

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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May 28, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 98-68
Petitioner	:	A. C. No. 44-06227-03583
v.	:	
	:	
BEAR RIDGE MINING, INC.,	:	
Respondent	:	No. 1 Mine

**DECISION**

Appearances: Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of Petitioner;  
Stephen M. Hodges, Esq., Penn, Stuart & Eskridge, Abingdon, Virginia, on behalf of Respondent.

Before: Judge Melick

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," charging Bear Ridge Mining Inc. (Bear Ridge) with one violation of the mandatory standard at 30 C.F.R. § 75.202(a) and seeking a civil penalty of \$40,000.00 for that violation. The general issue before me is whether Bear Ridge committed the violation as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

The citation at issue, No. 7293918, alleges as follows:

The mine roof in the area of the left coal rib, located approximately 70 feet inby survey station No. 2156, in the No. 6 entry on the 001-0- MMU, was not supported or otherwise controlled to protect persons from hazards related to falls of the mine roof. The Section Foreman removed three wood cribs using a rubber tired battery powered scoop. After the cribs were removed no action was taken to support or otherwise control the mine roof in the area of the left coal rib prior to the foreman and one other person working in the area. The foreman received fatal injuries when struck by a section of the mine roof 44" by "58 by 8" that fell in the area where the cribs had been removed.

The cited standard, 30 C.F.R. § 75.202(a), provides that "[t]he roof, face and ribs of areas

where persons shall work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

On March 23, 1998, at approximately 4:30 p.m., Bear Ridge section foreman Bruce Bandy was killed by a rock fall from the mine roof along the left rib of the No. 6 entry. Several days earlier, on March 17, David Elswick, a roof control specialist for the Virginia Department of Mines, Minerals and Energy (DMME), was investigating an earlier roof fall at the subject mine at the right crosscut of the same No. 6 entry. During the course of his investigation Elswick noted that there were five cribs on the right side of the No. 6 entry with some additional cribs on the left side. After evaluating the roof in the right crosscut off the No. 6 entry with state mine inspector Altizer, roof control specialist Kenneth Shortridge from the Federal Mine Safety and Health Administration (MSHA), mine superintendent Tim Lowe and two miners' representatives, it was initially decided to clean the crosscut through the No. 6 entry. Because of concerns of another state inspector it was then decided to cut through the No. 5 crosscut after rehabilitating the roof in both the No. 5 and 6 entries. It was also agreed that eight-foot point anchor roof bolts would be installed before the No. 5 crosscut would be cut through. In addition, it was decided by the group that additional cribs would be added in the intersection before cutting through the No. 5 crosscut. In this regard Elswick suggested that the left side cribs in the No. 6 entry could be used and reset in the intersection prior to cutting through the No. 5 crosscut. Elswick specifically recalls examining the area near the cribs for draw rock and found nothing abnormal. No one from the group dissented from this plan, including the removal of the left side cribs in the No. 6 entry, and Elswick therefore assumed that everyone had agreed to it.

Elswick returned to the same area following the fatal rock fall on March 23<sup>rd</sup> to secure the area. He was satisfied that the roof was adequately supported because the eight-foot roof bolts had been installed. Elswick opined that the roof was adequately supported even without cribs. The DMME did not issue any warnings or citations as a result of the fatal rock fall. In particular, Elswick concluded that there was nothing wrong with removing the cribs on the left side of the No. 6 entry as the deceased had done. Indeed, Elswick did not believe that a reasonably prudent person would have done anything different from the procedures followed by Bandy. Moreover, he saw nothing on his earlier visit on March 17<sup>th</sup> that would have warranted not removing the cribs.

Michael McGlothlin, a continuous mining machine helper, while employed by Bear Ridge only since 1997, has been a miner for 18 years. He is a certified mine foreman but at the time of the accident was working as a miner helper on the second shift under the deceased, foreman Michael Bandy. According to McGlothlin, Bandy was the "safest boss" he had ever worked for. Bandy had arrived earlier on the scoop. Three sets of cribs along the left side of the No. 6 entry were to be removed. According to McGlothlin he and Bandy both examined the roof before removing the first crib. Bandy then pushed it away and sat for 20 to 30 seconds in the scoop looking at the top again before repeating this procedure. Bandy examined the roof while seated on the scoop and then, off the scoop, from the side of the scoop. McGlothlin also moved in by the scoop and from that position again looked at the roof. He found no indication that any

rock would fall. After the first blocks were removed he and Bandy talked for a while and continued watching the top. McGlothlin threw some of the blocks aside. They both continued to look at the roof and saw nothing to indicate an imminent rock fall. McGlothlin agreed that the roof was "bad" but it had been double bolted and he determined that it was supported. McGlothlin also testified that none of the slips that were in the roof extended into the area where the rock fell. According to McGlothlin Bandy did nothing that was substandard either in his observations of the roof or removal of the cribs. In addition he concluded that sounding the roof would not have disclosed the rock fall because the entire top sounded drummy. McGlothlin did not hear the roof "working" prior to the rock fall and there was no flaking or popping. It was after Bandy had again examined the top, moved to the side of the scoop and looked again before he picked up some blocks and the rock fell.

This Commission in *Secretary v. Canon Coal Company*, 9 FMSHRC 667, 668 (April 1987) stated in reference to the proper method of interpreting the nearly identical language of predecessor 30 C.F.R. § 75.200, that questions of liability must be resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the standard seeks to prevent. More specifically the Commission stated that the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purposes of the standard, would have provided in order to meet the protection intended by the standard. The Commission further emphasized that the "reasonably prudent person test" contemplates an objective, not subjective, analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry at issue. See also, *Secretary v. Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (December 1998).

Within this framework I note that the two persons most qualified to meet the reasonably prudent person test were the deceased Michael Bandy and miner operator helper Michael McGlothlin. These were the only persons in a position to make a timely and objective analysis of the surrounding circumstances relevant to an appropriate inquiry of the roof conditions at the time of the rock fall. In this regard I accord McGlothlin's testimony significant weight. He is a certified mine foreman with 18 years mining experience. Both he and the deceased, also a mine foreman, were well-qualified by experience and observations to have properly assessed the roof conditions immediately before the roof fall. They both examined the subject roof from several different perspectives and concluded that it was adequately supported before Bandy proceeded beneath the area that fell.

Other roof control experts also testified concerning conditions at various times before and after the rock fall and corroborate McGlothlin's observations. MSHA roof control specialist Harold Musik was at the scene shortly after the fatal rock fall and found that the roof was "supported." Indeed, he found that the original four-foot roof bolts inserted according to the roof control plan plus the rebolting bolt-for-bolt with eight-foot roof bolts constituted "intense" control. Musik opined that even when a roof is intensely supported as it was here you

nevertheless can have a rock fall. He found no indications that the rock would have been observably loose before it fell. Moreover, Musik found nothing that would indicate that Bandy did anything substandard.

MSHA mining engineer Linda Hrovatic also corroborated that the area around the fatal roof fall had been heavily bolted and opined that the bolting had been in accordance with sound mining practices. Indeed, she concluded that the area was "supported roof." She saw nothing suggesting that the rock would have been visible as a hazard before it had fallen. MSHA supervisor of inspectors, Larry Worrell, also confirmed that there had been substantial roof bolting in the area of the roof fall and that the bolting had been done in a workmanlike manner. He knew of no actions by Bandy that he considered negligent or not prudent.

Finally, Virginia State mine inspector Daniel Altizer, who was at the accident scene that same night, observed that there were as many roof bolts in the affected area as he had ever seen anywhere. He also agreed that a "sound and vibration" method of roof testing was not necessary in that area since the roof conditions were known and the entire roof would sound drummy in any event. In sum, following the roof fall accident eight inspectors, supervisors and roof control experts from two regulatory agencies investigated the scene, six from MSHA and two from DMME, and three of those from MSHA and the two from DMME concluded that the No. 6 entry was fully supported even after the removal of the cribs.

In reviewing the evidence I have noted the testimony of several of the Secretary's witnesses who now maintain that the procedures followed by foreman Bandy (in removing the cribs on the left side of the No. 6 entry before cutting the 5 right crosscut), were unsafe. However, it is apparent that this was not the Secretary's position before the fatal rock fall. It is clear from the credible evidence that the Secretary, through its agent, roof control specialist Shortridge not only acquiesced in, but affirmatively approved the precise procedures followed by Bandy now criticized by the Secretary. The testimony of DMME roof control specialist David Elswick is particularly probative in this regard. Elswick's credibility is unchallenged and his recollection is particularly convincing. As previously noted, Elswick testified that, following the March 16 roof fall in the 6 right crosscut, a group of state and federal roof control specialists met on March 17<sup>th</sup> and agreed, without dissent, to the precise procedures followed by Bandy on March 23<sup>rd</sup>. Elswick's testimony is not only credible in itself but is fully corroborated by the testimony of mine superintendent Tim Lowe, who was also present when this agreement was reached.

While the Secretary also appeared to question the recollection of these witnesses regarding the existence of three sets of cribs along the left side of the No. 6 entry on March 17<sup>th</sup>, Elswick, Lowe and Daniel Houchins, an employee of Bear Ridge and union committeeman, all testified as to the existence of cribs on both the right and left side of the No. 6 entry on the 17<sup>th</sup> of March. In addition, Brian Salyers, another Bear Ridge employee, testified that he had helped build the three sets of cribs along the left side of the No. 6 entry. He felt that the area had been properly supported once the supplemental eight-foot roof bolts had been inserted. Salyers, who

is also a certified mine foreman, further testified that it was common practice to remove cribs prior to cutting through. He also opined that Bandy, who he knew very well, was probably the safest person he had ever worked with. He agreed that it would do no good to sound the roof in this area since the entire roof would have sounded drummy. He agreed that once the eight-foot bolts had been inserted, the roof was indeed "supported." He further testified that there were no cracks in the roof on the left side of the No. 6 entry at the time they installed the cribs on March 16<sup>th</sup> or 17<sup>th</sup>. He specifically recalled that the arrangement with the state and Federal inspectors, including MSHA Inspector Shortridge, was that once they rebolted the No. 6 entry they would then remove the three cribs on the left side before cutting through the crosscut.

On the day of the accident, Salyers was in the area before the fall at 10 or 11 a.m. He checked the three cribs on the left side of the No. 6 entry and checked the top. He tapped the wedges on the cribs with a hammer and indeed found that there was no weight on them. He saw no unusual hazard. He concluded that even had the cribs been removed, the roof was adequately supported because of the insertion of the eight-foot roof bolts. It was his opinion that the cribs on the left side were no longer necessary once the eight-foot bolts had been inserted. Under all the circumstances I give but little weight to Inspector Shortridge's absence of a recollection of the cribs on the left side of the No. 6 entry.

The Secretary also claims that Bandy was negligent and did not act prudently when he failed to "sound" the roof in the vicinity of the rock fall. However, as noted, the overwhelming credible evidence is that such efforts would have been futile and likely to have been a reckless and dangerous act in itself. Indeed, the credible evidence is that not even the MSHA inspectors and investigators themselves sounded the roof while in this area. The roof was admittedly in bad condition and it has been established by credible evidence that the entire roof would have sounded drummy in any event.

Within the above framework of evidence it is clear that the Secretary has failed to sustain her burden of proving a violation as charged. The overwhelming weight of credible evidence, based on the testimony of reasonably prudent persons, is that the existing roof control met the protective requirements of the cited standard.

### **ORDER**

Citation No. 7293918 is hereby vacated.

Gary Melick  
Administrative Law Judge

Distribution: (Certified Mail)

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