof fall would be in a better position to evaluate the flow of air than a person who arrives after the ventilation is allegedly impaired.

An additional issue focuses on whether the roof fall impeded "passage." The term "passage", not otherwise defined in the regulations, by common usage, means, in part:

> the action or process of passing from one place or condition to another; a way of exit or entrance: a road, path, channel, or course by which something passes; Webster's New Collegiate Dictionary, 1979 at 830.

See also the definition in the Department of Interior dictionary, supra at page 796, which defines a passage, in part, as:

> A cavern opening having greater length than height or width, large enough for human entrance and larger by comparison than a lead. An underground tunnel or roadway in metalliferous mines.

In this case it is uncontroverted that no person could proceed beyond the CM. Further, the area of the roof fall was not a travelway, escapeway or entry and the area was "dangered off" (Tr. 90, 91). It accordingly follows that there was no passage that could have been impeded. In addition, the movement of the CM was not impeded. In fact, after the roof fall the CM continued to back until the loss of hydraulic pressure caused the head to drop to the ground. This immobilized the CM. (Tr. 92, 103). I further note that there was no difficulty in removing the CM with retriever equipment (Tr. 94).

The Secretary also argues that there can be unplanned roof falls even in retreat mining. He declares that no operator permits rock to fall on its equipment such as occurred here. This argument finds support in the inspector's testimony that the roof failed over where they were mining coal. Hence, it is unplanned because it occurred back behind breaker rows which serve to stop a cave-in (Tr. 41, 63).

The Secretary is asking the Commission to redraft his definition of an accident. If he desires such a definition, as he has outlined in his argument, he should follow his rule making procedures.

In support of his case the Secretary also relies on United States Steel Corporation, IBMA, 1 MSHC 1585, 1 MSHC 1585 (1977).

The above cited case, decided by the Interior Board of Mine Operations Appeals, considered a similar factual situation. The Board ruled that the unintentional covering of a continuous miner by a planned roof fall was an accident requiring immediate notification.

The regulation considered by the Board was considerably broader than the one in contest here. It provided, in part, that an "accident" means: "any other event that could have resulted in the death or injury had any person been in the immediate area" 1 MSHC at 1586. For this reason the cited case is not persuasive authority.

Conclusions of Law

Based on the entire record and the findings herein I enter the following conclusions of law:

1. The Commission has jurisdiction to decide this case.

2. Respondent did not violate 30 C.F.R. 50.10 and Citation 1237680 should be vacated.

ORDER

Based on the findings of fact and conclusions of law herein I enter the following order:

Citation 1237680 and all penalties therefor are vacated.

John J. Morris
Administrative Law Judge