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ASARCO MINING COMPANY V. SOL (MSHA)  
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July 27, 1993

ASARCO MINING COMPANY	:	
	:	
v.	:	Docket No. WEST 92-624-RM
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This contest proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)(the "Mine Act" or "Act"), involves a citation issued by the Secretary of Labor to ASARCO, Inc. (hereafter "Asarco"), alleging a violation of 30 C.F.R. 57.3360.(Footnote 1) Following an expedited evidentiary hearing, Administrative Law Judge John J. Morris upheld the citation and dismissed the proceeding. 14 FMSHRC 1468 (August 1992)(ALJ).

Asarco timely filed a petition requesting expedited review of the judge's decision. The Commission granted Asarco's petition for review,(Footnote 2) which raises the following issues: (1) whether the citation met the particularity requirement of the Mine Act; (2) whether the judge improperly shifted the burden of proof to Asarco; and (3) whether the evidence

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1 30 C.F.R. 57.3360, "Ground support use," provides:

Ground support shall be used where ground conditions, or mining experience in similar ground conditions in 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 for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area.

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2 In its order granting review, the Commission denied Asarco's request to expedite.

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established a violation of the cited regulation.(Footnote 3) For the reasons that follow, we uphold the judge's conclusion that Asarco violated section 57.3360.

## I.

### Factual and Procedural Background

Asarco operates an underground silver and copper mine in Troy, Montana. The mine, which is 1½ miles long and 1/3 mile wide, utilizes the room-and-pillar method.(Footnote 4) Asarco developed drifts, or underground haulage areas, to transport men and materials to and from the ore bodies being mined.

The UQ 1 drift, so named for the geological formation, upper quartzite, served as a haulage area and, together with the UQ 2 drift, functioned as part of the air intake and exhaust system for the mine. The UQ 1 drift was 18 to 20 feet wide, 22 feet high, and approximately 900 feet long.

On July 11, 1992, a roof fall occurred in the UE 158 production area, resulting in the death of an equipment operator. On July 13, Seibert Smith, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), took part in an inspection of the area where the fatality occurred. Smith and the other inspectors traveled the length of the UQ 1 drift to reach the accident area. 14 FMSHRC at 1469.

Thereafter, Smith left the accident investigation and returned to the UQ 1 drift, where he had observed loose ground. Smith directed that several tons of rock be scaled down from the ribs at the intersection of the drift and the entry to the UE 158 area. Smith noticed roof bolts protruding two to three feet from the roof. He also observed small loose rock in the ribs, a condition he had not seen in his previous inspections of other sections of the mine. 14 FMSHRC at 1470.

Upon completion of his inspection, Smith conferred with other MSHA personnel about conditions in the drift and contacted MSHA's Technical Support

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3 In its petition for review, Asarco also asserts that the judge failed to address whether section 57.3360, as applied, was "vague and unenforceable." Pet. 3-5. Asarco did not refer to this issue in its brief or at oral argument. Consequently, we do not address it.

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4 "Room-and-pillar" mining is described as follows:

A system of mining in which the distinguishing feature is the winning of 50 percent or more of the coal or ore in the first working. The coal or ore is mined in rooms separated by narrow ribs or pillars. The coal or ore in the pillars is won by subsequent working, ... in which the roof is caved in successive blocks....

Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral and Related Terms 941 (1968).

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Center in Denver for engineering and geological assistance. On July 29, 1992, Smith returned to the mine with two representatives of the Denver Support Center, mining engineer Sid Hansen and geologist Jerry Davidson. Accompanied by a Montana state mine inspector and two Asarco employees, they walked the length of the drift and, with a high intensity light, inspected its left side from the floor to the roof. They found that the rock was fractured, making it only marginally stable. Clay seams in the bedding planes of the rock further reduced its stability. Hansen pulled off several rocks from the weakened bedding planes and, with his fingers, dug out white clay from seams. Conditions were similar the length of the drift. 14 FMSHRC at 1470, 1471-73, 1479.

The following day, the MSHA representatives held a close-out conference with Asarco and discussed their concern about rib and roof conditions in UQ 1 and the need for ground support. Asarco's unit manager, Doug Miller, disagreed with MSHA's assessment that ground support was needed. 14 FMSHRC at 1472.

Following the conference, Hansen and Davidson submitted their ground stability evaluation of the UQ 1 drift to the MSHA district manager. Their memorandum noted that the drift was driven through a shear zone, resulting in "an intensely jointed rock mass." Sec. Ex. 7. In addition, the rock mass had undergone geochemical alteration, causing white clay to be deposited between rock pieces and further weakening. Id. Secondary ground support for the roof was inadequate and none had been provided for the ribs. Hansen and Davidson "strongly recommended that additional rock reinforcement be installed." Id. (emphasis in original); 14 FMSHRC at 1472.

On August 6, 1992, Inspector Smith issued a citation to Asarco alleging a violation of section 57.3360 based on ground conditions in the UQ 1 drift. Asarco filed a notice of contest and requested an expedited hearing, which was held on August 13 and 14. The parties waived post-hearing briefs and requested an expedited decision. The judge issued his decision on August 25. He found that the ground in the UQ 1 drift was unstable, concluded that there was a violation, and dismissed the proceeding. 14 FMSHRC at 1479-81.

## II.

### Disposition of Issues

#### A. Particularity of the Citation

Asarco challenges the citation on the grounds that it did not meet the particularity requirements of the Mine Act. Pet. 3. Asarco further asserts that the judge failed to address this issue. In response, the Secretary argues that the citation was specific as to the nature of the violation and that Asarco was not prejudiced in its ability either to defend the citation or to abate the violation. Br. 18, 19. The judge, by considering the merits of

the alleged violation, implicitly rejected Asarco's argument.(Footnote 5)

Section 104(a) of the Mine Act requires that each "citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." 30 U.S.C. 814(a). The Commission has recognized generally that this requirement for specificity allows the operator to ascertain what conditions require abatement and to prepare adequately for a hearing on the matter. See Cyprus Tonopah Mining Corp., 15 FMSHRC 367, 379 (March 1993), and cases cited.

The citation states that "[g]round support was not provided and installed on the ribs of the UQ 1 haulage drift to prevent ground fall"; that "[a] ground support system shall be installed and maintained throughout the UQ 1 haulage drift"; and that "ground support shall be installed approximately (5) feet from the floor of the drift and up into the back area." Thus, the citation was specific as to the nature of the violation and the need for and extent of corrective action. Further, the MSHA inspection team met with Asarco officials following the July 29, 1992, inspection and discussed conditions in the UQ 1 drift and the need for ground support. Accordingly, we conclude that the citation was sufficiently specific to provide Asarco with notice of the conditions that were alleged to be in violation and of the fact that corrective action was necessary to bring Asarco into compliance with the regulation.

Finally, Asarco counsel's extensive examination and cross examination of witnesses concerning the condition of the ribs and roof in the UQ 1 drift demonstrate that Asarco had been able to adequately prepare for trial and knew the condition it was required to abate. Thus, Asarco's actions at the hearing do not substantiate ambiguity, or lack of specificity, in the citation. Accordingly, we reject Asarco's challenge to the citation based on particularity grounds.

#### B. Burden of Proof

Asarco argues that the judge improperly shifted the burden of proof in this contest proceeding. The judge stated at the beginning of the hearing that "the burden of proof rests with the Contestant, Asarco, with respect to the issues in contest." Tr. 5.(Footnote 6) Asarco asserts that, as a matter of law, the judge shifted the burden and that this burden shifting had an effect that was adverse to Asarco. The Secretary responds by acknowledging that he bears the burden of establishing a violation and that it is obvious from the conduct of the hearing and judge's decision that the burden of proof was with the Secretary.

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5 At the hearing, Asarco's reference to the particularity issue consisted of one sentence in its opening argument asserting that the requirements were not met. Tr. 8. Thus, the judge's treatment of the issue is consistent with its development in the record.

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6 Counsel for Asarco failed to object to the judge's statement.

The record shows that, in his opening statement, counsel for the Secretary described the theory of his case and the proof he would offer in support of the citation. Tr. 9-10. The judge required the Secretary to

proceed first with his case. Tr. 5, 11. Counsel for the Secretary then examined, as his primary witness, the inspector who issued the citation. Asarco responded by presenting expert witnesses to rebut the Secretary's evidence. Asarco's counsel, in presenting his closing argument, cited a Commission case to support his statement that "it's MSHA's burden to demonstrate ... that the operator's actions are inconsistent with ... a standard." Tr. 364-65. The judge's decision adheres to the same analytical approach in requiring the Secretary to carry the burden of proving the validity of the citation.

The judge misstated the law concerning which party bore the burden of proof. The Commission has long held, "In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). Accord: *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (August 1992). We conclude, however, that the judge's conduct of the hearing and the analysis in his decision are consistent with proper allocation of the burden of proof in this proceeding.

#### C. Evidence

The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). While we do not lightly overturn a judge's factual findings and credibility resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. See, e.g., *Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Testimony by the MSHA inspectors that ground conditions were unsafe constitutes substantial evidence where the judge determines, as he did here, that their testimony is reliable. Inspector Smith testified that, while in the mine investigating an accident, he became concerned about conditions in the drift because he observed ground conditions different from those in other areas he had seen in more than 100 inspections of the mine. At that time, he directed the scaling down of several tons of loose material. 14 FMSHRC at 1469-70. With the assistance of two MSHA specialists, Smith later re-inspected the drift and concluded that it was dangerous to miners because of the fractured condition of the ground. Tr. 34-36, 42-43. MSHA mining engineer Hansen, who joined in the investigation with Smith, testified that he saw extensive clay deposits that had filled joints vertically and horizontally and had weakened the ground. Tr. 117, 123-25, 140-41. MSHA geologist Jerry

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Davidson testified that he also found that the clay deposits in the drift further weakened rock that was already fractured due to the fault conditions in the drift. Tr. 333-35. Given this testimony, which he found credible, the judge reasonably concluded that there was a "lack of stability of the ribs." 14 FMSHRC at 1481.

Asarco challenges the judge's credibility determinations, arguing, *inter alia*, that the MSHA inspectors failed to adequately investigate conditions in the drift and that Asarco's expert witness was better qualified than the MSHA inspectors. As the judge recognized, "The principal credibility issue ... is whether the rock in UQ 1 is stable." 14 FMSHRC at 1480. In resolving this issue, the judge "generally credit[ed] MSHA's evidence." *Id.*

The judge acknowledged the conflicting opinions of Hansen and Dr. William Hustrulid, who testified as an expert for Asarco. The Commission has recognized:

Expert witnesses testify to offer their scientific opinions on technical matters to the trier of fact. If the opinions of expert witnesses conflict in a proceeding, the judge must determine which opinion to credit, based on such factors as the credentials of the expert and the scientific bases for the expert's opinion.

Asarco, Inc., 14 FMSHRC 941, 949 (June 1992). The judge noted that Hansen's experience in performing rock surveys in other mines qualified him to speak on the stability of ribs in the UQ 1 drift. The judge recounted that Hansen was able to scrape out clay from the seams. Dr. Hustrulid confirmed the presence of clay in the drift. 14 FMSHRC 1480. Further, the judge discounted Hustrulid's reliance on the absence of popping noises in the drift, reasoning that such noises are present when working ground is exerting pressure on pillars but would not be present with problems involving small pieces of rock falling off the rib. 14 FMSHRC at 1480-81. Finally, the judge did not find that Hansen's credibility was diminished by his failure to observe a crosscut in the drift or because he had limited his inspection to one side of the drift. (Footnote 7) We find no circumstances in this case warranting the unusual step of rejecting the judge's determination that the testimony of MSHA's expert witnesses should be credited over the testimony of Asarco's expert witness. See generally *Ranger Fuel Corp.*, 12 FMSHRC 363, 374 (March 1990).

Based on the foregoing, we conclude that substantial evidence supports the judge's findings that ground conditions in the UQ 1 drift required ground support under section 57.3360, and we affirm the judge's conclusion that Asarco violated that section.

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7 Hansen limited his inspection to one side of the drift because, as the evidence indicates, the rock mass was the same on both sides of the drift. Tr. 174.

Asarco's argument to the contrary rests in part on the method of ground control required to abate the violation. The regulation is silent on the particular means of ground support to be used, stating rather that it be "designed, installed, and maintained to control the ground...." 30 C.F.R.

57.3360. The preamble to the final regulation states: "The standard does not specify the type of ground support system to be used, only that it control the ground." 51 Fed. Reg. 36192, 36195 (October 8, 1986). Asarco asserts that MSHA required, as the means of abatement, rib bolting with wire mesh throughout the drift. However, the record is clear that MSHA did not undertake design of an acceptable ground support system for abatement of the violation or insist on a particular means of abatement. 14 FMSHRC at 1481; Tr. 53-54, 141. In any event, the method of abatement is not before us. As we have previously held, "The only question before the Commission is whether the particular conditions of the cited area required roof support, not which type of roof support." White Pine Copper Div., Copper Range Co., 5 FMSHRC 825, 835 n. 19 (May 1983).

III.  
Conclusion

For the foregoing reasons, we affirm the judge's findings and his conclusion that Asarco violated section 57.3360. Therefore, the dismissal of Asarco's contest proceeding was proper.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner