

CCASE:  
SOL (MSHA) V. HUBERT WILLIAMS  
DDATE:  
19790831  
TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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

Civil Penalty Proceeding

Docket No. VINC 78-102-P  
No. 21 Mine

v.

Old Ben Coal Company

HUBERT WILLIAMS  
(SECTION FOREMAN),  
RESPONDENT

DECISION

Appearances: J. Phillip Smith, Esq., Office of the Solicitor, U.S.  
Department of Labor, for Petitioner;  
Charles Widman, Esq., Washington, D.C., for  
Respondent.

Before: Judge Charles C. Moore Jr.

The above civil penalty proceeding was brought against a section foreman of the No. 21 Coal Mine in Sesser, Franklin County, Illinois, operated by Old Ben Coal Company, pursuant to section 109(c) (FOOTNOTE 1) of the Federal Coal Mine Health and Safety Act of 1969. The Government seeks to impose a civil penalty against Respondent who is charged with knowingly authorizing, ordering, or carrying out a violation of the roof control plan 30 CFR 75.200. The alleged violation occurred on November 21, 1977, and a hearing was held on March 6 and 7, 1979, in Evansville, Indiana.

The relevant sections of the roof control plan which MESA alleges that Respondent failed to comply with state: (Gov. Exh. 6, Part I p. 5 #4, Part II p. 9 #3, Tr. Vol. I 126, 129-131).

In the event that less than eight (8) inches of top coal is encountered or adverse roof conditions are evident, and the mining machine operator is beyond artificial support, mining in such working place will be stopped, the continuous mining machine withdrawn, and the roof adequately supported before further mining is conducted

in that area. When the roof rock is inadvertently exposed, but the roof is otherwise sound, the miner head may be dropped down and a brow of top coal no greater than six (6) feet deep may be established prior to withdrawal. \* \* \* (FOOTNOTE 2)

In order to prove a violation of section 109(c) of the 1969 Act, the Petitioner must establish that (a) the corporate operator violated 30 CFR 75.200 (b) Respondent was the agent of the corporate operator (c) Respondent knowingly authorized, ordered, or carried out these violation. Everett L. Pritt, 8 IBMA 216 (1977).

The term "agent" as defined under section 3(e) of the 1969 Act, 30 U.S.C. 802 (1970), is "any person charged with responsibility for the operation of all or part of a coal mine or the supervision of the miners in a coal mine." The evidence clearly establishes that the respondent was the section foreman, who was in charge of the relevant area of the mine where the roof fall occurred (Tr. Vol. I 95-96, Vol. II 140-141). I therefore find that the Respondent, as section foreman, is an agent of the corporate operator. MESA v. Daniel Hensler, Docket No. VINC 75-374-P (March 31, 1976).

The contentions of MSHA are, in my opinion, well summarized in the following portion of GX-11.

On the day of the accident, November 21, 1977, Mr. Terry Gossett, continuous miner operator was operating the continuous mining machine in the 45 degree crosscut between rooms 27 and 28 and during this time roof and rib rock became exposed. Mr. Terry Gossett, continuous miner operator stated that he showed the foreman Mr. Hubert Williams, the exposed rock and ask him if he wanted to back out and bolt and Williams said no, to drive it all the way up. Mr. Gossett stated that he drove the place into where the unsupported rock was over his head and then Williams, the foreman got on the machine and drove the place the rest of the way. To summarize the event, the section foreman knew about the exposed rock top and ordered the miner operator, Mr. Terry Gossett, to drive the place up and when the miner operator, did not do so, Hubert Williams, foreman ran the machine himself and mined 25 feet past exposed rock top.

Hubert Williams, foreman then backed the machine out and ordered Terry Gossett to take a couple of buggies off the corner before making the move to start another 45 degree crosscut. As Terry Gossett was taking the second buggy off the corner, Hubert Williams, foreman was standing nearby observing when the roof fell in.

Based on the information outlined above, Hubert Williams, section foreman knowingly authorized, ordered and carried out a violation of a mandatory safety standard.

Under Section 109(c) of the Coal Mine Health and Safety Act of 1969 and Section 110(c) of the Federal Mine Safety and Health Act of 1977, a section foreman is considered to be an agent of the operator, and is subject to be assessed a civil. I recommend that Hubert Williams, Section Foreman, Old Ben Coal Company, Mine No. 21, be assessed a civil penalty of \$2,000.00. The corporate operator has been assessed a civil penalty of \$10,000.00 for this same violation.

Respondent rigorously argues that the testimony as presented by MESA failed to establish that roof rock was exposed at the site of the alleged violation and Respondent had knowledge of such exposed rock. Instead, the Respondent contends that MESA has merely established that there was rock in the arch or rib rather than the roof; thus, this occurrence would not be violation of the above-stated roof control plan.

I am of the opinion that the evidence clearly establishes, not only the presence of exposed roof rock at the time of the violation, but also that Respondent had knowledge that such roof rock existed.

MESA introduced five witnesses who testified to the presence of the roof rock. Two of the witnesses had observed the roof immediately before the accident. Terry Gossett, the continuous miner operator, testified that not only did he observe exposed roof rock, which extended for approximately 15 feet (Tr. Vol. I 256), but he also had reported the presence of the roof rock to the Respondent (Tr. Vol. I 206, 207, 212). Mr. Gossett testified that upon being informed of the exposed roof rock, the Respondent instructed him to drive his machine up the short 45 without bolting the area (Tr. Vol. I, 207). After driving the machine about 20 feet, Mr. Gossett refused to drive the machine under the exposed rock (Tr. Vol. I, 223) and at this point Mr. Williams got on the machine and drove it the rest of the way up the short 45.

Gary Ritchason, a bottom laborer, had just left for dinner at the time of the roof fall. He testified that the roof rock was exposed prior to the accident and that Respondent had observed the roof rock

~1295

Tr. Vol. 1, 249-251). In fact, he had heard Mr. Gossett report to the Respondent that there was exposed roof rock (Tr. Vol 1, 251). Mr. Ritchason specifically indentified the rock he was referring to as being located in the rib and on the roof (Tr. Vol. I, 250).

Maurice Messersmith, a roof control specialist for MESA, examined rooms 27 and 28 of the No. 21 Mine 1-1/2 hours after the roof fall (Tr. Vol. II, 29). He testified that the roof and rib rock were readily visible at this time (Tr. Vol. II, 28-30).

A second MESA roof control specialist, William Mitchell, examined the relevant section on the day following the accident and he indicated that the exposed rock extended down into the rib and also across the roof (Tr. Vol. I, Tr. 71, 72, 78). He was of the opinion that the exposed rock should have been apparent to anyone working in the section (Tr. Vol. I, 146).

The president of the local union, Terry Jones, also took part in the initial investigation, approximately 1-1/2 hours after the roof fall. He stated that the exposed rock was located in the roof and the rib (Tr. Vol. II, 85); the exposed rock should have been apparent to the section foreman (Tr. Vol. II, 88). As Respondent points out in his brief, the two MESA inspectors and the president of the local union could only give "after the fact" testimony in that their examination of the roof occurred after the fall. It was thus possible that the roof rock which they saw became exposed because of the fall (Tr. Vol. II, 56).

The Respondent denied that he observed any rock on the roof or that his conversation with Mr. Gossett had brought to his attention the exposed roof rock (Tr. Vol. II, 144, 147, 149, 150, 158, 169). Respondent, however, did recall taking over for Mr. Gossett and driving up the short 45, but he could not remember his reason for taking such action (Tr. Vol. II, 70) or the contents of his conversation with Mr. Gossett.

Upon evaluating the testimony of the Governments' two eyewitness in conjunction with the testimony of the three "after the fact" witnesses, I find that the evidence clearly and convincingly establishes that roof rock, as well as rib rock, was exposed in the relevant section of the No. 21 Mine prior to the roof fall. Furthermore, I find that Respondent was aware of the exposed roof rock at the time he permitted mining activities to proceed for a distance greater than 6 feet in violation of the roof-control plan. It follows that Respondent's principal, the corporate operator, was also guilty of violating the roof control plan.

As to the gravity of the violation, Respondent argues that the rock fall did not occur during the time of the alleged violation (Rx 1, Resp. Brief p. 14) and the rock fall occurred in a different area than the alleged violation (RX 1 and 2, Tr. 14). Respondent

bases these arguments on a motion to approve settlement and a decision approving settlement in a civil penalty proceeding in which Old Ben, the corporate operator, was charged with the same roof control plan violation of November 21, 1977. He argues that the decision contains official findings of the Commission.

A decision approving settlement, under our proceedings, is made without the benefit of a formal hearing. There is no opportunity to present expert and non-expert witnesses; or to cross examine anyone on the accuracy and the validity of the documents introduced for purposes of having the settlement agreement approved. In this case, where a hearing has been held on the question of violation, due process dictates, that the findings of fact shall be based on the record as established at the hearing rather than deferring to the findings of a prior settlement decision. I therefore hold that the factual findings in a decision to approve settlement have no binding or collateral estoppel effects on a subsequent hearing involving the same violation with a different defendant.

Respondent is nevertheless technically correct that the rock fall did not occur during the exact time of the alleged violation. The area of the exposed roof rock, the short 45, had already been driven up for approximately 50 feet and at the time of the fall the corner between the short 45 degree crosscut and Room 28 was being cut. Mr. Gossett estimated that approximately 10 minutes had elapsed between driving the short 45 all the way up 50 feet and when the said corner was cut (Tr. Vol I 208).

Respondent's argument that the roof fall occurred in a different area than the alleged violation is clearly refuted by the testimony and exhibits. The exposed roof rock was located near the left-hand side of the rib in the short 45 (Vol. I, 74, Vol II 84). Government Exhibits 4 and 5 depict the area of the roof fall as including part of the area near the lefthand side of the rib of the short 45 where the exposed roof rock was located. I thus find that part of the roof fall occurred where there was exposed roof rock and that mining had proceeded beyond 6 feet in this area.

The testimony from five Government witnesses who had examined the roof fall area indicates that had the roof been properly bolted, the roof fall would not have occurred (Tr. Vol. I, 213,258, Vol. II, 33, 102). Inspector Mitchell stated: (Tr. Vol. I, 73-74).

A. (Mr. Mitchell) All right sir. When that rock was--when that rock was exposed, right there on the corner, the left-hand corner leading into the short 45 degree crosscut, that place shouldn't have been driven over six feet. The continuous miner pulled out, the roof bolting machine brought in, and that area permanently supported with roof bolts before mining was continued on up to the face of this short 45.



of the opinion that it does not matter whether the miners were engaged in advancing or retreating since the quoted part applies to both types of mining.