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SOL (MSHA) V. KING'S MILL ENERGY
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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 PROCEEDINGS Docket No. WEVA 86-286 A.C. No. 46-01735-03539
v.	Docket No. WEVA 86-317 A.C. No. 46-01735-03540
KING'S MILL ENERGY, INCORPORATED, RESPONDENT	Docket No. WEVA 86-318 A.C. No. 46-01735-03541 King's Mill No. 1 Mine

DECISION

Appearances: Page H. Jackson, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
Paul O. Clay, Jr., Esq., King's Mill Energy,
Incorporated, Fayetteville, West Virginia, for
Respondent.

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," charging King's Mill Energy, Incorporated (King's Mill) with regulatory violations and seeking an appropriate civil penalty for each violation. At hearings held in Charleston, West Virginia the parties agreed to settle all but one of the citations at issue proposing a reduction in penalties from \$995 to \$745. I have considered the representations and documentation submitted in connection with the settlement proposal and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

The remaining citation, Citation No. 2715285, alleges a "significant and substantial" violation of the operator's roof control plan under the standard at 30 C.F.R. 75.200 and charges as follows:

The approved roof control plan, permit no. 4ÄRCÄ11Ä70Ä1123Ä13 was not being followed in that a miner was permitted to work inby permanently and temporarily supported roof in the last cross-cut

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between the No. 4 and No. 5 entries on the North Mains Section. A roof fall occurred fatally injuring the miner. The fall measured 15' 9" x 7' 7" and 0Ä8 inches thick.

King's Mill admits that it violated the roof control plan as alleged and concedes that the violation was "significant and substantial" and serious. It argues only that the proposed penalty of \$3,000 was excessive in that the violation was not the result of its negligence.

The relevant provisions of the roof control plan read as follows:

When loose, broken, or drummy roof is encountered, mining shall be discontinued and bolts shall be installed on 4Äfoot lengthwise and crosswise spacing to within 4 feet of the face before mining is resumed. When mining in conditions described above, the length of the miner runs shall be limited to a depth that no person will be required to advance inby the last row of bolts during mining operations. (Government Exhibit 5 page 18 4)

MSHA's undisputed investigative report reads, as relevant hereto, as follows:

On Tuesday, November 5, 1985, at about 7:50 a.m., the day shift production crew under the supervision of Charles Sawyers, section foreman, arrived on the north mains (013 MMU) section. Sawyers conducted a preshift examination of the section and assigned work duties. Mining, with a Wilcox Mark 22 continuous mining system, was started in the No. 3 to No. 2 crosscut and then continued in the No. 3 entry face.

According to Franklin Scott, continuous miner operator, and Frank Stevens, front bridge conveyor operator, the roof became drummy and loose in the No. 3 entry face area as the coal was cut from the mine roof. Mining was stopped and the continuous mining machine trammed out of the No. 3 entry into the No. 4 to No. 5 entry crosscut. This crosscut had been mined through into the No. 5 entry by this section crew on November 4, 1985. According to Sawyers, the cut through lift was about 14 feet wide and was done to provide better face ventilation across the section. This cut through was roof bolted during the evening shift on November 4, 1985. Scott stated that he trammed the continuous mining machine into the mined through area and mined two or three runs (lifts) across the coal face, which

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further opened the crosscut into the No. 5 entry. Sawyers was helping Ronald Lane, timberman, set timbers and clean the right side of the crosscut opening during this mining. Sawyers then instructed Scott to move the continuous mining machine back into the crosscut and shear (slab) the left ribline to widen the crosscut so that the continuous mining system could be advanced into the No. 5 entry. Sawyers then left the area to conduct a preshift examination for the evening shift. Lane crossed the bridge conveyor to the left side of the crosscut and Scott moved the mining machine back. Scott began shearing the rib line and Lane followed timbering and cleaning along the left rib beside the mining machine.

During this mining a portion of the newly exposed roof, measuring 15' 9" x 7' 7" x 0Ä6" thick, fell along the sheared left rib. Scott stated that he was not facing the rib at the time of the fall and due to low mining height limiting his visibility, was unsure as to the whereabouts of Lane. Scott stopped the machine, crossed the bridge conveyor, and saw that Lane had been covered with the fallen slate. Scott summoned the foreman and mine electrician, Albert Sawyers, for help. These men used a lifting jack with timbers for blocking and recovered Lane from under the rock. Lane was examined and no vital signs found. Lane was transported to the surface into an awaiting ambulance and taken to a local hospital where he was pronounced dead on arrival.

It is undisputed that had the fallen rock been tested by the sound and vibration method prior to its falling it would have sounded "drummy" and that the cited area had not been roof bolted. The evidence also shows that the deceased had 7 years underground coal mining experience, had completed 9 days of training at the King's Mill No. 1 mine and had been working by himself at this mine for 4 or 5 days. Mine Superintendent Burke had also personally reviewed the roof control plan with the deceased. In addition before he left the deceased on the day of this incident the section foreman had reminded the deceased that the top was "drummy" in the cross-cut and had warned him to stay on the right side of the cross-cut away from the endangered area.

Superintendent Burke observed that the deceased was in violation of company policy by placing himself inby permanent supports under these circumstances. Burke had fired 2 miners for similar violations of company policy. He could offer no explanation as to why the deceased had violated this policy on this occasion.

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In arguing that the Respondent was negligent the government maintains that the deceased was a new employee with less than 3 weeks experience and had not been subject to a "written" training program. This argument does not however take into consideration that the deceased was a miner with many years experience and had been specifically trained in the roof control provisions barring miners inby roof bolts where drummy conditions existed. The government's argument also fails to take into consideration the undisputed evidence that Sawyers specifically warned Lane about the drummy roof conditions in the cross-cut at issue and told him to stay on the right side of the cross-cut, an area which had been properly supported.

The government next contends that the operator's negligence may be shown by the fact that the section foreman had taken the deceased inby the roof bolt support on the right side of the No. 5 entry earlier on the shift at a time when the continuous miner was allegedly cutting coal. It is undisputed however that the miner was not in fact cutting coal when Sawyers and Lane were at the right side of the No. 5 entry. Moreover it is clear that this area was not a "drummy" area and it was accordingly permissible for miners to be in the area that was then supported by timbers. Thus it was not a violation of the roof control plan for Sawyers and Lane to have positioned themselves in the noted area and Lane could not therefore have inferred from this positioning that it was somehow acceptable to violate the roof control plan. Under the circumstances there is insufficient evidence to support a finding of operator negligence as alleged.

In assessing a penalty for this violation I have also considered that the operator is small in size and has a moderate history of violations. There is also no dispute that the violation was abated in accordance with MSHA's directives. Under the circumstances a penalty of \$100 is deemed appropriate for the violation.

ORDER

King's Mill Energy Incorporated is directed to pay civil penalties of \$845 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge