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SOL (MSHA) v. ASARCO INC.
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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 84-48-M A.C. No. 05-00516-05506
v.	
ASARCO INCORPORATED NORTHWESTERN MINING DEPARTMENT, RESPONDENT	Leadville Unit

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Earl K. Madsen, Esq., Bradley, Campbell & Carney, Golden, Colorado, for Respondent.

Before: Judge Carlson

GENERAL BACKGROUND

This civil penalty proceeding arose out of a federal inspection of the Leadville, Colorado mine of ASARCO, Incorporated (ASARCO). The mine inspector issued a citation which charged that ASARCO violated the mandatory safety standard found at 30 C.F.R. 57.3-22.(FOOTNOTE.1) Specifically, the citation alleged that a miner drilling at the face of the 15-25-300 stope suffered a broken foot when a large quantity of loose rock came down. The Secretary of Labor (Secretary) proposes a civil penalty of $119.00 which ASARCO contests. Following an evidentiary hearing in Denver, Colorado, both parties filed extensive post-hearing briefs.

REVIEW AND DISCUSSION OF THE FACTS

There are no significant conflicts concerning the facts. At the outset counsel stipulated that on September 29, 1983 an ASARCO miner, Alan H. Lysne, suffered a broken bone in his foot because of a fall of rock from a face upon which he was drilling. The inspector who testified for the Secretary and the several witnesses who testified for ASARCO agreed that the miner had proceeded to drill an unstable face which plainly required barring down.

The parties also agree that on September 28, 1983, the back and ribs in the south one heading of stope 15-25-300 were loose and dangerous, requiring barring down and bolting. Elmer Nichols, the inspector who conducted the accident investigation on the 29th, had noted this condition on the 28th and had discussed it with ASARCO's safety engineer, its general mine foreman, its mine superintendent, and its unit manager of the Leadville Unit.

Miners could not bar or bolt at the time the inspector was present because mucking was in progress. The company officials agreed with the inspectors, however, that the face could not be advanced until the loose rock conditions were corrected. To that end, the undisputed evidence shows that Daniel Welch, the shift boss on the 28th and 29th, instructed Alan Lysne on the 28th to bar down the back and do what was necessary to make the dangerous area safe. The evidence also showed that mine foreman Ray Bond told Lysne to make the area safe before doing any more blasting.

George Naranjo, the other miner in the stope, received instructions from Mr. Bond to help Lysne bar down and bolt the area.

The evidence is not so clear as to how much the two miners did to secure the back and ribs on September 28. Their time cards for that date show both spent time in ground support activities that day (respondent's exhibit 3). More important, immediately after the accident it was apparent to all observers that the back had been bolted and mats installed. The shift report confirms that five mats (with three bolts each) were installed in the back. Naranjo was not present at the face when Lysne was injured.

Safety Engineer Louis Eversole's internal report prepared for the company (exhibit P-2), which was countersigned by Roy Bond, mine forman, and Elmer E. Nichols, the mine inspector, acknowledged that over a ton of rock had been barred down after the accident. Also, the signers agreed that "more barring down was needed and they [the miners] could have bolted the ribs, plus they needed at least one mat in the back."

The evidence shows that when the federal inspector and supervisory or management personnel of ASARCO were in the 15-25-300 stope on the day before the accident, the face, unlike the back and ribs, could not be seen. Any possible view of the face was obscured by muck. I find as fact, however, that the orders given to Lysne on September 28 were broad enough to include the adjacent face, should it have appeared unstable, as indeed it did. Besides, the routine procedures at the mine would have required barring down even had there been no specific instructions.

ASARCO has contended from the beginning that the Secretary is attempting to impose a doctrine of strict liability where none is justified by the standard in question or the Act itself. ASARCO looks to the first sentence of 30 C.F.R. 57.3-22 which declares that:

> Miners shall examine and test the back, face and rib of their working places at the beginning of each shift and frequently thereafter. (Emphasis supplied.)

This plain language, ASARCO argues, places the obligation for compliance squarely upon the miner, not the operator. ASARCO also reviews the Act extensively and concludes that none of its provisions, expressly or by implication, may be construed to permit a policy of strict liability. Accordingly, then, an operator cannot be held liable if its supervisory personnel are free of negligence.

I find no merit in respondent's argument. Ordinary miners, we may be certain, not management or supervisory employees, do most of the work in mines. This necessarily includes hazardous work. Ultimately, then, whether work is done safely or unsafely depends upon how the miners perform it. The Act, however, recognizes that the performance of miners is largely governed by the supervision, direction, and control of the operator. The Act abounds with declarations that the compliance burden rests with the operator. The statutory provisions will not be repeated here, but are referred to in the considerable number of cases which hold that an operator is liable without fault for violations committed by its employees. See, for example, Allied Products Company v. FMSHRC, 666 F.2d 890 (5th Cir.1982); Kerr-McGee Corporation, 3 FMSHRC 2496 (November 1981); American Materials Corporation, 4 FMSHRC 415 (March 1982); United States Steel Corporation, 1 FMSHRC 1306 (September 1979). The evidence shows that the face at which Lysne was working was plainly unstable: more than a ton of material was barred down after the accident. Unless he approached the face with his eyes closed before drilling, he could scarcely have failed to notice its dangerous condition. It is equally obvious that he did not "examine and test" the face "frequently" after his shift began. And most certainly he ignored that part of the standard which commands that:

> Loose ground shall be taken down or adequately supported before any other work is done.

These omissions must be imputed to ASARCO under the strict liability doctrine inherent in the Act.(FOOTNOTE.1)

A large question remains, however, concerning the appropriate penalty consequences. The Secretary in his brief declares forthrightly that the "effectiveness of ASARCO supervision is not in issue in this case." (Petitioner's brief at 4.) I have carefully reviewed the evidence bearing on both miner training and the efforts of ASARCO's supervisors, and must agree.

The virtually undisputed facts disclose that at the ASARCO Black Cloud Mine, barring down loose ground was an ordinary and almost inevitable phase of the mining cycle. At some locations in the mine loose ground is a greater problem than in others. This was true of the 15-25-300 stope where Lysne was injured. A part of the strata in the stope, including a part of the face, involved a geological feature known as the Hellena Fault. Ground control in the fault area was more demanding because the materials in the fault area are looser than elsewhere. The fault, however, appears at a number of points in the mine workings and was not unfamiliar to miners (Tr. 214).

As to the thoroughness of ASARCO's training and supervision of miners, particularly the injured miner, I must find that both were adequate under all the circumstances. ASARCO's evidence showed that ground control was a routine duty of miners such as Lysne and Naranjo, and that both had nevertheless been specifically instructed by superiors to bar down and bolt the stope in question. Pages 10 through 12 of ASARCO's booklet of safety rules (respondent's exhibit 2), stresses the necessity for barring down all loose ground, and the proper techniques for doing so. The rules were distributed to all miners, who signed for them and were responsible for knowing their contents. Employees are also required to attend monthly safety meetings where the rules, including ground control rules, were explained. Lysne attended these meetings (Tr. 89-92). Lysne had worked in the mine since 1972.

The evidence shows that ASARCO maintained a program of sanctions designed to discipline employees for safety violations. These range from verbal reprimands to outright dismissals.

The undisputed evidence shows that several supervisors visit all the stopes on a regular, daily basis, and had indeed been in the stope in question on the day before the accident and had specifically instructed Lysne to give his first attention to ground control the next day. Lysne's decision to begin drilling on an obviously unstable face must be regarded as unforeseeable and idiosyncratic.

Despite his concession that the accident was not the result of a supervisory failure, the Secretary in his brief appears to suggest that there was such a failure. The brief extracts portions of the transcript in which Lysne's shift foreman, Daniel Welch, acknowledged that he had experienced problems with the miner before about barring down (Tr. 179-180). The Secretary's approach would appear to be that (1) since supervisory personnel knew on September 28 that the stope needed bolting and barring, and (2) since Lysne had sometimes been reluctant to bar down before, ASARCO should have had a supervisor on hand at the beginning of Lysne's shift on September 29 to make certain that he did what he was told to do on the day before.

The essence of Welch's testimony, however, was that barring down was hard work and that Lysne sometimes had to be told to bar down. In this instance, however, Lysne had been told to make the ground in the stope safe, and Welch's past experience with the miner had shown that he could be relied upon to follow through on specific instructions (Tr. 177-179). Lysne had accumulated only four warning notices for safety violations in his file since 1972 (respondent's exhibit 7), which was fewer than the average miner (Tr. 99-100). Only two of those involved ground control.

On balance, this evidence does not present a picture of supervisory dereliction. The result might have been different had Lysne not been specifically directed to bar down before working at the face, if Welch had truly had strong reason to suspect that Lysne would disobey the direct command to bar down, or if bolting and barring down had not been a routine requirement in carrying out the mining cycle. To hold that ASARCO had a duty to have a supervisor present at the beginning of the September 29 morning shift would be tantamount to holding that a mine operator must provide one-to-one supervision of all miners at all times. Nowhere does the Act or the standard in question suggest such a draconian requirement. The operator, under the facts of record, was not negligent.

The Secretary proposes a civil penalty of $119.00. For the reasons which follow, I find the proposal excessive. Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the operator's size, its negligence, its good faith in seeking rapid compliance, its history of prior violations, the effect of a monetary penalty on its ability to remain in business, and the gravity of the violation itself.

The evidence shows that the Leadville Unit of ASARCO employed 140 miners at the time in question. No evidence was furnished about the size of the corporation itself. It is undisputed that ASARCO achieved speedy abatement of the violative conditions. Its history of prior violations was favorable. MSHA records showed only 11 violations and a total of $220.00 in penalties for the two years preceding the present infraction. No evidence was presented concerning the effect of the payment of the proposed penalty on ASARCO's ability to remain in business. The violation was obviously grave; the miner suffered a broken foot, and the injury could easily have been far more severe. In this case, however, these elements are all overshadowed by the negligence factor. Since I have held that ASARCO was not negligent, the penalty cannot be large. Considering all the statutory elements, with particular emphasis on ASARCO's lack of negligence, I conclude that $25.00 is a reasonable and appropriate penalty.

One final matter must be considered. The Secretary has classified the violation in this case as "significant and substantial" within the meaning of the Act. The Commission in Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981) set out the test for determining whether a violation, in the words of the statute, ". . . could significantly and substantially contribute to the cause and effect . . . of a mine safety or health hazard." Such a violation, the Commission held, is one where there exists ". . . a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." In the present case, the unstable face clearly met those tests. The violation here was significant and substantial. (The presence or absence of operator negligence does not have relevance in determining the existence of a significant and substantial violation.)

CONCLUSIONS OF LAW

Based upon the entire record and upon the factual findings made in the narrative portions of this decision, the following conclusions of law are made:

(1) The Commission has jurisdiction to decide this case.

(2) The respondent, ASARCO, violated the mandatory safety standard published at 30 C.F.R. 57.3-22.

(3) The violation was significant and substantial.

(4) ASARCO is liable for the violation despite the fact that it was not itself negligent.

(5) An appropriate penalty for the violation is $25.00.

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ORDER

Accordingly, the citation is ORDERED affirmed; and ASARCO is ORDERED to pay a civil penalty of $25.00 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 That standard provides:

Mandatory. 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.

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1 ASARCO, in its brief, cites a number of judges' decisions and a single Commission decision which deal with alleged violations of the same ground control standard involved here. ASARCO argues that none of these decisions found the mine operator strictly liable. If strict liability were the rule, the argument proceeds, surely some mention of that rule would have appeared in the cases. The argument is not persuasive. All eight cases, as do most cases under the Act, turned on simple issues of whether or not a violation occurred under the facts. Several involved vacations because the standard was inapplicable; the others were affirmations where the standard did apply. In none were there findings that would tend to raise the strict liability issue.