

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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January 10, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2000-100
Petitioner	:	A.C. No. 01-00851-04075
v.	:	
	:	Oak Grove Mine
U.S. STEEL MINING COMPANY, LLC,	:	
Respondent	:	

## DECISION

Appearances: Terry G. Gaither, Conference and Litigation Representative, U. S. Department of Labor, Birmingham, Alabama, on behalf of Petitioner;  
Anthony F. Jeselnik, Esq., U.S. Steel, Law Department, Pittsburgh, Pennsylvania, on behalf of Respondent.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against U.S. Steel Mining Co., L.L.P., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815. The petition alleges a single violation of the Secretary's mandatory health and safety standards and proposes a civil penalty of \$55.00. A hearing was held in Hoover, Alabama on October 14, 2000. The parties submitted post-hearing briefs on December 1, 2000, and reply briefs on December 22, 2000. For the reasons set forth below, I affirm the citation and assess a penalty of \$55.00.

### **The Evidence -- Findings of Fact**

On July 14, 1999, Robert D. Norris, an inspector for the Secretary's Mine Safety and Health Administration (MSHA), conducted an inspection of U.S. Steel's Oak Grove Mine. At about 10:30 a.m., he issued Citation No. 7664934, for what he perceived to be a violation of 30 C.F.R. § 75.206(a)(3)(i), which requires that roof supports "be installed to within 5 feet of the uncut face." His observations were described in the citation as follows:

The 6-east set up section has two faces not bolted to within 5 feet of the un-cut face. The left side of the #2 face was cut 5 feet beyond the right side, making a distance of 10 feet from the last permanent roof bolts installed to the

face. The crosscut turned from #3 to #2 was cut approximately 5 feet beyond the right side, making a distance of 7 feet from the last permanent roof bolt installed to the face. (spelling and punctuation errors corrected)

The citation was subsequently amended to allege a violation of 30 C.F.R. § 75.220(a)(1), i.e., that the operator had failed to follow its approved roof control plan, which mirrored the essence of the initially cited regulation by specifying in diagrams that the distance between the centerline of the last row of permanent roof supports and the face “shall not exceed 5 feet.” The diagrams in Respondent’s roof control plan depicted a typical face by use of a straight line at right angles to the sides of the entry. The distance between that line and the parallel centerline of the closest row of roof bolts was designated as “x” and a note specified that the “[d]istance ‘x’ shall not exceed 5 feet.” Neither the diagrams nor the text of the plan specifically addressed offsets or any other type of irregularity in a face.

The entries in the mine were 20-24 feet wide and crosscuts were 20 feet wide. The continuous miner makes a cut approximately 12 feet wide and, consequently, extends an entry or crosscut by making a series of cuts generally about 10 feet deep alternating between the left and right side. Under normal circumstances, both sides of an entry will be cut to approximately the same depth, and roof bolts can easily be installed to within 5 feet of the face. Although there is no requirement governing the time within which roof bolts must be installed, promptly bolting to within 5 feet of the face is consistent with generally accepted mining practice because allowing roof to go unsupported can result in sagging, making it more difficult to support. Ventilation problems can also result because miners cannot enter an unsupported area to extend ventilation line curtain. In addition, the area cannot be cleaned.

Occasionally, one side of an entry may not be cut to the same depth as the other, leaving an irregular or offset face. Offsets may result from operator error, a breakdown of the continuous miner, a shift change, or adverse roof conditions. Offsets should exist only temporarily. The respective sides of the face should be at least roughly evened out when the miner is repaired, the subsequent shift begins production or adverse roof conditions are properly addressed. If roof bolts are installed while the offset face condition exists, bolts may not be able to be installed to within five feet of the face. Some roof bolting machines, including those used by Respondent, cannot enter the narrower cut of an offset, which prevents bolts from being installed in the offset or deeper side of the face.

The offset in the #2 entry was created on July 12, 1999. Roof bolts were installed to within approximately 5 feet of the face on the right side, but were only within 10 feet of the face on the left side.<sup>1</sup> The offset in the #3-#2 crosscut was created on July 13, 1999, when the continuous miner became inoperable. It was bolted during the evening shift on July 13, 1999. Bolts were installed within approximately 2 feet of the right side of the face, but were 7 feet from

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<sup>1</sup> The offset in the #2 entry also was not cut to full height, which also would have prevented the installation of roof bolts.

the left side of the face.<sup>2</sup> Respondent's Exhibit 1 (Exhibit R-1) accurately depicted the conditions of the faces and roof bolts at the time the citation was issued, 10:30 a.m., on July 14, 1999.

MSHA's acting field office supervisor, Kenneth Ely, recognizing that there may be a legitimate reason why a face may be temporarily offset resulting in bolts not being installed to within 5 feet, testified that an inspector should attempt to ascertain the reason for the offset. If the second side of the cut was not made because a shift ended, for example, it should be completed when the next shift engaged in production of coal commences work. If due to a breakdown of the continuous miner, the cut should be completed when production resumes after the miner is repaired. If there is no viable excuse for failing to make the cut to even out the face, and roof bolts, consequently, are not installed within 5 feet of the deeper side of the face, a citation should be written for the violation.

Inspector Norris did not undertake a detailed investigation of the reasons for the offset faces in the areas cited. He did know, however, that the continuous mining machine had been inoperable about the time that the crosscut was being made, which could explain the failure to bolt to within 5 feet of the face at that location. It would not, however, explain the failure to even the face in the #2 entry and resultant failure to bolt within 5 feet of the deeper side of that face. He placed considerable significance on the fact that there were two offset faces, which indicated to him that no effort had been made to even out the faces so that roof bolts could be properly installed.

Respondent called one witness, Phillip Sumpter. Sumpter had not been identified as a witness on Respondent's prehearing report. His testimony was intended to substitute for that of Carl Harless, the foreman on the day shift on July 13 and 14, 1999, to explain the circumstances surrounding the offset faces. Harless had been listed as a witness on the prehearing statement, but had been allowed to take vacation and was not present for the hearing. Sumpter was allowed to testify over the Secretary's objection on the condition that the Secretary could use testimony given by Harless in a previous hearing to impeach Sumpter.<sup>3</sup> Harless' prior testimony regarding the offset faces was also admitted as substantive evidence during the Secretary's rebuttal case.

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<sup>2</sup> Roof bolts cannot be installed within 2 feet of the face because they would be torn out by the continuous miner when it started the next cut.

<sup>3</sup> Harless had been called to testify on August 23, 2000, at a hearing in a discrimination case brought under the Act. *Secretary o/b/o McGill v. U.S. Steel Mining Co., L.L.C.*, Commission Docket No. SE 2000-39-DM.

The record was held open to allow submission of the parties' respective designations of additional portions of Harless' testimony deemed necessary to place the admitted portion in proper context.<sup>4</sup>

Sumpter was a continuous miner coordinator, and he observed the continuous miner around 1:30 p.m. on July 13, 1999. It had been backed out of the #3-#2 crosscut into the #3 entry and was not capable of mining due to a burst water hose and insufficient hydraulic fluid because of a leak in the packing of a hydraulic jack. He arranged for the evening shift to install roof bolts in the unfinished #3-#2 crosscut and for repairs to be made to the continuous miner. The repairs were completed during the midnight shift on the 14<sup>th</sup> and the miner was ready to continue mining on the day shift of the 14<sup>th</sup>. By 10:30 a.m., however, when the citation was written, neither offset condition had been corrected. Subsequently, the crosscut was cut through and bolted and a production cut was taken in the #2 entry, thereby abating the violations. Sumpter believed that the conditions cited by inspector Norris were not violations of the roof control plan because bolts had been installed within 5 feet of the shallower side of the faces. Sumpter believed that the offset in the #3-#2 crosscut was attributable to the breakdown of the continuous miner. He had no explanation for the existence of the offset in the #2 entry.<sup>5</sup>

Excerpts from the prior testimony of Carl Harless, the day shift foreman, indicate that the continuous miner became inoperable due to leakage of hydraulic fluid around 10:30 a.m. on July 13, 1999, after mining the #3-#2 crosscut to the offset condition. It was backed out of the crosscut into the #3 entry, which is where Sumpter saw it. After Sumpter had left the area, however, Harless was able to temporarily restore the miner to operation for the remainder of the shift by adding 40 gallons of hydraulic fluid. Rather than returning to the #3-#2 crosscut to even off the face, he directed that cuts be made in the #4 entry. The reason for doing so was because he could claim no more production if he evened up the crosscut face, but could if he mined in the #4 entry. Since he was rated on how much production, i.e., how many feet of entry he mined, he chose to get credit for more production, leaving the crosscut face offset.

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<sup>4</sup> On October 31, 2000, Respondent designated pages 350-75 of the transcript of Harless' prior testimony as being necessary to place the previously admitted portions in proper context. On November 2, 2000, the Secretary counter-designated pages 340-49 and 369-403. While Respondent objected to admission of the testimony, neither party challenged the propriety of the other's designations.

<sup>5</sup> Sumpter had stated at one point in his testimony, in response to a question about the #2 entry, that the offset was due to the continuous miner's breakdown. However, that testimony occurred while he was being questioned about the #3-#2 crosscut and I find that his testimony was, in fact, in reference to the #3-#2 crosscut. On cross examination he was specifically asked about the #2 entry and clearly stated that he had no idea how or why that offset came into existence.

The Secretary contends that Respondent's approved roof control plan requires that permanent roof supports be installed to within 5 feet of the entire width of the face; that there was no justification for creating or failing to eliminate the offsets in the #2 entry and the #3-#2 crosscut; and, the failure to install roof bolts within 5 feet of the sides of the faces in question constitutes a violation of the roof control plan.

Respondent contends that it cannot be found to have violated its roof control plan based upon a condition that is not specifically referred to in the plan. Alternatively, it argues that bolts were placed as close as possible to the face under the circumstances and, thus, it should not be found to have violated the provision.

### **Conclusions of Law**

I conclude that the conditions observed by inspector Norris violated Respondent's roof control plan. There was no justification for creation of the offset in entry #2 and no justification for failing to correct the offset in the #3-#2 crosscut once the continuous miner became temporarily operational at the end of the day shift on July 13, 1999. Had the offset faces been eliminated timely, roof bolts could, and likely would, have been installed within 5 feet of the faces.

The plan's depiction of the 5 foot minimum distance between the roof bolts and the face is clear and unambiguous. The face, the exposed surface of the coal deposit in the working place where mining is proceeding,<sup>6</sup> is depicted by use of a line and the reference to the required 5 foot minimum distance between the centerline of the closest row of roof bolts and the face, applies to each point on that line, i.e., the entire surface or face. Portions of the face that are further than 5 feet from the centerline of the nearest row of roof bolts are not in compliance with Respondent's roof control plan. There is no indication that the diagram was intended to refer only to a face consisting of a single plane surface, no doubt a rare occurrence due to the difficulty of precisely controlling the depth of cuts with a continuous mining machine. The fact that the plan contains no specific reference to, or depiction of, an offset or irregular face, or that neither Respondent, nor MSHA, sought to create an exception in the plan for offsets or other irregularities, cannot inure to Respondent's benefit.

Respondent's argument, that there is no violation where roof bolts have been installed as close to the face as possible, is also unavailing. While it is true that the roof bolting machine used by Respondent could not enter the relatively narrow offsets, those conditions were created by Respondent. As found above, there was no justification for creation of the offset in the #2

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<sup>6</sup> See, American Geological Institute, *A Dictionary of Mining, Mineral and Related Terms* 198 (2d ed. 1996).

entry and there was no justification for maintaining the offset in the #3-#2 crosscut after the continuous miner was made temporarily operational at the end of the day shift on July 13, 1999, prior to the installation of roof bolts in the crosscut. It was, therefore, entirely possible for Respondent to have eliminated the offsets and bolted to within 5 feet of the faces.

### **The Appropriate Penalty**

Inspector Norris assessed the probability of injury as “unlikely,” the operator’s negligence as “moderate” and determined that the violation was not significant and substantial. The operator demonstrated good faith in rapidly abating the violation within the time specified. Accordingly, the violation was assessed as a single penalty assessment of \$55.00. *See*, 30 C.F.R. § 100.4. Respondent is a large business with an apparently unremarkable history of violations. The proposed penalty would not affect its ability to continue in business. Having no disagreement with Inspector Norris’ determinations, and upon consideration of the factors in § 110(i) of the Act, I find that the proposed penalty of \$55.00 is appropriate.

### **ORDER**

Based upon the foregoing, Citation Number 7664934 is **Affirmed** and Respondent is **Ordered** to pay a civil penalty of \$55.00 within 30 days.

Michael E. Zielinski  
Administrative Law Judge

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