FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 31, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 98-146 A. C. No. 01-00851-04032 A
v.	:	
	:	Oak Grove Mine
MIKE SUMPTER, Employed by UNITED STATES MINING COMPANY LLC, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 98-147 A. C. No. 01-00851-04033 A
v.	:	
	:	Oak Grove Mine
DANNY JOE COOK, Employed by UNITED STATES MINING COMPANY LLC, Respondent	:	

DECISION

Appearances: Robert A. Cohen, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary;
R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, Pittsburgh, Pennsylvania, for the Respondents.

Before: Judge Weisberger

STATEMENT OF THE CASE

This proceeding is before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (ASecretary@) alleging that Phillip Michael Sumpter and Danny Joe Cook, agents of United States Steel Mining Company, LLC, (AU.S. Steel@) are each liable under

section 110(c) of the Federal Mine Safety & Health Act of 1977 (Athe Act@), for payment of an individual civil penalty. Pursuant to notice, the cases were heard in Hoover and Vestavia, Alabama, on January 26-27, 1999, respectively. On March 15, 1999 the parties filed post hearing briefs.

1. Introduction

United States Steel operates the Oak Grove Mine, an underground coal mine. As part of normal mining operations, at certain locations overcasts are constructed in entries to provide for efficient air ventilation. In constructing an overcast the first step is to remove part of the existing roof by drilling holes in the existing roof and then inserting explosives, and blasting the roof. After removal of blasted material from the floor, the resulting new roof is then bolted which allows miners to work under supported roof while constructing an overcast. In order to stabilize the roof and protect the bolters during bolting, an Automatic Temporary Roof Support System (AATRS@) is raised vertically from the Fletcher Dual Boom Bolter and placed flush against the roof.

On August 16, 1996, during the day shift, in the North Main Section, Lawrence Pasquale and Jim Hubard working under the supervision of J. T. Williams, a production foreman, blasted the exiting roof. Towards the end of the day shift, prior to the removal of the blasted material that had fallen on the floor, Lonnie Daniel, Jr. and Nebitt (Pete) Wright, roof bolters on a production crew, were told by the foreman, Robert Cunningham, to bolt the overcast. The ATRS on the bolter was raised to its maximum extension of 11 feet, but did not reach the top of the roof. Daniel told Cunningham that the ATRS was not touching the top and that he, (Daniel) would not bolt if the ATRS was not touching the top. According to Daniel, Cunningham told him that he would bolt it himself, and the latter proceeded to bolt the roof without the ATRS being in contact with the roof. Neither Cook, the construction foreman, nor Sumpter, the general mine foreman, were in the area at the time of the blasting of the roof, and did not have notice or knowledge of the depth of the blasting. Nor were they present during the bolting of the new roof.

On August 17, 1996, MSHA Inspector Owneth Leslie Jones issued Order No. 4478891,[1] a section 104(d)(1) Order, alleging a violation of 30 C.F.R. ' 75.202(b).[2]

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[1]/ The parties stipulated that Athere was no direct connection between the roof fall fatality which occurred on the Main North on August 16 1996, at the Oak Grove Mine, and the issuance of section 104(d)(1) Order No. 4478891.@

[2]/ Section 75.202(b) provides that A[n]o persons shall work or travel under unsupported

roof unless in accordance with this subpart.@

The order alleges as follows:

> Persons were working beneath unsupported roof where roof bolting was being performed on the Main North Section. This occurred one cross cut inby survey point 9+04 in the cross cut to the right of the number 3 entry where overcast construction was in progress. The Automatic Temporary Roof Support System (ATRS) on the company number 43, model number D-D-O-13-B-C-F, serial number 96310/84042, Fletcher dual boom roof bolting machine would not engage the roof. The overcast height was 12 feet and the ATRS at maximum extension would only reach 11 feet. Supplemental supports were not being used.

United States Steel did not contest this order and the parties, in their filed stipulation, agreed that the Secretary Awill not be required to establish the fact of violation, if the violation was significant and substantial and caused by the unwarrantable failure of the mine operator, as part of its burden of proof in this case.@

It appears to be the Secretary=s position that Sumpter and Cook are liable under section 110(c) of the Act, for knowingly violating section 75.202(b), supra, since it was a common practice at the mine to bolt the roof in situations where the ATRS, fully extended, was not high enough to be placed flush against the roof. The Secretary argues that Sumpter and Cook knew of this common practice, and should have taken steps to ensure that Cunningham[3] would not bolt under unsupported roof where the height of the roof exceeded the height of the ATRS fully extended. In this connection, the Secretary appears to argue that Sumpter and Cook did not supply extenders, used to provide extra height to the ATRS, to the section at issue where the overcast was being constructed.

II. Applicable Law

Section 110(c) of the Act provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried such violation shall be subject to an individual civil penalty. 30 U. S. C. ' 820(c). (Emphasis added.)

The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1982) *aff=d on other grounds*, 689 F.2d 632 (6th Cir. 1998), cert.

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[3]/ The Secretary had also filed a section 110(c) proceeding against Cunningham. Cunningham subsequently paid the full penalty assessed against him and the proceeding was dismissed.

denied, 461 U.S. 928 (1983). *Accord, Freeman United Coal Mining Co*. v. *FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States* v. *International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). An individual acts knowingly where he is Ain a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition.@ *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).

III. Discussion

A. The Secretary=s Evidence

The Secretary relies on the testimony of MSHA Inspector Oneth Leslie Jones and four roof bolters who worked on the day shift. In this connection, Jones testified that he interviewed J. T. Williams,[4] the day shift construction foreman, who told him that he had known for a month prior to August 16, that the ATRS as extended has not been reaching the roof. However, Williams indicated that he did not report this to management. Jones did not indicate that Williams told him that it was common practice to bolt in situations where the height of the roof exceeded the height of the ATRS.

Lawrence Pasquale and Albert J. Rogers, worked together on the same bolter on the day shift as part of the construction crew. In general, Pasquale testified that Cook normally told the crew what to do and A. . . he would talk about how deep he wanted each hole drilled, and I=d drill them@ (sic) (Tr. 103). Pasquale indicated that generally Cook visited the section during lunch time once a day and that he (Cook) and Sumpter have been present during construction of overcasts. Pasquale testified that approximately 50 percent of the time during construction, the ATRS did not touch the roof and that on a Anumber of times@ (Tr. 107) he informed Cook of this problem, and his response was A[g]et the job done as best as you can@ (Tr. 106). Pasquale testified that it was Acommon practice@ to drill holes in the roof in situations where the ATRS was not in contact with the roof, that all the roof bolters Adone it@ (Tr. 116), and that it was Acommon knowledge@ that he would be required to drill in this situation (Tr. 116).

[4]/ J. T. Williams died between the date Jones interviewed him, and the date of the hearing.

I do not place much weight on Pasquale=s testimony for the reasons that follow. Even if it be found that Pasquale was credible regarding his version of his conversations with Cook, I find that it can not be reasonably inferred from Cook=s statement to Aget the job done@ when advised that the ATRS did not reach the roof, as either condoning or authorizing bolting to be performed in that situation. The plain meaning of Cook=s words do not preclude an inference that his intention was to communicate to Pasquale to use some means to raise the height of the bolter, by ramping[5] or the use of jacks. Also, not much weight is accorded his testimony that all the bolters drilled holes in situations where the ATRS did not reach the roof, and that this was a Acommon practice,@ as little foundation was provided for these conclusionary statements.

Further, the record indicates that although Pasquale handled miners= grievances against U.S. Steel when he worked as a miner at U.S. Steel, he did not complain to management,[6] or MSHA, that he was asked to bolt in situations where the ATRS was not in contact with the roof. Hence, the credibility of his testimony is somewhat diminished.

Rogers testified that Cook usually gave him his work assignments. According to Rogers, he and Pasquale had informed Cook that the ATRS was not in contact with the roof, and in response Cook said that he wanted the job done and did not care how. The weight to be accorded Rogers= testimony regarding Cook=s actions and responses is diminished by considering that a certain degree of animus existed between Rogers and Cook. In this connection, Rogers indicated that he did not get along with Cook, and that Cook had previously suspended him and tried to fire him based upon his (Rogers=) refusal to work beyond the usual quitting time. Also, the record contains some inconsistency between Rogers= testimony at the trial, and testimony he had previously given in a deposition (Tr. 202, 204-211). Hence, not much weight is accorded his testimony due to the principle of falsus in uno, falsus in onnibus.

Terry McGill and Wayne Carl Pippen worked together bolting as part of a production

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[5]/ Ramping is performed by not removing from the floor materials that fall from the roof upon blasting, and then riding the bolter up on the material so as to increase the height between the roof and the floor and allow the ATRS to reach the roof.

[6]/ The only evidence that Pasquale had communicated to management a complaint or information regarding this practice consists of his testimony that he had informed a Union Safety Committee member, Morris Ivy, who brought the matter to management. According to Pasquale, Ivy told him that management said that it would cost too much. Not much weight was placed upon this heresay testimony. Ivy did not testify on behalf of the Secretary, and no reason was offered to excuse his not testifying. Further, the record does not contain any corroborating evidence regarding the details of Ivy=s communication to management, the persons to whom Ivy made this communication, and the specific details of management=s response to Ivy. The only evidence possibly related to this issue consists of Sumpter=s testimony, that at meeting he attended, Ivy did not raise this issue, and that the only discussion concerning costs pertained to replacement of bolters with improved side protection.

crew on the day shift. McGill testified that one time a couple of months prior to August 1996, Sumpter had seen him bolt in a situation where there was an 8 to 10 inch gap between the ATRS and the roof.

Pippen testified that, in general, he got along with Cook. Pippen, indicated that often the ATRS did not reach the roof, and he had to bolt anyway. He did not indicate why he had to do it, and whether anybody in management ordered him to bolt, or had condoned it. Pippen testified that on a number of occasions, he saw other bolters bolt in situations where the ATRS was below the level of the roof. Not much weight is accorded this statement in the absence of particulars as to when this occurred, in what circumstances, and the identity of the miners involved. Pippen also indicated that the roof bolters talked among themselves about this problem, and it was a concern of everybody and not just the bolters. Due to the lack of specific details not much weight is accord this general statement.

Pippen indicated that on one occasion the ATRS did not reach the roof and it fell off. According to Pippen, Cook was in the area when Awe@ bolted, and the bolting continued until Cook said to move off. In contrast to the testimony of Pippen, Cook testified that, regarding this incident, after the extension on the bolter broke, there was no further bolting. I observed the demeanor of the witnesses and, based upon their demeanor, I found Cook to be the more credible and reliable.

B. Further Findings and Conclusions of Law

The evidence adduced by the Secretary fails to establish that either Sumpter or Cook had actual knowledge of the specific violative condition herein cited by the inspector i.e., the bolting by Cunningham on August 16, under unsupported roof in violation of section 75.202(b), supra. Neither Cook nor Sumpter were present when this act was performed. Further, as explained by Sumpter and Cook, Cook was not Cunningham=s supervisor, and Cunningham, not Cook, was responsible for the removal of the material after blasting, and the subsequent bolting of the overcast.

Additionally, in contrast to the testimony of the Secretary=s witnesses, U. S. Steel=s miner witnesses denied that there was any common practice to bolt in situations where the ATRS was not in contact with the roof. In this connection, Larry Neil McCarty, who supervised a crew that bolted overcasts, indicated that it was normal practice that if the ATRS did not reach the roof, the bolter was placed on top of the material that had fallen on the floor in order to allow it to reach the roof. He stated specifically that it was not common practice to bolt with the ATRS not up against the roof. Further, any inference that it was a common practice and common knowledge that bolting in an overcast was performed in situations where the ATRS did not touch the roof, is negated to a great degree by the testimony of Lonnie Daniel, Jr., a roof bolter who worked under the direction of Cunningham on August 16, 1996. According to Daniel=s uncontradicted and unimpeached testimony, when he was told by Cunningham to bolt the overcast after it became apparent that the ATRS did not reach to the roof, he (Daniel) and Nebitt Wright, the other bolter on the machine, refused to bolt, and Cunningham indicated that he would do the bolting himself, which he did. Daniel also indicated that he never bolted with the ATRS not against the roof. He also stated that, prior to August 16, 1996, Cunningham had never bolted, in his presence, in a situation where the ATRS was not against the roof.

Based on all the above, I find that in normal mining operations it was a common

occurrence, due to roof conditions, for the ATRS, as fully extended, not to be flush against the roof. However, as discussed above, the Secretary=s evidence falls short of establishing that bolting in situations where ATRS was not in contact with the roof was such a prevalent practice in the mine that Cook and Sumpter should reasonably have been aware that, following this practice, Cunningham would bolt under unsupported roof on August 16, 1996. It is not contested that the height of the roof in an overcast varied due to the variations in the height of the coal seam and the rock layer above. There is no evidence that either Sumpter or Cook should have reasonably been aware that on August 16, 1996, that the distance between the floor and the roof after it had been blasted would exceed the height of the ATRS as fully extended, i.e. 11 feet. In this connection, there is no evidence that either Cook or Sumpter knew or should reasonably have been expected to know the depth of the holes drilled in the original roof in order to insert blasting devices to create the overcast. Further, most importantly, the Secretary has failed to adduce sufficient evidence to establish that either Sumpter or Cook should reasonably have been aware that Cunningham would bolt under unsupported roof on August 16, which is the violative condition cited. There is no evidence that Cunningham had ever bolted or ordered another miner to bolt under unsupported roof. No binding authority has been cited by Petitioner which requires the imposition of section 110(c) liability upon agents for acts that violate a regulatory standard, but which have not been established to have been of a nature that should have reasonably been anticipated. Hence, for all these reasons, I find that neither Sumpter nor Cook knowingly authorized, ordered, or carried out the violation cited in the order at issue. Specifically, it has not been established that there were any extant conditions that provided them with knowledge or reason to know of the existence of the violative act, i.e. bolting on August 16, under unsupported roof. Accordingly, I find that the Secretary has not established that either Sumpter or Cook knowingly authorized, ordered, or carried out the violation cited in the order at issue. Thus, I find that it has not been established that either Cook or Sumpter violated section 110(c) of the Act.

ORDER

It is **ORDERED** that the Petitions for Assessment of Civil Penalty filed against Cook and Sumpter be **DISMISSED**, and that Docket Nos. SE 98-146 and SE 98-147 be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

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