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SOL (MSHA) V. SHAMROCK COAL
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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 78-636-P A.O. No. 15-02502-02023I
v.	No. 18 Mine
SHAMROCK COAL COMPANY, RESPONDENT	

DECISION

Appearances: John H. O'Donnell, Attorney, Office of the Solicitor, U.S. Department of Labor, for Petitioner
Neville Smith, Attorney, Manchester, Kentucky, for Respondent

Before: Judge Littlefield

Introduction

This is a proceeding for assessment of a civil penalty against the Respondent and is governed by section 110(a) of the Federal Mine Safety and Health Act of 1977 (1977 Act), P.L. 95-164 (November 9, 1977), and section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969 (1969 Act), P.L. 91-173 (December 30, 1969). Section 110(a) provides as follows:

> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

Section 109(a)(1) provides as follows:

> The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of

> title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

Petition

On August 17, 1978, the Mine Safety and Health Administration (MSHA),(FOOTNOTE 1) through its attorney, filed a petition for assessment of a civil penalty charging one violation of the Act as follows:

Order No.	Date	30 CFR Standard
1 ARH	8/30/77	75.200

Answer

On September 14, 1978, Respondent, Shamrock Coal Company, filed an answer thereto, which denied the allegation and requested a hearing thereon.

Tribunal

A hearing was held on Wednesday, February 14, 1979, in Knoxville, Tennessee. Both MSHA and Shamrock Coal Company (Shamrock) were represented by counsel (Tr. 3). Posthearing briefs were filed by both parties.

Evidence

1. Stipulations

The following stipulations were entered:

(a) The proceeding is governed by the 1969 Act and 1977 Act (Tr. 5).

(b) The Judge has jurisdiction (Tr. 5).

(c) Shamrock is the operator of the No. 18 Mine and is subject to the Acts' jurisdiction (Tr. 5).

(d) The No. 18 Mine currently employs 262 people (Tr. 5-6).

(e) The total production of Shamrock for 1977 was 1.3 million tons. The total production for the controlling interested party, Mr. B. Ray Thompson, was 1.4 million tons in 1977 and projected to be 1.5 million tons in 1978 (Tr. 6).

(f) The ability of Respondent to stay in business will not be affected by any civil penalty assessed in this matter (Tr. 6).

(g) The inspectors who issued the notices and orders herein at issue were duly authorized representatives of the Secretary (DAR) (Tr. 6-7).

(h) Copies of the notices and orders which are the subject of the hearing were properly served on a representative of the operator (Tr. 7).

(i) The No. 18 Mine's previous history of violations is as follows: January 1, 1970, through April 8, 1974, 113 violations, $6,623 penalty paid; January 1, 1970, through May 1, 1977, 249 violations, $17,117 penalty paid (Tr. 7).

2. Testimony

A. Albert R. Helton

MSHA initiated its case, exclusive of stipulations, through the testimony of Mr. Helton, the duly authorized representative (DAR) who issued the 104(b) notice herein at issue (Tr. 10-11; Govt. Exh. No. 182). The inspector spent 10 weeks in Charleston, West Virginia, receiving specialized training in roof control, ventilation, permissibility and respirable dust (Tr. 12). He had been a DAR for about 7 years, exclusive of a 6-month period when he worked as a certified mine foreman (Tr. 10-13). He testified that he had inspected the No. 18 Mine at least 10 times (Tr. 15-16).

On August 30, 1977, he was investigating an accident at the mine (Tr. 16) as ordered by his supervisor, Mr. Charlie Samples (Tr. 16). When he arrived, he received an accident report from the foreman, Mr. John Henry Sizemore, and the safety director, Mr. Gordon Couch (Tr. 17-18; Govt. Exh. No. 182A). The report was signed by the foreman who was on the shift when the accident occurred, Mr. Charles Gilbert (Tr. 19-20). The injury report indicated that a miner had a fractured skull and a pelvis fracture (Tr. 20-21). The witness stated that the report says in the 19th paragraph that injury was caused by a rock fall from the top knocking the subject into a shuttle

car which was waiting to be loaded (Tr. 21-22; Govt. Exh. No. 182A). The witness did not actually view the accident (Tr. 22). He estimated that the side of the shuttle car was 3 feet high (Tr. 23).

Page No. 1 of the memorandum report given the inspector by Mr. Gordon Couch stated:

> Cecil W. Hollen, had been operating the mine and had just returned to the area of the right crosscut when a piece of drawrock, five feet wide, six feet long and six inches in thickness, fell, striking him in the lower part of the back, forcing him into the shuttle car. The injured man was freed from the fallen rock immediately and brought to the surface. He was transported to Red Bird Hospital and later to St. Joseph Hospital in Lexington, Kentucky.

(Tr. 24; Govt. Exh. No. 182A).

The inspector went on to identify Government Exhibit No. 182, the section 104(b) notice at issue herein (Tr. 24-25). The inspector issued it because his supervisor told him to issue it (Tr. 25).

By Mr. O'Donnell:

> Q. Did you personally see any -- or did you personally find any evidence of a violation of 30 CFR 75.200?
>
> A. Nothing other than what was in the report.

(Tr. 26). He further concluded that the fault cited in the report constituted a violation of the roof control plan (Tr. 27; Govt. Exh. Nos. 183-184). The provision allegedly violated states: "No person shall proceed into an area where the space between roof support or between rib or face and support exceeds five feet for any purpose other than to set temporary support" (Tr. 28; Govt. Exh. Nos. 183-184).

The injury date was August 26, 1977 (Tr. 29). He examined the area on August 29, 1977 (Tr. 30). On August 29, 1977, he saw roof bolts (Tr. 30). The last page of the report says there was no roof support (Tr. 31).

The inspector concluded that the victim was hurt by being under unsupported roof.

> THE WITNESS: Well, I figure he Õthe victimÊ got into the crosscut to avoid the shuttle car.

~612

> THE COURT: What led you to that conclusion of, "figure." I don't know what you mean by, "figured." How did you --
>
> THE WITNESS: There was shuttle cars ÕsicÊ coming up the entry, and he had to get out of the shuttle car's way.

(Tr. 32).

The entry was about 20 feet wide (Tr. 34). The crosscut was 17 feet 6 inches wide, the shuttle car was 8 or 10 feet wide (Tr. 35). The rock which fell was 5 feet by 6 feet wide, 0 to 6 inches thick (Tr. 36).

The inspector was unable to tell how far the victim went inby permanent support (Tr. 36-37). The witness described the sketch at issue (Tr. 41-43). The document did not show roof support (Tr. 43).

The condition described was considered serious because a man got injured (Tr. 44). The inspector terminated the notice because a safety meeting was held (Tr. 45; Govt. Exh. No. 185). Therein, the roof-control plan was explained (Tr. 46). The inspector believed that the operator showed good faith in abating the condition cited (Tr. 46-47).

The inspector became aware of the accident on August 29, not August 26 (Tr. 48). The report was given voluntarily by Shamrock (Tr. 49). The day after he made his visual investigation, he issued the notice (Tr. 50). He did not issue the violation on the 29th because he was under the impression that he could not issue one unless he saw one (Tr. 50). He did not know whether the shuttle car was moving when the rock fell (Tr. 50-51). The sketch on which the violation was based did not indicate that the shuttle car was moving when the rock fell (Tr. 52-53; Govt. Exh. No. 182A p. 3).

Item No. 4 recommended that bolts be installed as required (Tr. 56; Govt. Exh. No. 182A). The inspector understood the recommendation as being made to prevent similar accidents from happening (Tr. 56-57).

The sketch in Government Exhibit No. 182A indicates that the victim was not in the crosscut area (Tr. 57). The sketch does not attempt to show the location of roof bolting (Tr. 57). He had no reason to doubt that the main entry was roof bolted, No. 4 entry, I section (Tr. 57).

On redirect, he stated that he never gave a date to a notice other than the date actually served (Tr. 122).

B. Gordon Couch

Respondent initiated its case through the testimony of Gordon Couch, safety director for Shamrock (Tr. 59). It was stipulated that he was qualified and experienced as a foreman, for MSHA inspectors and as an inspector/supervisor (Tr. 60).

The first report of the injury was on August 27 (Tr. 60). It showed the injury occurring at 9:45 p.m. on August 26 (Tr. 60; Govt. Exh. No. 182A). When he arrived at the scene of he accident at 7 a.m. on August 27, no equipment or anything had been moved (Tr. 61-62).

The shuttle car had about 1,000 pounds of coal in the bucket (Tr. 62). It indicated to him that it had been unloading coal when it was shut down and thus stationary (Tr. 62-63). The sketch involved on page 4 of Government Exhibit No. 182A was his work (Tr. 64-65).

The roof control plan had been exceeded in that it called for bolts at 5-foot centers in a 20-foot entry and, in fact, they had been spaced 3 or 4 feet in an 18-foot entry (Tr. 66; Govt. Exh. Nos. 183, 184).

He testified that there was blood on the bumper of the shuttle car (Tr. 67). The blood was on the right bumper as observed looking toward the face of the No. 4 entry (Tr. 68).

From the row of roof bolts on the righthand side to the shuttle car was about 6 feet supported area (Tr. 69). He did not believe that Mr. Hollen was 6 feet tall (Tr. 70).

Mr. Couch stated that he spoke with Mr. Collett who was there at the time of the accident (Tr. 20). Mr. Hollen was in the process of trying to learn the continuous miner, having been there about 3 weeks (Tr. 70). The rock struck Mr. Hollen on the back and he was told that the rock was on his feet. His head had hit the shuttle car bumper (Tr. 70-71). His entire body would have been under supported roof (Tr. 71-72). The roof rock fell from the left corner of the crosscut up to the edge of the roof bolt which remained intact (Tr. 74).

The report at issue (Govt. Exh. No. 182A), written by Mr. Couch, was written to Orville Smith, to recommend what is to be done in case of a man's getting hurt or killed (Tr. 77). With respect to suggested Item No. 3, he was trying to show the importance of 6 inches as they were 6 inches off, being 2 feet 6 inches from the right rib (Tr. 79). He concluded that the roof control plan had no bearing on this accident (Tr. 80).

The witness had an opportunity to interview the victim (Tr. 81). Mr. Hollen, the victim, stated that he was standing right around a roof bolt (Tr. 82). Mr. Hollen is still employed by Shamrock, but is laying carpet because his wife did not want him to go back into the mine (Tr. 83).

When the inspector came into the mine on August 29, the entry had been advanced nearly another full crosscut (Tr. 84-85). There was no known legal requirement to give the report to MSHA (Tr. 85).

On cross-examination, Mr. Couch testified that he knew everything was the same because the foreman, Mr. Gilbert, told him so (Tr. 86). The rock was moved aside after the accident and before Mr. Couch's investigation (Tr. 86-87). He conceded that the roof in the area was drummy and that was probably the reason that the bolts were placed more closely together (Tr. 87-88).

The witness testified that the rock striking Mr. Hollen's back must have forced his head into the shuttle car (Tr. 90).

The roof control plan required the bolts to be 2 feet from the rib when, in fact, the row of bolts was 2 feet 6 inches from the rib (Tr. 93). That was a violation of the plan (Tr. 93).

Based upon his knowledge and report, he concluded that Mr. Hollen was in a place where he was entitled to be according to law and regulation (Tr. 101). He did not actually know whether the shuttle car had been moved (Tr. 103). The sketch showed the rock about 2 feet further into the crosscut than it actually had been when it fell (Tr. 109).

His memory of the time sequence is that he called the accident in on Monday, inspectors arrived on Tuesday, and the notice was brought back on Wednesday (Tr. 114). Thus, though the notice was dated the 30th, it was received on the 31st (Tr. 114).

The rock cavity extended into the area of permissibility (Tr. 120).

Issues Presented

1. Whether the conditions cited in Notice No. 1 ARH, August 30, 1977, constituted a violation of 30 CFR 75.200?

2. What is the appropriate penalty to be imposed under the Act if a violation is established?

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Discussion

30 CFR 75.200 states:

75.200 Roof control programs and plans.

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

The notice charges:

> Evidence indicated the approved roof control plan was not being followed in the crosscut turned right off No. 4 entry on I-section (009) in that the mining machine operator's helper was injured Friday, August 26, 1977, at 9:45 p.m. by a roof fall when he advanced inby permanent supports for reasons other than to install temporary support.

(Govt. Exh. No. 182).

The gravamen of this alleged offense is proof that Mr. Cecil W. Hollen advanced inby permanent support for an impermissible reason (Tr. 26, 28).

Demonstration of other violations of 30 CFR 75.200 would increase the overall degree of Respondent's culpability, but would not stand by themselves as violations here because they were not charged in the issued notice (Tr. 28; Govt. Exh. No. 182).

The notice here is based on a report signed by Mr. Charles Gilbert and drafted by Mr. Gordon Couch (Tr. 19-20, 50, 52-53; 64-65; Govt. Exh. No. 182A). The inspector saw nothing to indicate a violation other than what was in the report (Tr. 26). The alleged violation is contained in the last paragraph of the report which says there was no roof support (Tr. 37). The inspector did not see any violation (Tr. 50).

In a nontechnical sense, MSHA has not introduced the "best evidence" of the occurrence of a violation. It has not shown why, at a minimum, it did not call the only eyewitness, the victim, Mr. Hollen, to at least corroborate the alleged evidence of a violation found in the report (Govt. Exh. No. 182A). According to Mr. Couch, Mr. Hollen is still employed by Respondent (Tr. 83) and thus it would appear that he could be found. Therefore, as the violation is based on evidence which is not firsthand, its reliability is suspect.

Further, the report, according to its author, was intended to be a recommendation to Mr. Orville Smith as to what was to be done to avoid future accidents of this nature (Tr. 77). Using such a report as grounds for issuing a violation would appear to discourage honest appraisal of what should be done to provide further protection for the miner. Such a discouragement would fundamentally contradict the primary purpose of the Act, (section 2(d)), and would work against the operator's responsibility to prevent unsafe practices. (Section 2(e)).

For the above reasons, the report (Govt. Exh. No. 182A) should be construed in light of its intended purpose and not as an admission by a party opponent, to be construed against the admitting party.

The inspector's theory was that Mr. Hollen went into the crosscut to avoid an oncoming shuttle car (Tr. 32). He was not even able to speculate how far Mr. Hollen was supposed to have gone inby permanent support (Tr. 36-37).

Direct contradiction of this speculation is found in the sketch which showed Mr. Hollen was not in the crosscut area (Tr. 57; Govt. Exh. 182A). Mr. Couch observed that the shuttle car had about 1,000 pounds of coal in the bucket which led him to conclude that the shuttle car was unloading coal and thus stationary (Tr. 62-63). Further, as Mr. Hollen had a cut on his forehead and a fractured skull, and as there was blood on the right bumper of the shuttle car (Tr. 68), it is reasonable to conclude that Mr. Hollen hit his head on the shuttle car (Tr. 21-22). As Mr. Hollen is less than 6 feet tall (Tr. 70), the rock hit his back (Tr. 24), knocked him into the shuttle car (Tr. 21-22), and landed on his feet (Tr. 70-71), he could not have been in the crosscut at all because the shuttle car was 6 feet from a row of entry roof bolts on the righthand side of the shuttle car which was supported area (Tr. 69). Therefore,

Mr. Hollen's entire body was under supported roof (Tr. 71-72). Mr. Couch also testified that Mr. Hollen stated during an interview that he was standing right around a roof bolt (Tr. 82).

It is possible that the fact that the sketch made after the fall showed the rock was about 2 feet further into the crosscut (Tr. 109; Govt. Exh. No. 182A), misled the inspector in his conclusions related to locating Mr. Hollen. I therefore conclude that the inspector's theory, that Mr. Hollen was located inby permanent support in the crosscut, is untenable.

There is the admitted violation of the roof control plan in that the roof bolt line next to the rib was 6 inches out of line-being 2 feet 6 inches rather than 2 feet from the rib (Tr. 79). However, this specification is not spelled out in the charge.

Apparently, this fact played no part in the inspector's conclusion as to the cause of the accident. There was no testimony by the inspector that he saw such noncompliance (Tr. 50). Further, the inspector, when he visually investigated the accident scene, would have seen this roof bolt line (Tr. 30) because it would not have moved. Nor could the inspector have relied on the sketch contained in the exhibit as it did not reveal the specific locations of the roof bolts (Tr. 57; Govt. Exh. No. 182A). Therefore, the inspector could not have viewed this accident as being caused by a 6-inch deviation from the plan. This conclusion, by the inspector, is also supported by the expert (Tr. 60) conclusion of Mr. Couch who found the violation (Tr. 79, 93) and stated specifically that it had no bearing on the accident (Tr. 80).

As there is no affinity between the 6-inch bolt deviation and the accident which caused Mr. Hollen's injury, Notice No. 1 ARH, August 30, 1977, cannot be fairly construed as charging the violation. I therefore conclude that MSHA has failed to establish a violation of 30 CFR 75.200 in Notice No. 1 ARH, August 30, 1977, as alleged in that citation.

Findings of Fact

Upon consideration of the record as a whole, I find:

1. The Judge has jurisdiction over the subject matter and the parties in this proceeding.

2. An unintentional roof fall occurred on August 26, 1977, at the No. 4 entry of the I section of the No. 18 Mine (Govt. Exh. No. 182).

3. As a result of the fall, Mr. Cecil W. Hollen was injured (Tr. 24; Govt. Exh. No. 182).

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4. The inspector did not actually see any violations of 30 CFR 75.200 during his investigation of August 29, 1977 (Tr. 26; 30; Govt. Exh. No. 182).

5. Mr. Hollen was not in the crosscut when he was injured (Tr. 57, 62-63, 69, 82; Govt. Exh. No. 182A).

6. Mr. Hollen was under "supported" roof when he was injured (Tr. 71-72, 82).

7. The evidence fails to establish the fact of violation of 30 CFR 75.200 as alleged in 1 ARH, August 30, 1977.

Conclusions of Law

1. This case arises under the provisions of section 110(a) of the Federal Mine Safety and Health Act of 1977, P.L. 95-164 (November 9, 1977), and section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969, P.L. 91-173 (December 30, 1969).

2. The procedural provisions of the above-cited statute have been complied with.

3. Respondent has not violated the above-cited statute as charged in the notice.

ORDER

WHEREFORE IT IS ORDERED that the petition for civil penalty filed on August 17, 1978, be and hereby is, DISMISSED.

Malcolm P. Littlefield
Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE

1 Successor-in-interest to the Mining Enforcement and Safety Administration (MESA).