

CCASE:
SOL (MSHA) V. EASTOVER MINING
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TTEXT:

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

Civil Penalty Proceeding

Docket No. BARB 79-198-P
A.O. No. 15-02002-03001 F

Darby No. 4 Mine

v.

EASTOVER MINING CO.,
RESPONDENT

DECISION

Pursuant to notice this matter came on for an evidentiary hearing on Thursday, May 31, 1979. After the receipt of testimony and documentary evidence from respondent's eyewitnesses with respect to the violations charged(FOOTNOTE 1) and the circumstances advanced in mitigation and exculpation the following disposition was effected:

1. With respect to the charge that a bolter helper was killed as a result of his failure to move safety jacks in the sequence required by the approved roof control plan and safe mining practice due to inadequate training and supervision, the parties, after consultation with the Presiding Judge, agreed to settle the 75.200 charge by payment of a penalty of \$1,000. Because of the time lapse, one and one/half years after the incident, it was impossible to determine what conditions existed immediately before the roof fall or the roof control plan that was being followed. It was clear beyond doubt, however, that Mr. Bennett was killed because of precipitous, unanticipated, and

unpredictable behavior that was unforeseeable and unpreventable by the operator. In this connection, the evidence showed that with respect to the particular conduct charged the operator had an adequate safety training program supported by disciplinary sanctions. It also showed that with an awareness that he was working under bad roof, Mr. Bennett, contrary to his training, instructions and common caution attempted to remove one or more safety jacks prior to installation of permanent support.

Under the circumstances, it was agreed that only slight negligence could fairly be imputed to the operator. See MESA v. NACCO Mining Co., VINC 76-99-P, decision of December 17, 1976 (Merlin, J.); MESA v. Mathies Mining Co., PITT 77-13-P, decision of April 12, 1977 (Merlin, J.); Island Creek Coal Company, (NORT 74-1007-P) decision of November 5, 1975, (Kennedy, J.), modified 6 IBMA 240 (1976). Here, as in the cases cited, the consequences of the violation, while extremely serious, resulted from circumstances of employee negligence not reasonably foreseeable or preventable by the operator that diminished the operator's responsibility under the doctrine of imputation to that of slight negligence. Compare National Realty and Construction Company, Inc. v. OSHRC, 489 F.2d 1257 at 1266-1267, n. 37 (D.C. Cir. 1973); MSHA v. Grundy Mining Co., Inc., BARB 78-168-P, decision of June 19, 1978 (Kennedy, J.).

2. With respect to the charge that the operator failed to take down or support loose roof in violation of 75.202, the evidence showed that neither Mr. Bennett nor any other miner responsible for the work place in question was aware of or had any reason to believe that a concealed slickensided horseback rock was resting on the safety jacks. The removal of the jack or jacks did, of course, result in a failure to support loose roof that was fatal to Mr. Bennett. In view, however, of the uncontradicted evidence that the roof had been sounded and found firm before the jacks were set; the fact that unintentional roof falls have never, standing alone, been considered violations of 75.202; the fact that the charge here was predicated on a claimed admission by the bolter, denied under oath at the hearing, that a jack had been set under an observed crack; and the fact that the conduct charged should fairly be considered subsumed under the 75.200 violation, the charge was ordered dismissed.

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The premises considered, it is ORDERED that the parties' settlement of the 75.200 violation be, and hereby is APPROVED and that respondent pay the agreed upon penalty of \$1,000 on or before Monday, June 11, 1979. It is FURTHER ORDERED that, subject to payment, the captioned petition be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1. Pursuant to Rule 611(a) of the Federal Rules of Evidence, the Presiding Judge reversed the order of proof to facilitate his understanding of the conditions charged. Under the authority of Rule 615 these witnesses were sequestered.