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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. WEVA 88-311
A.C. No. 46-06898-03538

v.

No. 1 Mine

DAVIDSON MINING, INC.,
RESPONDENT

DECISION

Appearances: Page H. Jackson, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
William D. Stover, Esq., M.A.E. Services, Inc.,
Beckley, West Virginia, for Respondent.

Before: Judge Maurer

This case is before me upon the petition 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", for alleged violations of regulatory standards. The general issues before me are whether Davidson Mining, Inc. has violated the cited regulatory standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Prior to the commencement of testimony at the hearing, the parties advised me that they had a proposed settlement of three of the four citations at issue. Citation Nos. 9959649, 9959659 and 9959660 were each assessed at \$227 for violations of 30 C.F.R. 70.101 and Davidson has agreed to pay the full assessed amount of \$227 each in settlement of that portion of this case. I approved that settlement from the bench, and confirm it herein.

The remaining section 104(a) citation; Citation No. 2904279 alleges a violation of 30 C.F.R. 75.200, and proposes to assess a civil penalty of \$168.

The respondent's portion of the case was heard in Huntington, West Virginia, on February 7, 1989. The Secretary's case was submitted by documentary evidence and the affidavit of Inspector James E. Davis, which was filed on April 3, 1989.

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Citation No. 2904279 alleges a "significant and substantial" violation of the roof control standard and alleges in particular as follows:

The investigation of a non-fatal fall of roof material accident that occurred on 3/3/88, at approximately 1:30 p.m., in the last open crosscut of the No. 5 entry intersection, on the No. 008-0 unit, revealed that the roof was inadequately supported, in that a piece of roof measuring approximately 90 inches in width, 87 inches in length and 0 to 3 inches in thickness fell around and between three roof bolts, struck a miner, resulting in serious injuries, the injured miner becoming hospitalized and disabled for an extended period of time.

On March 3, 1988, a serious, non-fatal roof fall accident occurred in the intersection of the last open crosscut in the No. 5 entry on the Jim Hazel Mains supersection (008-0) of the No. 1 Mine. David McKinney, a roof bolter, was seriously injured when he was struck by a large rock which fell around and between three roof bolts. The rock measured approximately 90 inches in width, 87 inches in length and up to 3 inches in thickness.

MSHA Inspectors Dooley and Davis investigated this accident and Davis authored the Report of Investigation which was received into evidence as Government Exhibit No. 2. During his investigation, Inspector Davis encountered drummy roof conditions indicative of a separation in the overlying strata of the roof in several areas outby the accident scene. These conditions were detected in areas where the continuous miner had left draw rock on the roof as the coal was mined. At the accident scene, Davis found additional areas of drummy roof in the vicinity of the prior roof fall, but in his opinion, these areas all seemed to be adequately supported. He also took a look at the three roof bolts that had been present when the roof fell between and around them and was satisfied that there was no evidence that these roof bolts had been damaged or improperly installed.

While standing in the area where the roof fall had occurred, he heard a noise from an outby area which sounded like rock falling. He asked what that noise was and someone responded that that noise was the roof falling around and between roof supports and that such falls were not unusual on the section. He does not know the identity of the person who made the statement, but everyone in the group present heard it and no one, including management personnel present disagreed with it.

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Inspector Davis stated that the section was being developed in accordance with the approved roof control plan then in effect. The company was using 4 foot fully grouted resin bolts and 6 by 16 inch bearing plates. These measures exceeded the minimum requirements of the roof control plan. The roof supports were being installed on spacings of 4 to 5 feet along the length of the entries and 4 foot spacings across the width of the entries. In the immediate area of the roof fall, the bolts were installed on spacings that varied from 3 feet 1 inch to 4 feet 11 inches. The investigation, in Inspector Davis' opinion, did not disclose any violations of the roof control plan, nor is the operator being charged with any violation of the roof control plan.

Several witnesses were interviewed by the two inspectors and they stated that in this mine it was not uncommon to have the roof fall between and around the roof bolts as it did in this case.

Inspector Davis, while acknowledging that the operator has made some efforts above and beyond the requirements of the roof control plan, still felt that management was aware of the hazard created by leaving areas of uneven draw rock in the roof that can and do separate from the main roof and which often ultimately results in draw rock falling out between the bolt patterns, as it did in the instant case. The inspector further opined that since management was aware of this fact, it was incumbent on them to take additional measures necessary to adequately support the roof. He suggested straps be installed to adequately support the areas between the roof supports which are not directly supported by the bearing plates. In a nutshell, he wrote the citation at bar because he believed the roof was inadequately supported and commonly fell out between the roof supports installed by the operator.

At the hearing, witnesses called by Davidson confirmed that draw rock commonly fell between and around the roof bolts. Mr. Vance testified that draw rock as large as the rock in the instant case had been known to fall out prior to the accident. David McKinney, the injured miner, stated that he had observed draw rock fall out between and around the roof bolts as well. In response to a question as to whether or not it was an unusual occurrence, McKinney responded "[n]o, sir. It happens. Not often, but it has happened".

The fact that Davidson did not violate its roof control plan is not controlling for purposes of determining the existence of the violation at issue. Section 75.200 requires both compliance with a roof control plan approved by the Secretary and that the roof be supported or otherwise controlled adequately. An

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operator's failure to comply with either requirement violates the standard.

Here, the violation of section 75.200 is predicated upon the standard's requirement that the roof and ribs be supported or otherwise controlled adequately. Liability under this part of the standard is resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized that the roof or ribs were not adequately supported or otherwise controlled. Specifically, the adequacy of particular roof support must be measured against what the reasonably prudent person would have provided in order to afford the protection intended by the standard. Quinland Coals, Inc., 9 FMSHRC 1614, 1617-18 (September 1987); Canon Coal Co., 9 FMSHRC 667, 668 (April 1987).

The respondent urges that the roof in the immediate accident area gave no warning nor had any physical appearance of being unstable prior to the accident. The section foreman had made a visual inspection of the section before starting work at the beginning of the shift and had made periodic examinations of the mine roof during the shift, including using the sound and vibration method to check for drummy roof. Despite these efforts, the unstable roof in the immediate area of the roof fall was unfortunately not detected.

I agree with respondent that there has been no showing that there were any objective signs that this particular piece of rock was going to fall out of the roof when it did. However, the evidence of record clearly demonstrates that draw rock commonly fell between and around the roof support being routinely used by Davidson in this mine and on this section, and that is sufficient in my opinion to prove up the violation.

Inspector Davis has been an MSHA Coal Mine Inspector since May of 1971 and prior to that had an additional 18 years of coal mining experience. Therefore, I credit his knowledge of standard mining practice a great deal. He based his decision to cite the respondent on what he personally observed in the mine during the accident investigation process and the statements of the miner witnesses who related the relevant history of what had been going on with the mine roof.

Accordingly, I conclude that the roof support in the area cited was inadequate to prevent draw rock, of sufficient size to injure a miner, from falling out of the roof. Additionally, I find that the Commission's "reasonably prudent person" would have, by the time of the accident involving Mr. McKinney, recognized that something more in the way of roof support was

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needed to prevent the continuing falls of draw rock between and around the existing roof support, and provided it. Citation No. 2904279 is therefore affirmed.

Finally, it is undisputed that the injuries that Mr. McKinney sustained in the roof fall in March of 1988 have continued to prevent his returning to work at least through the date of the hearing. Therefore, I believe it can be inferred from the circumstances that the violation was serious and "significant and substantial". Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

In view of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that a civil penalty assessment in the amount of \$168, as proposed, is reasonable for the violation which has been found herein.

ORDER

Davidson Mining, Incorporated is directed to pay civil penalties of \$849 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge