

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 17, 1996

SOMERSET MINING COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEST 95-267-R
: Citation 3584806; 3/16/95
: SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Sanborn Creek Mine
ADMINISTRATION (MSHA), : Mine ID 05-04452
Respondent :

DECISION

Appearances: Charles W. Newcom, Esq., Sherman & Howard,
Denver, Colorado,
for Contestant;
Robert Cohen, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Respondent.

Before: Judge Cetti

This case is before me pursuant to section 105(d) of the Federal Mine Safety & Health Act of 1977, 30 U.S.C. § 801, et seq., the "Mine Act". Somerset Mining Company (Somerset) challenges a citation issued to it by the Secretary of Labor Secretary) for an alleged violation of 30 C.F.R. § 75.220(a)(1). The cited standard requires a mine operator to develop and follow a suitable roof control plan, approved by the MSHA District Manager.¹

¹ Section 75.220(a)(1) provides:

Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological condition, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

I

The Sanborn Creek Mine is an underground mine located near Somerset, Colorado. The surface topography is mountainous. An advance and retreat panel and pillar method is used for mining the underground coal in the "B" seam of the mine. From April 1994 to January 1995 Somerset mined under an MSHA approved mine plan which provided, on retreat mining, for the double splitting of pillars which have between 1,500 and 2,000 feet of ground cover (overburden).

In January 1995 an "outburst" or "bounce" of coal along the down-dip side of the barrier pillar resulted in an injury to a section foreman. The injury was immediately reported to MSHA and in due course MSHA was made aware that in August 1994 there had been a prior bounce (a non-reportable one) not involving any injury. That first bounce was also located on the down-dip side of the barrier pillar. As a result of these two bounces or outbursts the operator, as well as MSHA, had safety concerns. MSHA withdrew its approval of the pillar splitting provisions of the mine's roof control plan in January 1995 and issued a citation concerning the adequacy of the roof control plan to protect miners and equipment from coal bursts. (Tr. 94-95). After some discussions and negotiations between MSHA and Somerset, that citation was withdrawn. It was agreed that the operator would hire an outside consultant to "study things further" rather than litigate the citation at that time. As a result of this agreement, Somerset asked Dr. John Abel, an expert mining consultant and Professor Emeritus at the Colorado School of Mines, to study the coal "outburst" problem and the suitability of resuming double splitting of the pillars in question in the "B" seam of the mine.

II

It is undisputed that "coal outburst" was the specific safety hazard that MSHA was concerned with (Secretary's brief, page 5). Dr. Abel visited the mine and prepared a comprehensive report based upon his analysis of the mine and the testing of coal samples taken from the Sanborn Creek Mine. Dr. Abel's solution for the coal outburst problem was to drive a series of short stub rooms, 10 feet long and 20 feet wide, into the down-dip barrier pillars at every crosscut or stub rooms 10 feet long and at least 14 feet wide on 50-foot centers. In his March 10, 1995, comprehensive twenty-five page report Dr. Abel recommended the following:

Softening of the down-dip barrier pillar ribside is recommended to alleviate bounces in the down-dip entry. This can probably be accomplished by mining a short, at least 10-foot long, 20-foot wide, stub room into the down-dip barrier pillar at each breakthrough (crosscut) during panel advance. Alternatively, a series of short, at least 10-foot long and at least 14-foot wide, stub rooms driven down-dip on 50-foot centers into the down-dip barrier pillar ribside should alleviate the bounce problem. Either of the recommended stub room configurations will move the shear stress concentration from the edge of the approximately 1720-foot long straight-sided barrier pillar ribside to a position back into the barrier pillar. Either of the recommended modifications of the panel retreat mining method should eliminate bounces in the down-dip entry, without inducing a roof failure. If down-dip bounces continue to develop after the modification, the bounces should be located at the face of the unused stub rooms.

Robbing of panel pillars upon retreat is essential to the safe application of room and pillar mining method used at depths of about 1500 to 2500 feet in the Sanborn Creek Mine. Pillar robbing on the retreat results in yielding of the stump pillars remaining after splitting the advance coal pillars, preventing roof or floor pillar failure. The three 30-foot wide by 80-foot long by 7-foot high panel advance pillars in the 170-foot side, four entry, advance panel are graded to a height of 12 feet before being robbed on the retreat. The panel width is increased to 270 feet by driving 100-foot long rooms on 50-foot centers in the up-dip barrier pillar during the retreat. The up-dip rooms perform the same function of pushing the abutment stresses back into the barrier pillar that is proposed for the down-dip stub rooms recommended for the down-dip barrier pillar.

It is clear from Dr. Abel's report and testimony at the hearing that Dr. Abel's solution to the coal outburst problem was a series of stub rooms into the barrier pillar. This recommenda-

tion was approved and adopted. It is undisputed in the record before me that there were no more outbursts of coal after the series of stub rooms recommended by Dr. Abel were driven into the barrier pillar.

Dr. Abel, in his analysis, also determined that on retreat mining, double splitting of pillars located between 1,500 and 2,000 feet of cover in the "B" seam was safer than single splitting because the double split pillars yield at a safer more controlled rate than single split pillars. Dr. Abel opined that double splitting of pillars in the "B" seam located between 1,500 and 2,000 feet of cover was safer and more suitable for the Sanborn Creek Mine than single splitting.

Dr. Abel's report dated March 10, 1995, along with Somerset's request to resume double splitting, was sent to MSHA before a March 1995 meeting between MSHA and Somerset. The report was submitted to MSHA mining engineer Ted Hansen who believed that the double splitting of pillars caused the bounces. Mr. Hansen disagreed with Dr. Abel's conclusion that double splitting was safe and suitable for the mine. Hansen and his supervisors prepared their own reports, recommending that Somerset not be permitted to resume double splitting of the pillars in question. (Gov't. Ex. 5-7).

The March 1995 meeting between MSHA and the operator did not result in an agreement to permit double splitting of the pillars in question. Dr. Abel attended this meeting and following the meeting prepared a follow-up report on the single versus double splitting of the pillars in question. (Resp. Ex. 3). In order to obtain Commission jurisdiction to resolve the dispute, Somerset mine manager Walt Wright signed a letter (which had been drafted by MSHA) advising MSHA that Somerset would not adopt the revised roof control plan and that it intended to double split pillars. (Tr. 121-122; Gov't. Ex. 3 at p. 1). MSHA responded by issuing the present contested Citation No. 3584806, alleging a 104(a) violation of 30 C.F.R. § 75.220(a)(1), which requires operators to develop and follow an approved roof control plan. Thus, the citation was issued as part of an agreed plan between the operator and MSHA so Somerset could request a hearing on the disputed issue.

As stated by counsel for the Secretary in his post-hearing brief "The important facts in this case are not in dispute." Specifically, there is no dispute between Somerset and MSHA concerning the history of the mine, how the mining panels were developed, the advance and retreat room and pillar method of mining and the fact that two above-mentioned coal outbursts occurred in

the down-dip side of the barrier pillar before the 5th west panel of the "B" seam was retreated.

III

Applicable Law and Discussion

The citation alleges a violation of safety standard 30 C.F.R. § 95.220(a)(1) which, in relevant part, requires each mine operator to "develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine."

Section 302(a) of the Mine Act requires each operator to carry out on a continuing basis a program to improve the roof control system of each mine. It reads in pertinent part as follows:

Sec. 302. (a) Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system.

In Dole, 870 F.2d 662 at 667 the court stated "[t]he specific contents of any individual mine [roof control] plan are determined through consultation between the mine operator and the [MSHA] district manager." In Peabody Cole Company, 15 FMSHRC 389 (March 1993) the Commission held that "both the Secretary and the operator are required to enter into good faith discussions and consultation over mine plans." The Commission in Peabody, supra, further explained this process and quoted their decision in Carlson County, 7 FMSHRC 137 as follows:

The requirement that the Secretary approve an operator's mine ventilation plan does not mean that an operator has no option but to acquiesce to the Secretary's desires regarding the contents of the plan. Legitimate disagreements as to the proper course of action are bound to occur. In attempting to resolve such differences, the Secretary and an operator must negotiate in good faith and for a reasonable period concerning a disputed provision. Where such good faith negotiation has taken place, and the operator and the Secretary remain at odds over a plan provi-

sion, review of the dispute may be obtained by the operator's refusal to adopt the disputed provision, thus triggering litigation before the Commission.

In this case it appears from the face of the citation, as well as the undisputed evidence, that the citation was issued when Somerset with the assistance of MSHA staff wrote a letter stating that Somerset intended to resume the double split partial recovery plan without MSHA's approval. The letter was sent to MSHA and MSHA, in response, issued the citation so Somerset could have a hearing and Commission decision on the operator's request that MSHA approve the provision which would allow the mine to resume double splitting of the pillars in question.

Somerset and MSHA agreed that both of the parties negotiated in good faith over the disputed provisions of the operator's roof control plan before an impasse was reached and the citation in question was issued. I accept the stipulation and find that the parties negotiated in good faith and for a reasonable period concerning the disputed pillar splitting provisions.

It is undisputed that financial gain is not motivating Somerset's desire to double split rather than single split the pillars in question. The undisputed evidence established that Somerset is motivated by safety concerns. About the same amount of coal is produced using either double or single splitting of pillars. It is also undisputed that because of the additional timber required for double splitting it's more expensive per ton of coal mined than single splitting. (Tr. 106-108).

IV

The Secretary's post-hearing brief lists three burden of proof issues for decision in this case as follows:

1. Whether the MSHA District Manager acted correctly in denying approval of Somerset roof control plan for the 5th west panel of the Sanborn Creek Mine.
2. Whether the evidence established that double split retreat mining method for the 5th west panel of the mine was unsuitable and unsafe for the mining conditions.
3. Whether the District Manager's decision to deny approval to Somerset's double split

retreat mining method for the 5th west panel is entitled to be affirmed as long as the decision is not arbitrary, capricious or an abuse of discretion.

With respect to the issue MSHA listed above as No. 1, I find this is a non-issue. There is no allegation or contention in this case that the District Manager did not act "correctly" in carrying out his administrative duties. I am mindful that in the Dole, supra, footnote 10, the court states "MSHA always retains final responsibility for deciding what had to be included in the plan." However, the court was surely referring only to the District Manager's administrative duties. The court was not addressing in any way MSHA's burden of proof when the suitability of the mine's roof plan provisions are in litigation before the Commission and its judges.

The burden of proof suggested by MSHA in the issue listed above as number "3", is rejected. The Commission in Peabody Coal Co., 15 FMSHRC 381 at 388 (1993), clearly held, with respect to the merits of a disputed provision in the mine plan, the Secretary bears the burden of proving that the plan provision at issue was suitable to the mine in question. See JWR, 9 FMSHRC at 907 (involving ventilation plans), and SOCO, 14 FMSHRC at 13 (involving safeguards).

V

Further Discussion and Findings

Dr. Abel in responding to MSHA's criticism of his report, testified his report and analysis (unlike MSHA's) was based on coal samples that were taken from the Sanborn Creek Mine. He also responded to MSHA's criticism of his assumption that the overburden horizontal pressure was equivalent to the vertical pressure in the mine. Dr. Abel convincingly showed that the assumption he used in analyzing and resolving the outburst problem was more realistic than the alternate assumption suggested by MSHA.

I conclude that Dr. Abel's superior qualifications, extensive experience and logical analysis of the problems are entitled to considerable weight and are persuasive.

On the record before me I find that MSHA has not established by a preponderance of the evidence that the double splitting of the pillars in question is not suitable for the Sanborn Creek Mine or that single splitting of said pillars is suitable to the

mine's prevailing geological condition and the mining system used at the mine.

ORDER

In view of the foregoing, Citation No. 3584806 is **VACATED** and Somerset's contest is **GRANTED**.

August F. Cetti
Administrative Law Judge

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