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MSHA V. TENNESSEE CHEMICAL  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
May 30, 1989

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v. Docket No. SE 85-63-M

TENNESSEE CHEMICAL, INC.

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,  
Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq (1982) ("Mine Act" or "Act"), Commission Administrative Law Judge William Fauver concluded that Tennessee Chemical Company ("Tennessee Chemical" or "operator") violated 30 C.F.R. § 57.3-20 (1984), a standard addressing the use of ground support in underground metal and nonmetal mines. We granted Tennessee Chemical's petition for discretionary review. On the bases that follow, we affirm.

Tennessee Chemical operates an underground copper mine near Copperhill, Tennessee (the "Cherokee Mine") employing approximately 200 miners, working three eight-hour shifts per day, seven days a week. Copper and iron sulfide ore are mined using the sublevel stopping method. This case arose as a result of a fall of ground in a development tunnel. Development work (i.e., excavating tunnels for haulageways and travelways) was performed by crews who drilled blast holes into the tunnel face and back, 1/ set charges, blasted the rock, scaled the back, and removed the rock from

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1/ "Back", defined as "[t]he roof or upper part in any underground mining cavity" is generally considered the metal/nonmetal counterpart to the term "roof" in coal mines. "Fall of ground" or "rockfall" refer to "[r]ock falling from the roof into a mine opening." Dictionary of Mining, Mineral, and Related Terms 70, 410, 934 (1968).

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the blast area. This development cycle would then be repeated. The crews were paid an incentive rate based on the number of feet they advanced the tunnel. The drilling was performed with the use of a three-boom pneumatic drill described as a "Jumbo." The holes were drilled and blasted on close centers in the back to provide a "smooth wall" that extended about 20 feet from the face. A "smooth wall" is a lip or brow intentionally left in the back after an explosion. Rock bolts were installed in the back on an "as needed" basis. Each development crew, working under the supervision of a development foreman, was to examine and scale the back in its own work places and to bolt, unless a large area needed bolting in which case a separate bolting crew would perform that work.

Shortly before September 14, 1984, the development drift involved in this case (referred to as the 14 N 33) had been down for eight shifts because of adverse ground conditions. Rock bolts were installed up to the edge of the smooth wall and this work was completed on September 13. The bolter who performed this work, Mark Richards, installed an extra row of bolts at one place because he heard popping noises in the back and saw small bits of rock falling from it. Richards also bolted an area around a small bore hole in the drift, after Gary Williams, general mine foreman, ordered that it be bolted due to dangerous ground conditions in the area.

On September 14, 1984, Steve Dillard and Joshua Waters, development drillers, began working a shift that started at 3:00 p.m. They were working with Frank Wright, development loader operator, in the 14 N 33 drift, where they were tunneling a 16 by 18 foot opening to be used as a truck haulage road. The development foreman for their shift was Cleaston Morrow.

When Dillard, Waters, and Wright arrived at the 14 N 33 drift with Hayden Stiles, equipment operator, they found that the heading had to be "mucked out," that is previously blasted rock left by the day shift development crew had to be removed. After blasting, it was the development crew's job to examine and scale the back, following which the loader operator would then commence mucking. Once that was completed, the cycle would be repeated. Dillard, Waters, and Stiles began scaling loose rock from the back while Wright went to get a loader to muck out the rock. Wright returned with the loader and Dillard told him the area was ready to be mucked. Wright and Stiles proceeded to muck out the area, and Dillard and Waters left the area. Most of the area had been mucked when a rock measuring about two feet wide by four feet long fell from the back, in by the last row of bolts, landing in front of Wright's loader. Wright was frightened by the

event as his loader had passed under the area where the rock fell. He also was angered because Dillard had told him the area had been scaled.

After the fall of ground, Wright backed his loader into the N-28 crosscut and told Stiles what had happened. Wright then got into the dipper of Stiles' loader so he could reach the back and scale it with a scaling bar. Wright and Stiles scaled "quite a bit" of loose material, and then finished mucking the area. When that was completed Wright went to the office/lunchroom where he saw Dillard, Waters, and their foreman, Morrow.

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Wright confronted Dillard because of the rock fall and the loose ground that had not been scaled. Wright also warned Dillard that some back had "blowed up." (This term refers to a bad ground condition signaling the potential danger of a fall; "blowing", as it is called, may include popping noises, cracking or the falling of fine pieces of material called fines or scales.) When Dillard and Waters returned to the drift they did no further scaling of the back, although they did scale the floor of the tunnel. They then began drilling holes in the tunnel face with the Jumbo when a rock six feet eight inches long, four feet ten inches wide and four to five inches thick fell from the back striking both of them while they were at the controls of the Jumbo. The rock killed Dillard and permanently injured Waters. At the time of the fall the men were approximately seven and one-half feet beyond the last bolted area.

On the following morning, MSHA inspectors Frank Holiway and Eugene Mouser began an investigation. They inspected the 14 N 33 drift and interviewed mine officials and employees. As a result they issued a citation on September 15, 1984, charging a violation of 30 C.F.R. § 57.3-22. 2/ Almost two years later, on August 18, 1986, the citation was modified to instead allege a violation of section 57.3-20, which provided:

Mandatory.

Ground support shall be used if the operating experience of the mine, or any particular area of the mine, indicates that it is required. If it is required, support, including timbering, rock bolting, or other methods shall be consistent with the nature of the ground and the mining method used. 3/

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2/ 30 C.F.R. § 57.3-22 (1978) provided:

Mandatory. Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

3/ Although we are construing § 57.3-20 as it appeared in 1984 we note that the standard has since been revised and renumbered and now provides:

Scaling and Support - Underground Only

§ 57.3360 Ground support use.

Ground support shall be used where ground conditions, or mining experience in similar ground conditions in

(Footnote continued)

A hearing was held before Judge William Fauver on April 14 and 15, 1987. In his decision the judge affirmed the citation and assessed a \$7,500 civil penalty.

In finding that Tennessee Chemical violated section 57.3-20 the judge first construed the standard, focusing upon the term "operating experience." The judge held "that 'operating experience' sufficient to indicate the need for roof support does not have to be at the point of an immediate danger of a roof falling, but includes [the] danger of a potential roof fall." 10 FMSHRC at 377. The judge also considered a prior fall of ground fatality at the Cherokee Mine as part of the mine's operating experience. 10 FMSHRC at 387.

Crediting and relying upon the testimony of MSHA supervisor M. Turner and inspectors Holiway and Mouser, the judge found that the areas of loose rock viewed by those individuals after the Dillard fatality existed prior to that event and were not caused by the fall of ground. The judge further concluded that the 14 N 33 drift had poor ground conditions, was dangerous, and needed support where Dillard and Waters had been working. 10 FMSHRC at 378. The judge rejected Tennessee Chemical's position that the fall of ground was a surprise and that it had an effective "layered" ground control system under which miners, front-line supervisors, and upper management all played a role in monitoring and controlling ground conditions. On this point the judge found that there was a breakdown in communication on each of these levels. 10 FMSHRC at 382, 387.

The first issue raised by Tennessee Chemical on review is whether it was reversible error for the judge to consider a prior fatality as part of the mine's "operating experience," as that term is used in § 57.3-20.

The prior fatality considered by the judge occurred on January 27, 1984, when Ted Ledford, a development driller like Dillard and Waters, was killed while operating a Jumbo drill at the Cherokee Mine. Although the Ledford fatality occurred in a different drift, like the instant case, the miner was killed while drilling blasting holes into the face and a large rock fell from the back. MSHA investigated the Ledford fatality but did not issue any citations or orders for violation of safety standards. The MSHA investigation concluded in a report issued February 22, 1984, that the cause of the accident was the failure of management and employees to

the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber use (sic) for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area.

30 C.F.R. § 57.3360 (1988).



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detect loose ground. Exhibit P-6. 10 FMSHRC at 372, 373. MSHA also believed that a contributing cause may have been that vibrations from the Jumbo drill may have loosened unstable ground. The report contained recommendations that supervisors review proper ground control procedures with the miners and that overhead protection be provided on all mobile equipment where feasible. MSHA further advised in the report that to prevent future rock fall accidents there must be continued surveillance of day-to-day ground conditions and continual scaling of the back and ribs. *Id.*

The judge observed that in its investigative report of the Dillard/Waters accident MSHA made the same findings as to the cause of the accident and repeated its earlier recommendations. 10 FMSHRC at 372-374. The Dillard report also recommended that, where necessary for ground support, rock bolting should be as near to the face as possible. *Id.*

Tennessee Chemical contends that it was reversible error for the judge to consider the Ledford fatality as part of its operating experience and asserts that operating experience should not encompass prior incidents that are free of operator culpability. Since MSHA did not issue any citation in connection with the Ledford fatality, Tennessee Chemical contends that it had been exonerated of any culpability. Therefore, according to Tennessee Chemical, consideration of this incident in the present proceeding subjects it to double jeopardy.

The Secretary contends that the Ledford fatality is relevant to Tennessee Chemical's operating experience within the meaning of 57.3-20 and that it is also relevant to the issue of Tennessee Chemical's negligence. The Secretary notes that the judge also evaluated the conditions in existence in the 14 N 33 drift prior to and at the time of the Dillard/Waters incident as part of the mine's operating experience apart from the Ledford fatality.

We hold that it was proper for the judge to consider the Ledford fatality, as well as the events occurring in the 14 N 33 drift in the days preceding the Dillard/Waters incident, as part of Tennessee Chemical's operating experience within the meaning of section 57.3-20.

As noted by the judge, the Commission has previously interpreted the standard in issue. In *White Pine Copper Range Company*, 5 FMSHRC 825 (1983), ("White Pine") we observed that the dictionary definition of the key word "experience" included "practical wisdom resulting from what one has encountered, undergone, or lived through" and that "a

mine's 'operating experience' broadly encompasses all relevant facts tending to show the condition of the mine roof in question and whether, in light of the roof condition, roof support is necessary." White Pine, 5 FMSHRC at 836. We further observed that operating experience is determined by looking at the mine's prior operating history and present day experience and that "this determination takes into account the operating history of the mine (i.e., its past mining practice) geological conditions, scientific test or monitoring data and any other relevant facts tending to show the condition of the mine roof in question and whether in light of those factors roof support is required in order to protect the miners from a potential roof fall." Id. at 838.

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While the Ledford fatality occurred in January 1984 in a different drift, it shared the following commonalities with the September 1984 Dillard fatality: development work was being performed; the victims were drilling blasting holes into the face with a Jumbo drill; loose ground had been neither adequately scaled nor bolted; the victims were working under an unbolted area; and a large rock fell from the unbolted area causing the fatal injury. 10 FMSHRC at 372.

We view these common factors as sufficient to bring the Ledford fatality within the scope of the term "operating experience." Indeed the operator does not attempt to distinguish the circumstances surrounding the two fatalities. Instead, Tennessee Chemical raises only a "fairness" objection to consideration of the Ledford fatality.

To ignore the operator's previous experience simply because no violations had been alleged would place a severe limitation upon what would otherwise be considered a part of operating experience. Since the White Pine test for "operating experience" takes an inclusive approach allowing consideration of all relevant facts, Tennessee Chemical's argument that operating experience should be tied to culpability is inconsistent with that precedent.

While the operator asserts that this amounts to "double jeopardy", we reject that argument for several reasons, chief among them being that the concept is limited to situations where a defendant has been punished in a prior criminal proceeding and the Government is now seeking a second punishment for the same offense. *United States v. Halper*, 57 U.S.L.W. 4526 (U.S. May 16, 1989)(No. 87-1383); 21 Am. Jur. 2d Criminal Law § 244, 249. Here, there was no prior criminal proceeding. The Secretary is not seeking a civil penalty in connection with the Ledford fatality, nor is she seeking to litigate the facts surrounding that event. The Ledford fatality accident report was introduced only to show that the event was part of the mine's operating experience.

We also find no basis for Tennessee Chemical's assertion that the judge based his finding of a violation upon the Ledford incident. The judge clearly relied upon a great deal of other information about the conditions in the 14 N 33 drift in concluding that Tennessee Chemical's operating experience was such that it should have known that ground support was needed. The judge recounted the following as part of Tennessee Chemical's ground support operating experience:

Shortly before the Dillard fatality the 14 N 33 drift had been down for eight shifts due to adverse ground conditions. Extra rock

bolts were installed up to the edge of the smooth wall and this was completed on September 13, 1984. 10 FMSHRC at 371; Tr. 308, 309, 312, 315, 319, 324, 344, 482, 483. Rock bolter M. Richards testified that he installed these bolts and that he put in an extra row of bolts due to popping noises in the back and fines falling from the back. 10 FMSHRC at 378; Tr. 315, 318, 319. On or about September 13, 1984, Richards also bolted around a small bore hole which was located 15 feet from the place where Dillard was killed. This bolting was ordered by the general mine foreman, G. Williams. because of the dangerous ground conditions. 10 FMSHRC at 371;

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Tr. 310-312. Prior to the Dillard fatality Richards told his supervisor, L. Hicks, of the dangerous ground conditions he encountered. 10 FMSHRC at 371; Tr. 324, 325, 326.

Tennessee Chemical's manager of mining, A. Edey and Dr. Ross Hammet, a mining engineer consultant, testified that noise in the back and falling of small and large rocks as well as the necessity of installing rock bolts in a particular area are all part of a mine's operating experience. 10 FMSHRC at 372; Tr. 521, 522, 618. Miners F. Wright and T. Mason (part of the 14 N 33 development crew) testified about the bad ground conditions they experienced in that drift prior to the Dillard fatality. 10 FMSHRC at 372, 385; Tr. 179, 182, 183, 204, 230, 264, 270, 281.

In July, 1984, Dr. Ross Hammet advised Tennessee Chemical that while systematic rock bolting was not then indicated, the requirement for ground support should be determined by continuing to observe local geological conditions that might ultimately dictate the need for systematic bolting. 10 FMSHRC at 372, 386; Exhibit P-27 at 10; Tr. 602-611.

Most importantly, immediately before the Dillard fatality, a 2 foot wide by 3 to 4 foot long rock fell in front of Wright's loader while he was mucking out the 14 N 33 drift. Wright informed Dillard of the fall and warned him that the back had "blowed up." C. Morrow, the development foreman, overheard Wright tell Dillard of these conditions. 10 FMSHRC at 370; Tr. 164, 167, 171.

Turner, and MSHA inspector E. Mouser testified that the loose rock they observed upon visiting the scene of the Dillard fatality on September 15th and 17th existed prior to the fatality and was not caused by the rock fall. 10 FMSHRC at 381; Tr. 95, 96, 142.

The judge recounted all of the above in the context of reviewing Tennessee Chemical's "abundant operating experience" indicating the need for ground support before the fatality. Reading the judge's decision as a whole it is evident that, while the judge considered the Ledford fatality as part of Tennessee Chemical's operating experience, he did not predicate his decision upon that event and, in fact, relied in large measure upon this other experience, which Tennessee Chemical does not contend was improperly considered as part of its operating experience.

We next address Tennessee Chemical's challenge to the judge's finding of gross negligence. After finding that Tennessee Chemical

violated section 57.3-20 by failing to provide support at the place where the rock fell on Dillard and Waters, the judge determined that:

In light of the abundant operating experience showing the need for roof support in this area before the fatality, I find that Respondent's failure to provide roof support to protect Dillard and Waters from a potential roof fall constituted gross negligence.

10 FMSHRC at 387-88.

Thus, the judge's legal determination of gross negligence was tied to his factual findings of abundant operating experience showing the need for ground support in the 14 N 33 drift. In terms of whether there is substantial evidence for the judge's determination of gross negligence, we find support for this finding in the record beginning with the mine operator's experience in connection with the Ledford incident, and including the events and history of the conditions in the 14 N 33 tunnel in the days immediately preceding the Dillard fatality.

The judge also found that Tennessee Chemical's "layered system" involving three levels of responsibility (miners, front line supervisors, and upper management) for monitoring and controlling the ground failed at each level. 10 FMSHRC 382. These failures played an important part in the judge's determination that gross negligence was involved. In this regard the judge pointed to several failures of communication between Wright, Dillard and Waters regarding the areas that were scaled and those that needed to be scaled. 10 FMSHRC 383. The judge also related the failures at the front line supervisor level, focusing upon the failure of Morrow, the development foreman, to carry out his duties under 30 C.F.R. § 57.3-22, which requires supervisors to examine the ground conditions during daily visits. The judge found that Morrow had not visited the area on that shift before or after the warning and that he failed to take any action even after overhearing Wright warn Dillard of the hazardous ground conditions. The judge also found that Morrow knew that Dillard and Waters would be returning to the area that Wright had warned about and that they would be drilling into the face while working in an unbolted area. 10 FMSHRC at 384. Additionally, the judge accepted the general mine foreman's statement that the development crew had reported the adverse conditions to Morrow. Tennessee Chemical does not take issue with these findings.

The judge further determined that there was a second failure on the part of front line supervisors. Based on the testimony of rock bolter, M. Richards, the judge found that L. Hicks, supervisor of stopping and rock bolting, was informed by Richards on September 13th of the adverse ground conditions yet, like Morrow, he took no action to inspect or provide support for the area where Dillard and Waters would be drilling. In fact, Hicks criticized Richard for installing extra bolts. 10 FMSHRC at 385.

At the upper management level the judge noted general mine foreman G. Williams' awareness of the adverse conditions in the part of the drift where Dillard would be working and his ordering of

bolting around the bore hole, but his failure to order bolting for the area where Dillard would be working. 10 FMSHRC at 386. Finally, the judge noted that, while Dr. Hammet had stated in his July 1984 report that systematic bolting was not yet needed, he warned that such bolting might ultimately be necessary and that decisions on the areas to be supported would depend primarily on local geological conditions.

We view the above as constituting substantial evidence in support of the judge's finding as to the degree of negligence involved. 4/

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4/ Geological differences between underground coal mines and underground metal/nonmetal mines generally result in requiring systematic roof bolting

(Footnote continued)



There is, however, Tennessee Chemical's argument that the judge did not consider the opinions of the MSHA inspectors who considered the negligence to be moderate. MSHA supervisor Turner explained that he retreated from his initial opinion that high negligence was involved to his subsequent view that the negligence was moderate because he believed that there were mitigating circumstances. 5/ Tr. 18, 97. Turner felt the negligence was moderate because of Tennessee Chemical's efforts following the Ledford fatality, including their hiring of consultants and the training and retraining of their employees in ground control. Tr. 38, 39, 41, 42, 89, 100.

While the judge did not specifically discuss MSHA's change in opinion as to the level of negligence involved after a citation is contested before the Commission, it is the judge's responsibility to determine the extent of negligence de novo based on the evidence in the record before him. *Sellersburg Stone Co.*, 5 FMSHRC 934, 36 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). "When a judge's penalty assessment is put in issue on review, we must determine whether it is supported by substantial evidence and whether it is consistent with the statutory penalty criteria." *Missouri Rock, Inc.*, 11 FMSHRC 136, 141 (February 1989). As we have set forth, we find substantial evidence of record supporting the judge's finding.

Tennessee Chemical also asserts that there is no factual support for the judge's finding that there was a failure to supply needed ground support, unless it is held to a standard of being an insurer of events in the mine. It is Tennessee Chemical's position that it had done all it could under the smooth wall method by bolting as far forward in the drift as possible. It notes that smooth walling is an accepted way to mine and that MSHA knew that it was utilizing that method.

We need not consider the merits or demerits of smooth walling generally or as practiced by Tennessee Chemical. The fact that the smooth wall method may be a recognized method of ground support is not at issue. The issue is simply whether, while utilizing the smooth wall method, Tennessee Chemical maintained ground support that their operating experience indicated was needed at the cited location. Although Tennessee Chemical may have bolted as far forward as normally called for under the smooth wall method, it is clear that, in the circumstances presented, further bolting was called for and could have been achieved. See Tr. 44, 45.

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Fn. 4/ continued:

in the former and rock bolting as necessary in the latter. Applying that tenet here, the issue is not whether systematic bolting to the face should have been instituted prior to the Dillard fatality, but whether bolting should have been provided in the area where Dillard and Waters were working. As to that issue, substantial evidence in the record establishes that the area should have been bolted and that failure to do so was grossly negligent.

5/ Turner's original basis for determining that high negligence was involved stemmed from directions by his superiors within MSHA who were influenced by the fact that there had been seven fatalities in mines inspected by Turner's MSHA field office. Tr. 88.

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In sum, there is substantial evidentiary support in the record for the judge's finding that Tennessee Chemical should have recognized that there were serious ground support problems in the 14 N 33 drift, preceding the Dillard fatality. Accordingly, there is substantial support for the judge's rejection of Tennessee Chemical's argument that the fall of ground that killed Dillard was a surprise. Further, there is substantial support for the judge's finding regarding the penalty criteria in his assessment of a \$7,500 penalty.

For the foregoing reasons, the judge's decision is affirmed.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

#### Distribution

Ronald G. Ingham, Esq.  
Miller & Martin  
1000 Volunteer Building  
Chattanooga, Tennessee 37402

Linda Leasure, Esq.  
Dennis D. Clark, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd.  
Arlington, VA 22203

Administrative Law Judge William Fauver  
Federal Mine Safety & Health Review Commission  
5203 Leesburg Pike, Suite 1000  
Falls Church, VA 22041