

Safety Matters

Special Edition

June 2005

The OHS Minefield – Recent Developments

This Special Edition of *Safety Matters* provides an update on key decisions in the coal mining industry and summarises implications and observations arising from those developments.

It has been a very active time for safety in the mining industry. There have been a number of very important decisions and, for the first time in the history of the occupational health & safety (OHS) jurisdiction in New South Wales, there have been appeals to the Supreme Court: Court of Appeal from decisions of a Full Bench of the Industrial Relations Commission of New South Wales in Court Session (IRC). *Safety Matters* also provides an update on these appeals and their current status.

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To track recent developments concerning safety in the coal mining industry, please see past issues of *Safety Matters* at www.bdw.com under Publications:

- September 2002 *Safety Matters*: included a report on the NSW Government’s review of OHS legislation in the NSW coal mining industry (www.bdw.com/publications/safety/safety092002.pdf).
- August 2003 *Safety Matters*: included a summary of anticipated changes under the *Coal Mine Health & Safety Act 2002* and implications and tips for clients (www.bdw.com/publications/safety/safety082003.pdf).
- November 2004 *Safety Matters*: included a report on the Gretley Mine OHS Prosecution and implications for mining operations (www.bdw.com/publications/safety/safety11-2004.pdf). The decision on sentence in the *Gretley* case has now been handed down and an update on that decision is provided in this Special Edition.

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Powercoal – The Uncompromising Nature of Safety Obligations

The judgments of the Full Bench in the *Powercoal* decision (*Morrison v Powercoal Pty Ltd & Anor* [2004] NSWIRComm 297 and *Morrison v Powercoal Pty Ltd & Anor (No. 3)* [2005] NSWIRComm 61, handed down 18 November 2004 and 7 March 2005 respectively) highlight an uncompromising nature of the obligation on mining companies to ensure risks to health, safety and welfare of employees are eliminated or controlled.

Facts

Panel 304 of the Awaba Mine (Mine) was to be mined in a series of sequences. The first two sequences mined were sequences 4 and 5 (taken out of sequence with approval from DMR). This work had been substantially carried out on 15 and 16 July 1998, and on 17 July 1998 the team was to complete the last 2 of 17 lifts adjacent to the right hand stook (Stook X). During the mining of Stook X, the void created by the removal of two pillars forming sequences 4 and 5 was the subject of a major roof fall. The roof fall extended beyond the goaf and over to the point where a miner was operating the continuous miner. The miner was struck by falling rocks and suffered fatal injuries.

Two charges (referred to as the “assessment charge” and the “recording and notification charge”) were brought against Powercoal for offences under the 1983 *Occupational Health & Safety Act* (OHS Act). Charges were also brought against the Mine Manager under section 50 of the 1983 OHS Act.

The assessment charge

The prosecution alleged that Powercoal failed and/or omitted to provide or maintain an adequate system for assessing the safety of the roof.

Powercoal had relied on visual inspection and sounding with a metal bar to assess roof competency. However, the Full Bench considered that there had been very clear indications which pointed to the risk of roof fall. They included that:

- either non-conglomerate or inferior conglomerate roof had been detected in the relevant area of the Mine prior to the fall, as early as first workings;
- extra bolts had been inserted in the stub of 1 heading in the first workings, indicating poor roof conditions;
- there had been a roof fall (2 lifts wide and 400mm thick) on the previous shift and a rock fall (15cm thick and covering 2-3 metres);
- the roof in the goaf had been described as “dribbly” or “flaky” and contained water cracks; and
- a miner of great experience felt a distinct uneasiness on the date of the incident.

In light of the above indications, the Full Bench of the IRC held that the defendant had not ensured safety by providing or maintaining an adequate system for assessing the safety of the roof.

The recording and notification charge

The prosecution alleged that Powercoal failed and/or omitted to implement an adequate system of recording and notification to employees of roof problems and roof history.

The Full Bench found this failure was made out. This was because:

- W straps and extra bolting (being indicators of poor roof conditions) had been installed in the stub of 1 heading but were not recorded on any plans used for second workings; and



- reports by mine deputies recording indicia of poor roof had not been disseminated to all mine workers subsequently working in the relevant area.

Was a defence available?

Powercoal argued that it was not reasonably practicable to comply with the OHS Act as the risk of a roof fall was not reasonably foreseeable in circumstances where, in its opinion, no means were available which would have detected the weakness in the roof.

The Full Bench rejected this argument, finding that measures were available to Powercoal to identify the risk. The Full Bench commented that there was nothing impracticable in terms of money, time and trouble that would have prevented Powercoal ordering mining to cease in the area until an adequate assessment of the safety of the roof had been carried out. Accordingly, Powercoal was found guilty of both the assessment and the recording and notification charges.

Sentence

The Full Bench imposed penalties totalling \$200,000 on Powercoal.

The Full Bench did not enter a conviction against the mine manager and, under section 10 of the *Crimes (Sentencing Procedure) Act 1999*, dismissed the charge against him. The Full Bench took the following matters into account in relation to the Mine Manager: that he had only been in the position for a short period of time; he had carried out inspections; he had actively attended to safety activities at the Mine and he was not involved in critical planning stages where decisions were made about assessment procedures in relation to mining conditions.

Lessons

The judgment refers to various measures that could have been taken to manage the risk in this case. The measures point to a more systems based approach. The measures included:

- placing information relating to the inferior roof in 1 and 3 Headings on the working plans relating to the extraction process and to progressively update the plans as work progressed in the second workings;
- notifying employees on a regular and progressive basis of information relating to the state of the roof;
- conducting a comprehensive inspection and assessment of each area where work was carried out before second workings commenced;
- analysing the mine official's reports over more than one shift to determine whether a pattern of instability was emerging; and
- requiring that work cease in the event of indicia of unstable roof conditions being present.

Coal Operations – Where is the “Support” in the Rules?

The judgment of the Full Bench of the IRC in the Coal Operations decision (*Rodney Dale Morrison v Coal Operations Australia Limited* [2004] NSWIRComm 239, handed down 10 November 2004) is discussed below. The case highlights lessons regarding prescribing systems of work in relation to assessing roof stability and installing support.

Facts

On 5 and 6 July 1998, coal was being mined at the Wallarah Colliery from the Great Northern Seam. The crew was working in the face area sequence 131, Production Panel 3 in Production District 3 (Work Area), which was in close proximity to a fault zone. On 5 July 1998, the crew hit the fault. This was reported to the night shift Undermanager who arrived at about 2:00am. The nightshift Undermanager sounded the roof and said that it sounded competent as it had a good ringing sound. Approximately 1 hour after having sounded the roof, there was a roof fall.

Later in the shift, 2 operators took over the roof bolting process. There was a further roof fall. The operators tested the roof with a metal bar and considered it competent. After this second roof fall, the operators continued work and the steel drill became jammed in the roof. One of the operators checked the air hose in the roof bolter, and while he was doing so, another fall occurred, fatally burying him and pinning the other operator.

At the time, the work was being conducted in accordance with minimum support rules approved by the Department of Mineral Resources (DMR), which provided, amongst other things that operators were not to proceed beyond the last test hole or temporary support unless the roof had been tested by sounding with a metal bar and found secure. The minimum support rules also provided that the mining official may direct additional support be installed “when roof conditions deteriorate”.

Under the OHS Act, two charges (referred to as the “erection of roof support charge” and the “assessing roof stability charge”) were brought against Coal Operations Australia Limited (Coal Operations).

The Full Bench found these charges were proved and found Coal Operations guilty of breaches of the OHS Act.

The erection of roof support charge

The Prosecution alleged that Coal Operations’ system of work in relation to the erection of roof support required the use of hand held drilling and bolting equipment which placed employees underneath or immediately adjacent to the part of the roof being drilled or bolted. The Full Bench considered that this system of work undeniably exposed the employees to risks in using the roof bolter under unsupported roof.

Powercoal argued that the minimum support rules permitted the two workmen to be performing the work under an unsupported roof and the minimum support rules had been approved by DMR. On this basis, Powercoal argued that there could be no finding of guilt because section 33(2) of the OHS Act provides that a person is not guilty of an offence where the act of the person was permitted to be done. The Full Bench found that although section 33(2) of the OHS Act had to be strictly construed, there could be no finding of guilt based solely on this charge, given that the support rules had been approved by DMR and this approval therefore triggered the operation of section 33(2) of the OHS Act.

However the Prosecution also alleged that the system of work in relation to erection of roof support did not require the provision of temporary support immediately adjacent to the part of the roof being drilled or bolted. Given the indicia of an unstable roof existing at the time, the Full Bench upheld this allegation of the Prosecution and found that the failure to provide for temporary support was directly related to the risk of roof fall.

Further, the Prosecution alleged that the system of work in relation to the erection of roof support was not sufficiently prescriptive in relation to unstable roof conditions. The Full Bench found that the minimum support rules were not sufficiently prescriptive as to what constituted unstable roof conditions and as to what was to be done, in any precise way, when unstable roof conditions existed. The Full Bench found that the failure of Coal Operations to sufficiently prescribe the system of work to be followed in identifying and dealing with unstable roof conditions was causally related to a risk of roof fall.

The assessing roof stability charge

The Full Bench also found that the system of work in relation to assessing the stability of the roof structure was not sufficiently prescriptive in relation to the indicia of unstable roof conditions, and that it did not require that work cease below unsupported roof where indicia of unstable roof conditions was present.

Sentence

On 27 April 2005 the Full Bench handed down the sentencing decision in *Morrison v Coal Operations Australia Ltd (No. 2)* [2005] NSWIRComm 96.

The Full Bench found that whilst the defendant’s approach to occupational health and safety was one of an employer who accepted its responsibilities for workplace safety and acted upon them in a comprehensive and plain manner, the

offences were objectively serious and towards the upper middle of the penalty range available to be imposed.

Despite evidence that roof falls were, at most, "relatively rare", the Full Bench commented that the risk to safety that presented itself was "abundantly obvious" and that the likely outcome of the risk of roof fall when working underground is death and/or serious injury. Given the indicia of roof stability present at the time, the minimum support rules were not sufficiently prescriptive as to what constituted unstable roof conditions and what was to be done if such conditions existed. This lack of prescription as to assessment and support of a clearly unstable roof was held to have "undoubtedly allowed the workplace circumstances where the miners were working to deteriorate rapidly to one of imminent risk to safety in the form of a roof fall."

When determining sentence, the Full Bench took into account the need for general and specific deterrence. With no prior convictions under the OHS Act, penalties of \$150,000 were imposed in relation to each of the roof support charge and the assessing roof stability charge. Taking into account the principal of totality, these penalties were later reduced from \$300,000 to a total penalty of \$200,000.

Lessons

- **Systems of work in relation to assessing roof stability must take into account all indicia of unstable roof.**
- **Support rules should be as prescriptive as possible as to the circumstances in which temporary or additional support is to be installed and what sort of support should be installed to deal with the particular conditions being encountered.**
- **Avoid general and catch all terms such as to install support "when conditions deteriorate". So far as possible support rules should set out criteria which is instructive to operators as to what constitutes "deteriorating conditions" and what needs to be done in those circumstances.**
- **Operators need to be trained to identify risks of roof fall and what needs to be done to address those risks.**
- **Employers should ensure that there is an effective system of communication of indicia of unstable roof to all who need to know.**
- **Employers should consider implementing a system such that work cease in the event of unstable roof conditions until a further assessment can be made ensuring safety of continued operations.**



Gretley – Decision on Sentence

In the *Gretley* case two companies and three individuals were found guilty of breaches of the *Occupational Health and Safety Act 1983* (the OHS Act) arising out of an incident that occurred at the Gretley Mine in 1996 when a crew of mine workers holed into some flooded old workings and 4 miners were drowned. See the November 2004 *Safety Matters* for a summary of the case (at www.bdw.com/publications/safety/safety11-2004.pdf).

In the *Gretley* liability case the prosecution had alleged that there were three main charges as follows:

- A failure to plan and properly research the available sources and information on the location and extent of the old flooded Young Wallsend Colliery (YWC) workings (planning and research offences);
- A failure to put in place a safe system of work from September to November 1996 (the period when development work was carried out in the 50/51 panel where the inrush occurred) (the system of work offences);
- A failure to put in place a safe system of work on the actual night shift on which the inrush occurred, namely the night shift on 13 November 1996 (the night shift offences).

Penalties

On 11 March 2005 Justice Staunton handed down her sentencing judgment in the *Gretley* matter. None of the corporate or individual defendants had prior convictions. In summary, Justice Staunton imposed penalties of:

- \$730,000 on the operating company Newcastle Wallsend Coal Company (NWCC) (\$400,000 for the planning and research offences; \$250,000 for the system of work offences; and \$80,000 for the night shift offences);
- \$730,000 on NWCC's parent company, Oakbridge Pty Ltd (OPL) (\$400,000 for the planning and research offences; \$250,000 for the system of work offences; and \$80,000 for the night shift offences);

- \$102,000 on three individuals (\$30,000 on the first mine manager, \$42,000 on another mine manager who had replaced the first mine manager and \$30,000 on the mine surveyor).

The planning and research offences were ranked as being towards the high end of the range of penalties available to be imposed by the Court. Justice Staunton ranked the system of work and night shift offences as objectively less serious than the planning and research offences as the system of work and night shift offences followed on from the failure to plan and research.

Culpability of corporate defendants

The Court found that it was not sensibly possible to distinguish the role of NWCC as distinct from OPL in the overall management and day-to-day running of the Gretley mine. The culpability of both corporations was equal. When assessing the level of penalty, the Court took into account the need for general and specific deterrence.

However, general deterrence had already been achieved to an extent by the dramatic effects of the incident within the industry. Also, given that the corporate defendants, via the corporate structure of Xstrata, continued to operate in an industry "replete with risks to safety on an ongoing basis," the Court assessed penalty in order to achieve specific deterrence.

Lessons for individuals

- Mine managers and other individuals holding management, technical or operational positions at a mine should audit, review and test information provided to them to ensure that they are in possession of all available and accurate information relevant to issues of safety prior to authorising any course of action.

Culpability of the personal defendants

Justice Staunton found that the level of culpability for the mine managers was not as great as that of the corporate defendants. In the case of one mine manager, work had been undertaken prior to his employment at the mine, especially in relation to researching the location and extent of the YWC old workings. In the case of the other mine manager, reliance was placed on the opinion of the then mine surveyor and the assumed accuracy of his plans. Regardless of these mitigating factors, Justice Staunton held that the mine managers' culpability must be viewed in the context of them having ultimate statutory responsibility for safety as well as a responsibility to "facilitate a workplace free of risk to safety on behalf of the corporate defendants".

Justice Staunton found that the mine surveyor's culpability was not as great as that of the corporate defendant. The mine surveyor's culpability was assessed by reference to the steps taken or not taken to verify the accuracy of information relating to the YWC old workings. Justice Staunton found that the mine surveyor's fundamental obligation was to take every possible step to research and obtain all information to be confident of the location of the old workings of YWC and that this involved an independent, professional and critical appraisal of the information.



Recent Developments

Appeals to Supreme Court

Appeals have been recently lodged from the *Gretley, Powercoal and Coal Operations* decisions of the IRC to the New South Wales Court of Appeal (NSWCA). This is the first time that appeals of this nature have been filed from the IRC to the NSWCA. The Attorney General of New South Wales has indicated an intention to intervene in these appeals.

It is anticipated that the appeals will be heard in July 2005 in the NSWCA before the Chief Justice of New South Wales, the Honourable Justice Spigelman, President of the Court of Appeal, Justice Mason and Justice Handley.

In essence, the grounds relied upon in support of the appeals include:

- that the IRC lacked jurisdiction to hear and determine proceedings for an offence under the OHS Act because it is incapable of being granted a criminal jurisdiction (OHS prosecutions are criminal proceedings);

- that there should be a right of appeal or right to seek leave to appeal to the High Court of Australia from a decision of the IRC; and
- that the IRC erred in its construction and interpretation of the OHS Act.

If successful, these appeals could have major ramifications for all industry in NSW because they challenge the operation of the OHS Act and the jurisdiction of the IRC to deal with prosecutions under the OHS Act.

New South Wales Mine Safety Review – February 2005

In February 2005 the *New South Wales Mine Safety Review Report* (Review) was released to the Minister for Mineral Resources by the Hon. Neville Wran AC QC and Jan McClelland. The Review forms part of the process by the government aimed to achieve zero mine fatalities and serious injuries.

The Review considered a series of issues ranging from the progress of the

implementation of recommendations arising out of the Gretley report to the relationships between corporate stakeholders, the unions and the Department of Primary Industries (DPI) in the mining sector.

The Coal Mine Health and Safety Act 2002

As discussed in our August 2003 edition of *Safety Matters*, the *Coal Mine Health & Safety Act 2002* (CMHS Act) has been passed by Parliament and is due to commence operation once the Regulations supporting the CMHS Act are introduced. The CMHS Act intends to build on the current OHS Act to create additional obligations for colliery holders, operators, contractors and others in the coal mining industry.

To date, the Regulations under the CMHS Act have not been released, in part, due to an inability between the parties to reach a consensus on a number of topics including hours of work and contractor management.

The Review has recommended that the Regulations under the CMHS Act be introduced without delay. The Review also recommended that the Regulations for the *Mine Health and Safety Act 2004* be expedited. Once commenced, the Review recommends that the new Regulations be subject to further audit and review within two years.

Safety performance of contractors and fatigue management

Safety performance of contractors and fatigue management were identified as key areas of concern in mining especially given that the last 3 fatalities in the NSW mining industry involved contract workers.

The Review recommended that DPI closely monitor the implementation of proposed contractor management provisions under the new CMHS Act. In addition the Review recommended that the DPI take enforcement action commensurate with the gravity of any breach of such contractor provisions.

In relation to fatigue management, given the differences of opinion and approach among the stakeholders, the Review has recommended that an expert independent assessment be conducted in relation to hours of work and fatigue management in the mining industry.

Other key recommendations

In total, the Review makes 33 recommendations including the following:

- mine health issues to be regulated by the DPI rather than by separate agencies;
- the Mine Safety Advisory Council (MSAC) to be revitalised and strengthened including by providing an improved consultative structure, a new decision making process and a focus on collaboration with other committees;
- the formation of a Board of Inquiry to examine issues of the DPI

enforcement policy and the processes used to implement the policy;

- DPI inspectors to regularly check (via monitoring, audits, inspection, observation and consultation with the workforce) the implementation of companies' risk management plans and safety management systems in general;
- an examination by MSAC into the disconnect between some company management systems and plans and their implementation; and
- a strengthening of the DPI Inspectorate including a focus on funding, staffing and training.

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