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WESTERN FUELS v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

WESTERN FUELS-UTAH, INC.,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDING

Docket No. WEST 86-108-R
Citation No. 2832711; 3/1/86

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

WESTERN FUELS-UTAH, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 86-245
A.C. No. 05-03505-03524

Deserado Mine

DECISION

Appearances: Karl F. Anuta, Esq., Duncan, Weinberg & Miller,
P.C., Denver, Colorado, for Contestant/Respondent;
Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado, for
Respondent/Petitioner.

Before: Judge Maurer

The hearing in the above-styled contest proceeding was held on July 23, 1986, in Denver, Colorado, before the late Judge Carlson. Subsequently, when the civil penalty proposal was issued, the parties moved to have it consolidated with the contest proceeding. That motion is hereby granted, and I further note that evidence as to the penalty was taken in that hearing.

Due to Judge Carlson's untimely death, these cases were reassigned to me. The parties have agreed to my adjudication of the cases on the basis of the record made before Judge Carlson without additional hearings or briefing. I have considered all of the arguments made by the parties in their respective briefs and I make the following decision.

Both the contest proceeding and the civil penalty case relate to section 104(a) Citation No. 2832711, which was issued on March 1, 1986, alleges a violation of 30 C.F.R. 75.200, and states as follows:

A fatal accident occurred February 28, 1986 at about 10:50 A.M. It was revealed that the roof bolting machine operator proceeded about 7 feet inby permanent roof supports for reasons other than to install temporary supports. The accident occurred in the east mains headgate belt entry about 73 feet inby Survey Station 380.

The incident which led up to the fatal accident began when the deceased, Austin Mullens, and his supervisor, one Carson Julius, trammed the roof-bolter into the entry to begin bolting. This particular roof-bolting machine is the type that has an automatic temporary roof support system (ATRS) on the front of the machine. They had set one mat and had moved the machine forward to set a second when Julius' drill stopped because of a loss of water pressure. A water hose had become kinked, so the ATRS system was taken down and the machine backed up to straighten out the hose. When the machine was backed up, the pan fell off on the side Julius was working on. After the hose was straightened out, the bolting machine was again moved forward, and the two men discussed how to retrieve the pan that had fallen out under unsupported roof. Julius attempted to drag the pan back under supported roof using a four foot steel, but it was too short. Julius then went to the back of the machine to get a longer steel, but before he went, he specifically told Mullens not to go out under the unsupported roof. By the time he got to the rear of the machine and turned around, Mullens was in front of the roof-bolting machine, out under unsupported roof, bending over the pan, trying to lift it up. Julius testified he shouted to Mullens to get back. Mullens did not respond. He shouted for Mullens to get out a second time, but at that moment a large rock fell and killed Mullens.

The parties' recitation of the facts of the accident in their respective briefs are fairly close and indeed the parties stipulated that on February 28, 1986, Austin Mullens was seven feet inby permanent roof support for reasons other than installing temporary supports when a rock fell and killed him.

30 C.F.R. 75.200 states in pertinent part that:

No person shall proceed beyond the last permanent support unless adequate temporary support is

provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners.

Western Fuels' roof control plan prohibits miners from traveling inby permanent roof support for reasons other than installing temporary roof support. It is undisputed that Mullens was inby the permanent roof support, was not protected by temporary support and was there for reasons other than to install temporary support. Therefore, it would appear to be axiomatic that a violation of 30 C.F.R. 75.200 occurred, as alleged.

However, the operator asserts that any violation of the cited mandatory safety standard that occurred was due wholly to the negligence of a rank and file miner (Mullens) and that his negligence should not be attributed to the operator. Therefore, it follows that the operator did not violate the regulation and should not be penalized.

The law, however, is otherwise. Assuming, arguendo, that there is absolutely no evidence of operator negligence in this record, the respondent's contention that it should not be held accountable for a violation of the mandatory safety standard by one of its employees is simply not the law as it exists today. This is the case even if I should find, and I do, that Mullens for some reason known perhaps only to himself, ignored his supervisor's instructions to stay out from under the unsupported roof, only seconds before he was killed.

The Commission has consistently and frequently held that an operator is liable, without regard to fault, for violations of the Act or its regulations committed by its employees. Asarco, Inc.-Northwestern Mining Dept., 8 FMSHRC 1632 (1986). An operator's negligence has no bearing on the issue of whether a violation occurred. Rather it is a factor to be considered in assessing a civil penalty. United States Steel Corp., 1 FMSHRC 1306 (1979); El Paso Rock Quarries, Inc., 3 FMSHRC 35, 39 (1981).

Accordingly, I find that the respondent herein is liable for the violation of 30 C.F.R. 75.200 committed by Austin Mullens and further find that violation to be obviously "significant and substantial" and serious.

CIVIL PENALTY ASSESSMENT

The parties have stipulated that the Deserado Mine is owned by Western Fuels-Utah, Inc., and is a large coal mine. They have further stipulated that the proposed penalty of \$1,000 will not affect the operator's ability to remain in business and that the citation herein was abated in good faith.

I have reviewed the operator's violation history for the two year period prior to the issuance of the citation at bar (Exhibit No. R-2), and I have already found the gravity of the violation to be serious. Therefore, the sole remaining issue relevant to the assessment of the penalty amount is operator negligence.

The fact that the violation in this case was committed by a rank and file miner does not necessarily shield the operator from being found negligent. We must look to such considerations as the foreseeability of the miner's conduct, the risk involved, and the operator's supervision, training, and discipline of its employees with regard to the mandatory safety standard at issue. A.H. Smith Stone Co., 5 FMSHRC 13, 15 (1983).

I find that the evidence in this record is undisputed that the decedent, Mullens, walked out under the unsupported roof on his own, contrary to the direct orders of his supervisor. However, the Secretary urges that in this instance, the miner's violative conduct was foreseeable and therefore his negligence should be imputed to the operator in any event. In support of this proposition, the Secretary points out that during the investigation of this fatal accident by MSHA, two miners came forward and told the investigator that they had seen other miners, including Mullens, walking out under unsupported roof on prior occasions. These two miners went on to state, however, that they had never informed anyone in management of this fact. Secondly, the Secretary cites the foreman's warning to Mullens as further evidence of foreseeability on the part of the operator. This argument strikes me as a classic example of the "damned if you do, damned if you don't" school of advocacy. On the one hand the absence of frequent and timely warnings on critical safety issues could be construed as inadequate training and/or supervision while on the other hand, too many warnings, especially right before an accident happens could be an inference that the supervisor knew of the employee's dangerous proclivities and didn't do enough to correct them. In sum, I do not find substantial evidence in this record to support a finding that Mr. Mullens' violation was foreseeable by the operator, or that proper supervision was lacking in this instance.

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Furthermore, I have carefully examined the record concerning the operator's training program and its history of disciplining its employees for violations of the mandatory safety standard at issue herein and find both to be adequate.

In my opinion, it was Mr. Mullens' own negligence, not that of the operator, which caused his death. Accordingly, I find this to be a substantial mitigating factor with regard to the penalty to be assessed.

ORDER

Citation No. 2832711 is AFFIRMED and Western Fuels-Utah, Inc., is ordered to pay a civil penalty of \$250 within 30 days of the date of this decision for the violation of 30 C.F.R. 75.200, as alleged.

Roy J. Maurer
Administrative Law Judge