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SOL (MSHA) V. ALLAN GOODE
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEVA 91-2096
 :
ALLAN GOODE, employed by :
CONSOLIDATION COAL COMPANY :

BEFORE: Holen, Chairman; Backley and Doyle, Commissioners(Footnote 1)

DECISION

BY THE COMMISSION:

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"), presents the issue of whether Allan Goode "knowingly authorized, ordered or carried out" a violation of the roof control plan of his employer, Consolidation Coal Company ("Consol"). Following an evidentiary hearing, Administrative Law Judge William Fauver determined that Goode had knowingly violated the roof control plan within the meaning of section 110(c) of the Mine Act.(Footnote 2) 14 FMSHRC 2106 (December 1992). For the reasons that follow, we reverse the judge's decision.

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Pursuant to section 113(c) of the Mine Act, 30 U.S.C. 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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Section 110(c) provides, in part:

Whenever a corporate operator violates a mandatory health or safety standard ..., any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, ... shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

30 U.S.C. 820(c). Section 110(c) was carried over without significant change from section 109(c) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976)(amended 1977)("Coal Act").

I.

Factual and Procedural Background

When the alleged violation occurred, Goode was a section foreman at Consol's Ireland Mine in Moundsville, West Virginia. On the midnight shift of March 8-9, 1990, Goode's crew was building an overcast. The crew consisted of George Holmes, the continuous miner operator; Donald Conner, the left roof bolter; Charles Minor, the right roof bolter; and Donald "Page" Whorton, the loading machine operator. They had cut a portion of the roof higher to make room for the overcast and were installing permanent roof support. The crew was using a Jeffrey Continuous Miner equipped with an automated temporary roof support ("ATRS") system. Under the roof control plan, the crew was required to temporarily support the roof with the ATRS system during the roof bolting process.(Footnote 3) Permanent roof support was installed using the roof bolting component built into the continuous miner.

The continuous miner was equipped with four ATRS jacks, two near the front and two near the back. When activated, these jacks press against and temporarily support the roof so that the crew can bolt the roof with the augers on the continuous miner. The miner is also equipped with two plank jacks, which are used to press planks, wire mesh and cribbing against the overcast roof so that roof bolts can be installed through the planks. The judge described the process used to build an overcast as follows:

Permanent roof support in the overcast required double planks with wire mesh and, if necessary, cribbing boards to fit irregular places in the roof. To build an overcast, the continuous miner cuts down existing roof support and cuts into the roof to raise the height for the overcast. The miner is then backed up to a supported roof area, where a double plank, a section of wire mesh, and if necessary cribbing boards are stacked on the plank jacks. The miner is then trammed forward and the ATRS jacks are raised firmly against the roof. After that is done, the roof bolters raise the plank jacks, drill the roof holes and install roof bolts pinning the double plank and materials to the roof. The ATRS is then lowered and the cycle is repeated.

14 FMSHRC at 2107.

On the night in question, Goode's crew was installing a set of planks when a small section of the roof fell, knocking down the mesh, cribbing boards and a plank. Goode arrived in the area while the miners were trying to free the wire mesh from the material that had fallen. Conner testified that Goode

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The mine's roof control plan provides, in part, that "operators of integral roof drills will not advance inby the last permanent support until the ATRS system is placed firmly against the roof." Ex. G-5.

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became "a little bit upset." Tr. 126. Minor testified that Goode "scream[ed]" at the crew and stated that "one man could do this job." Tr. 91. After the fallen material had been removed from the mesh, Goode climbed on top of the miner to position the planks, cribbing and mesh on the plank jacks. Whorton testified that this procedure was not unusual when installing planks and wire mesh. Tr. 171. As Goode was stacking this material on the plank jacks, some of it fell and hit Minor in the head. Tr. 80, 172. Minor then told Goode that "this was unsafe as hell." Tr. 113, 222. Minor testified that Goode replied that "so is walking down the street, but you've got to do it." Id. Goode testified that he became "a little disturbed" and he does not dispute that he had an argument with Minor. Tr. 222-23.

After Goode repositioned the planks and cribbing on the plank jacks, the miner was trammed forward and the ATRS jacks were raised. The crew then raised the plank jacks to press the mesh, cribbing and planks against the roof. Next, the crew raised the roof bolting augers and Goode made sure that the materials were positioned correctly so that the crew could drill through the planks and install the bolts. As soon as the crew started to drill, Goode left the area.

Whorton testified that, when the crew raised the ATRS jacks, as described above, the jacks on the left side of the miner did not press against the roof. Tr. 172-73. Because the roof fall had created a small cavity along the left side of the miner, two ATRS jacks were about 12 to 18 inches from the roof. Tr. 197. He stated that he told Conner that the ATRS jacks were not pressurized against the roof, but that he did not hear Conner's response because of the loud noise. He also testified that he saw Conner speak to Goode shortly thereafter but that he could not hear their conversation.

Minor testified that he had observed that the left rear jack was not pressurized against the roof. Tr. 94-95. He stated that he had not told Goode because he thought that Goode had seen it from his position on top of the miner. Tr. 87. The crew installed roof bolts through the planks despite the fact that the ATRS system was not fully pressurized. In a written statement made to the Department of Labor's Mine Safety and Health Administration ("MSHA") on December 8, 1990, Minor said that, under normal circumstances, he would not install roof bolts if he observed that the ATRS jacks were not in place, but that, "because of Goode's actions and the way he was screaming I was intimidated and afraid he was going [to] begin screaming again and lose control, so I did install the roof bolt." Ex. G-9 p. 3.

Conner testified that "maybe one" of the jacks did not press against the roof. Tr. 155. In his statement to MSHA dated December 14, 1990, he said that, if he had noticed that the jacks were not touching the roof, he would have told Goode. Ex. G-13 p. 4. He testified that he did not know whether Goode saw that the jacks were not fully supporting the roof because the planks and cribbing may have blocked his view of the jacks. Tr. 131, 143. Conner testified that Goode should have been able to determine whether the jacks were in contact with the roof by listening for the wire mesh to crunch against the roof when the jacks were fully pressurized. Tr. 143. Conner also testified that, shortly after he arrived, he asked Goode if there were any extensions

for the ATRS jacks on the section and that Goode replied that the crew would have to use what was available. Tr. 130.

Goode testified that he did not know that some of the ATRS jacks had not reached the roof. Tr. 223, 227. He testified that the planks and cribbing prevented him from seeing whether the jacks were supporting the roof. Tr. 227-28. He stated that, if anyone had told him that all of the jacks were not pressed against the roof, corrective measures would have been taken. Tr. 224-25, 227. He testified that built-in extensions on the ATRS jacks could have been raised or cribbing could have been used to support the roof. Tr. 223-25.

After receipt of a request for an inspection under section 103(g) of the Act, MSHA Inspector Lyle Tipton investigated this incident.(Footnote 4) Following his investigation, he issued a section 104(d)(2) order of withdrawal charging Consol with a violation of its roof control plan.(Footnote 5) Consol paid a civil penalty of \$1,300, without contest. The Secretary also proposed a civil penalty of \$1,000 against Goode, which is the subject of this proceeding.

Consol sought to discharge Minor and Conner for their violation of the roof control plan. There is no dispute that they knew that installing roof

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Section 103(g) provides, in pertinent part:

Whenever a representative of the miners ... has reasonable grounds to believe that a violation of this [Act] or a mandatory health or safety standard exists, ... such ... representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation....

30 U.S.C. 813(g).

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The condition or practice section of the order states, in pertinent part:

Based on the conclusion of a [103(g)] investigation, it has been determined that the approved roof control plan, (page 21 C, line 1, Basic ATRS cycle) was not being complied with on March 9, 1990, where the continuous mining machine was cutting an overcast utilizing integral roof bolting machines with an approved ATRS system which was not in contact with the mine roof. Interviews with the crew members and the Foreman indicated that the ATRS jacks were from 12 to 18 inches from the mine roof during the installation of 2 to 5 roof planks where the foreman assisted the crew in the bolting process.

Ex. G-4. The record in this case demonstrates, and the Secretary does not dispute, that only one set of planks was installed in violation of the roof control plan rather than two to five as alleged in the order.

bolts when the ATRS jacks were not supporting the roof violated the roof control plan. Minor and Conner invoked the grievance process under the mine's labor agreement and the matter was arbitrated. The arbitrator determined that Minor and Conner had violated the roof control plan, but he concluded that "compelling extenuating circumstances" mitigated against discharge. Ex. G-12 p. 14. Instead, he ordered the miners suspended, for about two weeks. He reached this conclusion after determining that the miners' failure to follow the roof control plan was caused in part by Goode's angry demeanor.

The judge found Goode liable under section 110(c) because he had reason to know that at least some of the jacks would protrude into the cavity created by the roof fall and might not press against the roof. 14 FMSHRC at 2111. The judge assessed a civil penalty of \$1,000.

II.

Disposition

Goode argues that the judge erred in adopting the labor arbitrator's holding that the crew's failure to notify Goode that the ATRS jacks were not supporting the roof was caused by Goode's demeanor. He maintains that the evidence shows that he did not have actual knowledge of or reason to know of the violation. Goode contends that the judge improperly concluded that Goode had reason to know of the violation as a result of his allegedly intimidating demeanor. He argues that the judge's decision ignores the fact that it was the crew's responsibility to ensure that the ATRS jacks were pressurized against the roof. Thus, Goode contends that the evidence presented by the Secretary is too tenuous to support a finding that he knowingly authorized, ordered or carried out the violation.

The Secretary argues that substantial evidence supports the judge's finding that Goode had reason to know of the violation because: (1) his unsafe conduct intimidated the crew, (2) he knew that the cavity caused by the roof fall created a reasonable likelihood that the ATRS jacks would not reach the roof, and (3) he knew that the wire mesh on the left side of the miner did not audibly crunch against the roof. The Secretary maintains that Goode, having voluntarily taken over control of the roof bolting crew, should have made it his business to ascertain for himself whether the ATRS jacks were supporting the roof. The Secretary argues that, by intimidating the crew into haste and silence, Goode created a safety risk that the roof bolters would install the roof bolts without the ATRS jacks supporting the roof.

The judge did not base his conclusion that Goode was liable under section 110(c) on a finding that Goode knew that the ATRS jacks were not supporting the roof. The judge found that the record did not make clear whether, from his crouched position on top of the miner, Goode could have seen that the ATRS jacks did not reach the roof. 14 FMSHRC at 2110-11. Further,

the judge found no evidence that anyone on Goode's crew told him that some of the jacks were not in place. Id. at 2110.(Footnote 6)

Instead, the judge concluded that Goode knowingly authorized, ordered or carried out the violation of the roof control plan because he had reason to know the plan was being violated. 14 FMSHRC at 2111. He found that Goode had a reasonable duty to listen for the wire mesh to crunch against the roof when the ATRS jacks were pressurized. Id. He also found that "Goode's unsafe conduct, combined with a reasonable likelihood that the ATRS jacks in the cavity would not reach the roof and the fact that the wire mesh on the left side did not audibly `crunch' against the roof, gave Goode reason to know that the roof control plan was being violated." Id. (footnote omitted). In this regard, the judge found that:

Ordinarily, [Goode] could expect the roof bolters to observe the ATRS jacks and to be sure that they were pressed against the roof before they advanced to raise and bolt the plank. However, by his demeanor in (1) screaming at employees and displaying intense anger at the crew's delay in installing the second double plank, and (2) angrily climbing up on the continuous miner to steady the plank while waiting for the bolters to raise the plank, drill the roof and bolt the plank, Goode created a safety risk that his crew would be intimidated and not tell him if the ATRS [jacks] did not reach the roof.

14 FMSHRC at 2111. Thus, the judge concluded that Goode had reason to know that the roof control plan was being violated.

The judge's conclusion that Goode knowingly authorized, ordered or carried out a violation of the roof control plan as a result of his intimidating demeanor is based on two key findings. These findings are not supported by substantial evidence. The judge found that "Goode was known for having a short temper" and that "Minor and other members of the crew ... had come to recognize Goode's displays of temper as permitting no response or explanation from a subordinate, evoking only silence and motivation to `keep out of his way.'" 14 FMSHRC at 2108. There is no record evidence to support the judge's finding that the crew had previously been subjected to intimidating displays of temper or that they had previously been afraid to respond to him.

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Although Whorton testified that he told Conner that the left ATRS jacks did not reach the roof and that Conner immediately spoke to Goode, Conner did not testify that he had a conversation with Whorton or that he told Goode about the left ATRS jacks. Indeed, in his statement to MSHA, Conner said that if he had noticed that the ATRS jacks were not reaching the mine roof, he would have told Goode and would not have installed the roof bolts. Ex. G-13 p. 4.

The judge relied on the decision in the labor arbitration in making these findings. The arbitrator determined that the grievants "committed a violation of the Ireland Mine Roof Control Plan and the Company Conduct Rules." Ex. G-12 p. 3. He found, however, that Goode spoke to the crew "in the angry tone and manner which all stated they had come to recognize as permitting no response or explanation, evoking only silence and 'keeping out of his way' as much as possible." Ex. G-12 p. 11. The arbitrator concluded that "a part, at least, of the responsibility for the events leading to the discipline of the Grievants lies with the actions and demeanor of Goode at the time." Ex. G-12 p. 15. As consequence, the arbitrator assessed a disciplinary suspension in lieu of discharge. Id.

The Commission has adopted the approach to arbitration findings developed by the Supreme Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). In adopting this approach, the Commission held that "according weight to the findings of arbitrators may aid the Commission's judges in finding facts." *Secretary o/b/o Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2795 (October 1980). The Commission stated:

As *Gardner-Denver* indicates, there are several factors that must be considered in determining the weight to be accorded to arbitral findings: the congruence of the statutory and contractual provisions; the degree of procedural fairness in the arbitral forum; the adequacy of the record; and the special competence of the particular arbitrator. Arbitral findings may be entitled to great weight if the arbitrator gave full consideration to the employee's statutory rights; the issue before the judge is solely one of fact; the issue was specifically addressed by the parties when the case was before the arbitrator; and the issue was decided by the arbitrator on the basis of an adequate record.

Id.

The judge did not evaluate the Pasula factors in adopting the arbitrator's findings. The issue before the arbitrator was whether Minor and Conner should be discharged for violating the roof control plan. He considered Goode's actions only because he determined that his conduct "suppl[ies] mitigating circumstances which provides some explanation for Grievants' failures, albeit not excuse." Ex. G-12 p. 15 (emphasis in original). Thus, the arbitrator did not give any consideration to Goode's procedural or statutory rights. Although Goode testified as a rebuttal witness on behalf of Consol at the arbitration hearing, Goode was not a party and did not have cross-examination rights. Moreover, a number of individuals, including the continuous miner operator on the crew and several safety committeemen and other miners who testified on behalf of the grievants before the arbitrator did not testify at the Commission hearing. Thus, Goode had no opportunity to cross-examine these witnesses. After consideration of the factors set forth in Pasula, we conclude that the judge erred in according

weight to the arbitration findings. Cf. David Hollis v. Consolidation Coal Co., 6 FMSHRC 21, 26-27 (January 1984).

The Secretary also argues that Goode was aware of the cavity and knew that, if the distance between the floor and the roof were great enough, the ATRS jacks would not reach the roof. Whorton, however, testified that, because the floor of the entry had been cut on a previous shift, the distance was greater than normally encountered when cutting overcasts. Tr. 194. He stated that the crew "had never actually been in a situation quite like that before" and that he would have thought that the jacks would reach the roof. Tr. 195. Indeed, Minor and Conner testified that they had never bolted without the ATRS jacks fully in place and did not know of any instances when anyone else had. Tr. 115-16, 154. Thus, the fact that a cavity was present in the roof does not establish that the ATRS jacks were unlikely to reach the roof or that Goode knowingly authorized, ordered or carried out a violation of the roof control plan. The Commission has held that supervisors are not permitted to "close their eyes to violations, and then assert lack of responsibility for those violations because of self-induced ignorance." Secretary v. Roy Glenn, 6 FMSHRC 1583, 1587 (July 1984). Knowledge that miners might perform a task in an unsafe manner, however, is "too contingent and hypothetical to be legally sufficient." Id. at 1588.

The Secretary also seeks to prove Goode's liability under section 110(c) based on his knowledge that the wire mesh on the left side of the mining machine did not audibly crunch against the roof. The judge determined that "Goode had a reasonable duty to listen for the crunch." 14 FMSHRC at 2111. Conner testified, however, that noise from the mining machine makes it difficult to hear, so that he must look up at the mesh to ensure that it is being pressed against the roof. Tr. 144-45. In addition, the four jacks may press against the roof at the same time so that distinct sounds may not be audible. Thus, Goode's failure to notice that the left jacks did not crunch against the roof cannot be the basis of section 110(c) liability.

III.

Conclusion

For the foregoing reasons, the judge's decision is reversed, and the section 110(c) civil penalty proceeding against Goode is dismissed.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner