

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

April 12, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Petitioner	:	
v.	:	
	:	
CHARLES CONN, employed by	:	Docket No. KENT 2002-356
ROCKHOUSE ENERGY MINING CO.,	:	A.C. No. 15-17651-03599 A
	:	
CHARLES MORLEY, employed by	:	Docket No. KENT 2003-161
ROCKHOUSE ENERGY MINING CO.,	:	A.C. No. 15-17651-03624 A
	:	
MITCHELL SALMONS, employed by	:	Docket No. KENT 2002-357
ROCKHOUSE ENERGY MINING CO.,	:	A.C. No. 15-17651-03600 A
	:	
TOMMY FLUTY, employed by	:	Docket No. KENT 2002-358
ROCKHOUSE ENERGY MINING CO.,	:	A.C. No. 15-17651-03601 A
	:	
ROGER MANN, employed by	:	Docket No. KENT 2003-162
ROCKHOUSE ENERGY MINING CO.,	:	A.C. No. 15-17651-03625 A
	:	
GARY VARNEY, employed by	:	Docket No. KENT 2003-163
ROCKHOUSE ENERGY MINING CO.,	:	A.C. No. 15-17651-03626 A
	:	
and,	:	Docket No. KENT 2003-164
ROCKHOUSE ENERGY MINING CO.,	:	A.C. No. 15-17651-03627
Respondents	:	
	:	Docket No. KENT 2003-5
	:	A.C. No. 15-17651-03602
	:	
	:	Mine No. 1

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Mark E. Heath, Esq., Spilman Thomas & Battle, PLLC, Charleston, West Virginia, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Rockhouse Energy Mining Company and Charles Conn, Charles Morley, Mitchell Salmons, Tommy Fluty, Roger Mann and Gary Varney, all employees of Rockhouse, pursuant to sections 105 and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820(c). The petitions allege 13 violations of the Secretary's mandatory health and safety standards by Rockhouse, two violations by Conn and one each by Morley, Salmons, Fluty, Mann and Varney. The Secretary seeks penalties of \$67,000.00 against Rockhouse, \$1,500.00 against Conn, \$800.00 against Morley, \$500.00 against Salmons, \$2,000.00 against Fluty, \$500.00 against Mann and \$2,000.00 against Varney. A hearing was held in Pikeville, Kentucky. For the reasons set forth below, I dismiss the petitions against Conn, Morley, Salmons, Fluty, Mann and Varney, vacate Order No. 7378603 in Docket No. KENT 2003-5, affirm the remaining orders and citations in Docket No. KENT 2003-5 and assess a penalty of \$42,700.00 against Rockhouse.

Settled Orders and Citations

Prior to the hearing, the parties submitted an agreement to settle 11 of the 13 orders and citations in Docket No. KENT 2003-5. The agreement stated that the Secretary had vacated Order No. 7383667. It proposed a reduction in penalty from \$45,000.00 to \$33,700.00 for the other ten orders and citations. After considering the representations and documentation submitted, I concluded that the settlement was appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i), and accepted the settlement. (Tr. 16.)

At the commencement of the hearing, the parties stated that they had also settled Order No. 7378610, in Docket No. KENT 2003-5, and the individual civil penalty dockets, Docket Nos. KENT 2003-161, KENT 2003-162, KENT 2003-163 and KENT 2003-164, associated with that order. The agreement provided that Secretary agreed to dismiss the individual cases and Rockhouse agreed to pay the proposed penalty of \$9,000.00 for the order in full. Again, after considering the representations and documentation submitted, I concluded that the settlement was appropriate under the 110(i) criteria and accepted the settlement. (Tr. 20.)

The provisions of the agreements will be included in the order at the end of this decision. With the settlements, the only thing remaining to be tried was Order No. 7378603 in Docket No. KENT 2003-5 and the associated individual cases against Conn, Morley and Salmons, Docket Nos. KENT 2002-356, KENT 2002-357 and KENT 2002-358.

Background

Rockhouse Energy Mining Company operates Mine No. 1, an underground coal mine, in Pike County, Kentucky. The mine is a fairly large one and employed around 120 employees in the summer of 2001. At that time, it used both continuous miner and longwall miner mining methods. The one and two sections consisted of longwall panels and the three section was being

mined by a continuous miner in the room and pillar configuration preparatory to also becoming a longwall section.

A roof fall occurred during the second shift on July 17, 2001. The fall happened in the No. 3 belt entry beginning in crosscut 52 and heading up the entry toward crosscut 53. Charles Morley, the second shift mine foreman, arrived at the fall site sometime between 9:30 p.m. and 10:00 p.m. He had the area “dangered off,” then he called the superintendent to tell him about the fall and to have the superintendent notify the state and federal mine agencies. Morley next had a scoop brought up to the area and he began cleaning up around the edges of the fall in crosscut 52. He took the material that he cleaned up back down the track entry to crosscut 50 and deposited it by a stopping that was between the return airway and the track entry. Morley was still trying to clean up with the scoop when the third shift arrived in the area between 12:00 and 12:30 a.m.

Mitchell Salmons was foreman of the third shift move crew. He arrived at crosscut 52 with his crew, Robert Crabtree, Tracy Dingess and Charles Sturgill. Charles Conn, also a move crew foreman on the third shift, was in the mantrip with Salmons and his crew. Salmons and Conn proceeded from the track entry up crosscut 52 to examine the fall. Crabtree, Dingess and Sturgill stayed in the track entry and helped unload machinery and supplies as they were brought to the area.

Morley stopped working with the scoop shortly after the third shift arrived and the scoop was taken back to the charger to be recharged. The three foremen then waited for a roof bolter to be brought to the site. The bolter finally arrived sometime around 4:00 a.m. After it was set-up, Conn began installing bolts. He put ten bolts, in two rows, across crosscut 52, by the edge of the fall, and ten bolts, in two rows, across the belt entry, across the front of the fall. Then he put 11 bolts around the inside edge of where the roof had fallen. Salmons helped him with this until he left at 4:30 a.m. to perform a preshift examination of another section.

When Conn finished bolting, Morley brought the scoop back up and began more cleaning around the edge of the fall. Because the scoop was not fully charged, he began putting the material that he cleaned up on the right side of the fall area by the stopping in crosscut 52 that separated the belt entry and the intake airway. He stopped around 5:30 a.m. and attempted to take the scoop back to the charger. He did not make it, however, as the scoop became “hung-up” on the track.

Morley, who had been working since the second shift, then left for home. No further clean-up was done on the roof fall. The foremen had cleaned up about one third of the fall material.

MSHA Inspector William Cole was assigned to investigate the roof fall and arrived at the mine about 8:30 a.m. on July 18. He went into the mine with Kentucky Inspector Randal Smith, Gary Goff, Mine Superintendent, and Gary Varney, first shift foreman. They met the third shift

coming out, so the third shift had to back up several crosscuts where both mantrips could park. The inspection team then walked up the belt entry to the fall.

Based on his investigation, Inspector Cole concluded that Conn, Morley and Salmons had been working under unsupported roof. Consequently, he issued Order No. 7378603, which alleged a violation of section 75.202(b) of the Secretary's regulations, 30 C.F.R. § 75.202(b), because:

Persons were allowed to work inby permanent roof support in the No. 3 belt entry where a roof fall had occurred. Evidence showed that the roof fall was cleaned from the left side of the fall pushing the rock into the right crosscut placing the scoop operator inby permanent roof support[.] The cleaned area of the fall was 16 feet as measured from the last row of permanent roof support to the toe of the fall. There was oil deposited on the mine floor where 11 roof bolts had been installed in the roof where the fall had occurred without safety post [*sic*] or jacks being used for temporary roof support. The ATRS installed on the 300 Galis roof drill would not reach the mine roof due to the height of the fall. There were no safety post [*sic*] or jacks present at the site. The conveyor belt had been cut with a knife 14 feet inby permanent roof support.

(Jt. Ex. 1.) Section 75.202(b) provides that: "No person shall work or travel under unsupported roof"

Findings of Fact and Conclusions of Law

As always, the Secretary has the burden of proving that the alleged violation happened. In this matter, her case is based essentially on the testimony of Inspector Cole. Inspector Cole did not arrive at the mine until after the roof fall and partial cleanup had been accomplished. Thus, his evidence is based on the observations he made at the scene, the conclusions he drew from those observations and statements he and Inspector Smith got from witnesses. Unfortunately for the Secretary, with the exception of one unbelievable witness, none of the miners, who were either interviewed by Cole and Smith and/or testified at the trial, support the Secretary's theory of the case. Furthermore, the physical evidence observed by Inspector Cole is susceptible to more than one interpretation and is not strong enough to overcome the testimony of the witnesses. Therefore, I find that the Secretary has not proved that a violation of section 75.202(b) occurred.

As indicated in his order, three factors led Inspector Cole to conclude that the three foremen had been working under unsupported roof. The first was the presence cleaned up roof

fall material located on the right side of the fall area against a stopping.¹ The second was the presence of roof bolts placed in the roof, inside the fall area, at a height which he believed exceeded the height that the roof bolting machine's automatic temporary roof support (ATRS) would reach. Finally, the third factor was a piece of conveyor belt which he believed had been cut by someone while under unsupported roof. These factors will be discussed *seriatim*.

Cleaned-up material on the right side of the fall.

Inspector Cole testified that he inferred that the roof fall had been cleaned up from the left side of the fall, pushing the rock into the right crosscut, because “[t]hat would have been the only way, due to the conditions, that they would have pushed it in there.” (Tr. 69.) However, he also testified that the material could not be pushed straight across the entry. He said that if one did that, “[y]ou’d run your batteries down. There’s too much digging. There’s not enough power to flip this stuff up and bring it back in your bucket.” (Tr. 76.) The inspector further testified that when cleaning up with a scoop you have to work around the edges of the fall material. (Tr. 76, 157-58.) He also testified that because the operating controls of a scoop are located 12 feet behind the scoop’s bucket, a miner operating the scoop could stay under supported roof and work 12 feet into the fall. (Tr. 158.) Finally, he testified that there was no evidence that equipment had traveled over the top of the remaining fall material. (Tr. 71.)

Morley testified that he began scooping from the edge of the fall and took the material he cleaned up back to crosscut 50. (Tr. 422-23.) He was doing this when the third shift arrived. (Tr. 424.) He said that he was “under supported [*sic*] at all times,” that the mine had “reflectors hung on the bolts” to indicate the last row of support and he was “watching it.” (Tr. 424-25.) He said that he cleaned up around the toe of the fall, that “there was room to get a scoop around through there and still be under support.” (Tr. 425.)

After cleaning around the edges of the fall, Morley stopped so a roof bolter could be brought in to bolt the brow of the fall. While waiting for the roof bolter the scoop was put on a charger. (Tr. 428.)

After Conn finished bolting, Morley testified that:

We brought the bolter out, took the scoop back and I cleaned across the front across the outby end. And there was some gob in that break, and I cleaned it up, took it out, put it in. Then I pulled over with the scoop end to[ward] that break, and back down toward the belt and then cleaned up the fall.

¹ To assist in understanding the facts in this case, Joint Exhibit Three, a not-to-scale drawing of the area of the fall made by Inspector Smith, is attached to this decision as Appendix I.

(Tr. 429-30.) Morley said that the second time that he cleaned with the scoop he put the fall material in the break on the right side of the fall because: “I didn’t have a whole lot of power in the scoop, so I wanted to put it closer. So I put it over in that break.” (Tr. 436-37.) He testified that he was able to perform this second cleanup while under supported roof. (Tr. 438.) After he finished, he attempted to return the scoop to the charger, but it got “hung up” on the track. (Tr. 439.)

Charles Sturgill and Robert Crabtree, two hourly employees called by the Secretary, testified that they observed Morley working around the edges of the fall and staying under supported roof. (Tr. 288, 316.) Salmons and Conn also testified that Morley did not operate the scoop under unsupported roof. (Tr. 391, 478-79, 490.)

Only Tracy Dingess, another hourly employee called by the Secretary, testified that the scoop was “going through the intersection.” (Tr. 333, 343.) On cross examination, he later equivocated:

Q. Okay. All right. So you see [the scoop] operating up there, but you don’t know whether it’s under supported top or not, because you’re 70 feet away and you don’t know what’s bolted and not bolted; right?

A. Well, I just saw it going through the intersection. It could have been, it could not have been. It could have been on this side, but I saw him go through the intersection.

(Tr. 343-44.)

Whatever he meant to say, I did not find him to be a credible witness. When they interviewed him on the day of the investigation, less than 12 hours after allegedly witnessing it, Dingess did not tell Cole and Smith that he seen Morley operating the scoop under unsupported roof, even though Cole specifically asked him that question. (Tr. 350-51, 522.) In addition, he allegedly observed this from the track entry between crosscuts 52 and 53, some 70 feet from the fall area, in a crosscut that was lighted only by miners’ cap lights and the scoop’s lights. (Tr. 343-45.) Furthermore, his testimony was contradicted by the testimony of Conn, Morley and Salmons. More importantly, it was also contrary to the testimony of Crabtree and Sturgill, who were together with him when he purportedly made his observations. (Tr. 344, 362.) Finally, Dingess’ manner and demeanor while testifying indicated that what he had to say was not reliable.² Therefore, I give his testimony no weight.

² Indeed, even before he claimed that he had seen Morley go through the intersection, I found myself wondering why the Secretary had saved him for last because he seemed to be such a poor witness.

One factor leading to Cole's conclusion that the fall material had been pushed from left to right across the entry was his belief that all of the material that was cleaned up was located in the crosscut on the right side of the fall. (Tr. 159, 197.) He said he was not aware that any material had been taken back to crosscut 50. (Tr. 159, 197.) However, as noted above, Morley, when he was cleaning the first time, took the material back to crosscut 50. This was confirmed by Sturgill, Crabtree, Salmons and Conn. (Tr. 274-75, 322, 380, 479.)

The Secretary's case that Morley operated the scoop under unsupported roof is based almost exclusively on Cole's conclusion that that is what must have happened. There is no physical evidence, such as scoop tracks clearly going under unsupported roof, to support Cole's theory. In fact, he testified that there was no evidence that equipment had gone over the fall material. On the other hand, testimony of those who participated in the cleanup plausibly explained how, taking into consideration the 12 feet from the bucket of the scoop to its operator controls, which are on the side of the scoop, and its eight foot width, the cleanup was performed without going under unsupported roof. One of the reasons that Cole believed that the scoop had to have gone under unsupported roof was his assumption that all of the fall material had been placed on the right side of the fall. The testimony indicates, however, that that was not the case. Much of the material was taken two crosscuts out by the fall and the scoop was not taken around the right side of the fall until the roof had been bolted.

Roof bolts inside the fall area, installed at a height higher than the ATRS would reach.

Inspector Cole believed that 11 roof bolts had been installed around the brow of the area where the fall had come out of the roof, while the roof bolt operator was under unsupported roof. He reached this conclusion because there were no timbers or steel safety jacks of appropriate length, that could have been used as temporary roof support, in the area of the fall when he examined it, there were oil spots on the floor where he believed the roof bolter was used and he thought that the roof was higher than the roof bolter's ATRS would extend. (Tr. 89-97.) Since the company does not claim that temporary roof supports were used, the issue is whether roof bolting was performed without the proper use of the bolter's ATRS.

The inspector estimated that the mine roof was six and one half to seven feet high and that after the fall it was 12 feet high. (Tr. 93-4, 162.) He agreed that the cavity in the roof left by the fall tapered up from the edge. (Tr. 180-81.) He said that with use of the "stab jack," the ATRS would reach a height of seven and one half feet. (Tr. 94, 162.) He did not, however, measure the height of the roof where the 11 bolts were installed. (Tr. 209.)

Conn testified that the highest point where he installed a roof bolt was "eight feet, eight and a half." (Tr. 501.) He testified that at all times when he installed the 11 roof bolts his ATRS was against the roof. (Tr. 485-86.) He explained that to be able to reach the roof, "[w]e took and moved some material to where I could get the pinner, or the roof bolter up on the edge of the fall, the gob and stuff, so that we could get up into the cavity part and start bolting" (Tr. 484.)

He said that he only put in the 11 bolts because “any farther out through there, my t-bar wouldn’t—I mean, my ATRS wouldn’t touch the top.” (Tr. 485.)

Morley corroborated Conn’s testimony. He estimated the height of the bolted area inside the brow was “only about eight-foot high . . .” (Tr. 433.) Relating how Conn was able to install the bolts, he said: “Well, I left some rock in there on the bottom. Just a little bit and packed it down with the scoop bucket. He backed down there and he run up on that and he raised the canopy up to bolt it.” (Tr. 433.) He confirmed that the ATRS was touching the roof in that area. (Tr. 433.)

The only testimony contrary to Morley’s and Conn’s was Dingess’. He claimed that the ATRS would not reach high enough “to do what they were going to do or needed to be done.” (Tr. 337.) He asserted that “you could just tell that it was going too far.” (Tr. 362.) For the reasons enumerated in the previous section, I do not find this testimony credible. I find it particularly significant that he was 70 feet away from the area, looking at an unlighted roof, and would further have his view blocked by the top of the ATRS being inside of the brow.

Cole also believed that oil on the floor had leaked from the roof bolter, which indicated that the bolter had been operated under unsupported roof. (Tr. 85-87.) However, this circumstantial evidence is not persuasive because: (a) Cole admitted that the area he pointed out as having oil was not under an area where roof bolts were installed; and (b) he admitted that what he thought was oil could, in fact, have been pieces of black draw rock. (Tr. 167-68.)

Once again the testimonial evidence does not support Cole’s theories and the circumstantial evidence is, at best, equivocal. Thus, the Secretary has not shown that roof bolts were installed in areas where the ATRS did not support the roof.

Cut Conveyor Belt

Finally, Inspector Cole cited a cut conveyor belt as evidence that someone had gone under unsupported roof. The belt was located 14 feet in by supported roof and it was Cole’s theory that a miner had gone under the unsupported roof to cut it with a knife. (Tr. 105-107.) He believed that it had been cut with a knife because of “[t]he clean edge on the belt.” (Tr. 105.) He did not think that it could have been cut by the scoop because: “There was no ragged edges on the belt. If the scoop had torn that, you would have strings, it would [have] stretched it. There would have been jagged edges.” (Tr. 107.)

Morley testified that he “didn’t think too much about it at the time, really,” but believed that he hit the belt “with the scoop and it just came out with the scoop.” (Tr. 434-35.) The evidence provides more support for Morley’s contention than it does for the inspector’s.

In the first place, an examination of the picture of the belt in question does not show a straight, smooth cut. (Govt. Ex. 2A.) Instead, it shows at least two places where frayed strings

are sticking out of the belt as well as several jagged areas on the top half of the belt. In the second place, the belt was under the roof fall material. (Tr. 192, 435.) Thus, it could only have been cut by a knife after the roof fall was cleaned up. There does not appear to be any reason why the belt would have been cut after the area was cleaned. Consequently, I find that it is more likely that the belt was cut when the scoop was cleaning the area, than when the area had already been cleaned.

Conclusion

The Secretary's case on this order is based primarily on circumstantial evidence. That is, the inspector reached his conclusions based on his view of the scene, after the alleged working under unsupported roof had occurred, and not on eye witness testimony. However, the witness evidence is contrary to the inspector's conclusions. While the testimony of Conn, Morley and Salmons could be suspect because of their obvious interest in the case, I find it to be credible. Their explanation as to what they did is reasonable and not inconsistent with the facts reported by the inspector. Further, it is corroborated in many respects by Crabtree and Sturgill, who do not have the foremen's interest in the outcome of the case. With the exception of Dingess, none of the witnesses' demeanor and manner while testifying indicated that they were not worthy of belief. Accordingly, I find that the Secretary has not proven a violation of section 75.202(b) as alleged and will vacate the order and dismiss the petitions against Conn, Morley and Salmons.

Order

In accordance with the discussion above, Order No. 7378603 in Docket No. KENT 2003-5 is **VACATED** and Docket Nos. KENT 2002-356, KENT 2002-357 and KENT 2002-358 are **DISMISSED**. In accordance with the settlement agreements, the remaining orders and citations in Docket No. KENT 2003-5 are **AFFIRMED**, Docket Nos. KENT 2003-161, KENT 2003-162, KENT 2003-163 and KENT 2003-164 are **DISMISSED** and Rockhouse Energy Mining Company is **ORDERED TO PAY** a civil penalty of **\$42,700.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge
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Distribution: (Certified Mail)

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attachment (mine map)