

CCASE:  
SOL (MSHA) V. BETHLEHEM MINES  
DDATE:  
19800530  
TTEXT:



### III. Statement of the Issues

1. Whether the conditions or practices described in the citation violated mandatory health or safety standards, and, if so, the amount of the penalty which should be assessed based on the criteria set forth in section 110(i) of the Act.

2. Whether negligence on the part of Respondent was involved in the alleged violation, and, if so, the degree thereof.

3. Whether a causal relationship exists between (a) any violation found to have occurred or (b) any act of negligence attributable to Respondent found to have occurred and the roof fall which resulted in the death of Ken Vivis, a roof bolter who was crushed to death when the roof fell.

### IV. Findings of Fact with Respect to the Three General Criteria

The factors of (1) size of business, (2) history of previous violations, and (3) effect on Respondent's ability to continue in business lend themselves to preliminary findings of fact.

#### 1. Size of Business

The parties stipulated that the Nancy Glo No. 31 Mine produces 216,861 tons of coal per year and that Bethlehem Mine's total annual production of coal is in excess of 8 million tons. The parties stipulated, and I find that this is a large coal mine operator.

#### 2. History of Previous Violations

The computerized history of previous violations introduced at the hearing indicates that Respondent, during the 2-year period preceding the commission of the alleged violation, committed approximately 268 violations. I find that this is not an unusual number of prior violations for a large operator and that this statutory factor affords no basis for either increasing or decreasing the amount of any appropriate penalty should a violation be found to have been established.

#### 3. Effect on the Operator's Ability to Continue in Business

The parties stipulated, and I find, that any penalty imposed in this proceeding will not adversely affect Respondent's ability to continue in business (Tr. 5).

### V. Findings of Fact with Respect to Liability And The Three Specific Criteria

The Respondent acted in good faith in attempting to achieve rapid abatement of the conditions resulting in the issuance of the order of withdrawal involved herein. Thus, the occurrence of the violation charged and the

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factors of negligence and seriousness remain for consideration and are the focus of the findings which follow:

1. A roof-fall accident occurred at Bethlehem Mines Corporation's Nanty Glo No. 31 Mine at about 7 p.m. on Thursday, June 22, 1978, in the No. 22 room between the Nos. 3 and 4 entries of the 4 Right, off the 5 Cross, in the 0-21 section which resulted in the death of Kenneth R. Vivis, a roof-bolter operator.

2. MSHA was notified shortly thereafter and an investigation began that evening (June 22, 1978).

3. The area of the mine involved in the accident was known by the operator to have bad roof along the right rib.

4. Vivis was informed of the condition of the roof.

5. Vivis had 39 months' mining experience, 9 months of which he was a roof-bolter operator.

6. Vivis knocked out two temporary roof supports immediately prior to the fatal accident.

7. The approved roof-control plan for the No. 22 room required at least 12 posts.

8. There were less than 12 set at the time of the accident.

9. The circumstances of the accident are as follows:

On Thursday, June 22, 1978, at approximately 4 p.m., the 4 Right off 5 Cross, 0-21 section crew, under the supervision of William J. Zamboni, lead foreman, entered the mine via portal bus and traveled to the working section arriving there at approximately 4:35 p.m. Zamboni made an examination of the working places after which he instructed Thomas R. Yahner, continuous-miner operator, to complete the mining in the No. 22 room. The room was being developed by splitting the pillars perpendicular to the section entries. A cut-through had been made between the Nos. 3 and 4 entries on the previous shift, but additional mining was required to develop the room to its normal width. Zamboni's instructions to Yahner were to remove the temporary supports from the face area, finish mining and to clean up the place. After removing the supports, Yahner observed the roof was broken along the right rib and reported the condition to Zamboni.

Zamboni left the No. 22 room and traveled down the No. 3 entry. The roof-bolting machine was parked in the first open crosscut outby the entrance to the No. 22 room. Kenneth R. Vivis, roof-bolter operator, and Diane M. Costlow, roof-bolter helper, were waiting to move the machine into the No. 22 room upon withdrawal of the continuous miner. Zamboni told Vivis

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and Costlow to install line canvas in the No. 21 room while they were waiting. He also told them to move into the No. 22 room upon completion of mining and to install the temporary supports before beginning the bolting cycle and to be aware of the bad roof on the right side of the place. Zamboni told Vivis the roof was drummy on the right side and to "timber it heavy."

Shortly thereafter, mining was completed in the No. 22 room, and the continuous miner was trammed to the belt feeder in the No. 3 entry for servicing. Zamboni instructed Rick West on how to hang the cable of the continuous miner as the miner backed up over to No. 20 room.

Vivis and Costlow moved the roof-bolting machine into the No. 22 room. Costlow began to install temporary supports while Vivis prepared for roof bolting. Then, both Vivis and Costlow came out into the No. 3 entry for additional supplies. Zamboni asked Vivis if the place was timbered and he replied that it was. (FOOTNOTE 1) Vivis and Costlow returned to the No. 22 room. Costlow began putting in more temporary supports while Vivis drilled a test hole. After Costlow had put in a grand total of four or five temporary props, she informed Vivis that she was going for more props. (FOOTNOTE 2) Vivis already had started the roof-bolting machine and had starting bolting, despite the fact that Costlow had not yet finished putting up the temporary supports. Costlow went to an area where she thought she would find props but finding none, she returned to room No. 22.

As Costlow returned, she saw Vivis accidentally knock out two temporary supports while he was maneuvering the roof bolter. Costlow heard a roar and yelled a warning to Vivis, but the rock fell on him before he could react. The rock fell immediately upon dislodgement of the temporary props.

Costlow deenergized the roof bolter and immediately summoned help from the other crew members. The rock was raised and Vivis was removed from under it and placed on a stretcher. Mouth-to-mouth resuscitation and CPR were started and continued as Vivis was transported to the shaft bottom where he was pronounced dead by Doctor Magley.

10. Zamboni, who was foreman at the time of the accident, gave Vivis a direct order to "timber it heavy" (Tr. 243), meaning to put in more than the normally required for the area involved, 12 props. Vivis ignored Zamboni's order and unnecessarily exposed himself to a known hazardous roof condition.

11. Zamboni properly designated Vivis and Costlow to install temporary supports since the roof-control plan did not bar the roof-bolter crew from putting in the required supports, and the miner crew does not necessarily have to install temporary supports.

12. Although the general consensus was that Vivis was a safe worker, Rick West who worked with Vivis on occasion, said that Vivis claimed the day before that the roof was good and the temporary supports were not necessary. Even so, some temporary supports were there. Along these lines, I find that there is no previous indication that Vivis was an unsafe worker or that management had reasons to believe he was careless.

13. It is not certain exactly how many props were set in place or how many more than the minimum of 12 should have been posted. I find that less than 12 were installed. This is at least a technical violation.

14. Even though a violation of the law existed there was no causal relationship between the alleged violation and the fatal accident. The proximate cause of the accident was Vivis' knocking out the posts which supported the roof which fell. Vivis was a well trained employee. He knew his job. He was satisfactorily supervised. He was capable of carrying out his roof-bolting assignment. He was a careful and trusted employee who apparently had a momentary lapse in observation or attention. These circumstances, when carefully examined in the record, do not fairly indicate blame on the part of any other persons or Respondent's management.

15. I find that there were valid reasons for having the timber removed in No. 22 room by the miner crew. There was no way the roof bolter could get into the area unless the place was cleaned up and leveled. Furthermore, removal of the timbers was not in violation of the roof-control plan. Under the circumstances removal of the props was a proper exercise of discretion.

16. Management's training program for roof control is effective and was not a causal factor in the accident. There was extensive testimony concerning Respondent's supervisory safety training program. Records were kept to check and confirm that proper training was received by each employee. Employees making mistakes were both reinstructed and reobserved by management to assure that their jobs were done safely in the future. Furthermore, I find Zamboni's qualifications, training and certification to be of a high quality. He received appropriate instruction in two separate training programs of 4 weeks each, he is qualified as an instructor, and his past performance as an instructor has been reviewed without incident. Costlow testified about the type of training which she received as a bolter helper (Tr. 35), which I find to be satisfactory. Similarly, Vivis had been satisfactorily instructed in safety methods.

17. I find no merit to the contention that Respondent was negligent because Zamboni did not return to No. 22 room prior to when the roof-bolting operation began. Vivis was an experienced employee who knew his job and could be trusted. Also, Zamboni had instructed Costlow on the roof-bolter helper job and he expected Vivis to help her put up the temporary posts. Zamboni's decision in staying with West, an inexperienced continuous miner

helper, was a proper exercise of discretion. Furthermore, Zamboni testified that Vivis told him the place was timbered (Tr. 285). There was no reason for Zamboni to believe that Vivis was not telling him the truth. I find that the trust Zamboni put to Vivis' assertion was without fault.

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In addition, Inspector Chappell testified that there was no requirement in the roof-control plan for Zamboni to check on Vivis prior to roof-bolting operations (Tr. 169). Further, Zamboni testified that he planned to check on Vivis during his normal rounds (Tr. 250).

#### Gravity

In weighing the gravity of the violation,, it is important to determine if there was a causal relationship between the violation and the death of Vivis. At the hearing, the only eyewitness to the accident, Costlow, testified that Vivis had "knocked two (props) out, and it came down. That is it" (Tr. 29).(FOOTNOTE 3) The direct, proximate cause of the roof fall was the act of Vivis in knocking down two of the props, causing the roof to immediately fall. While an insufficient number of props had been put up, which I find is a technical violation of the Act, it is conjectural whether or not the roof would have fallen if additional props had been up. Therefore, I find the violation to be only moderately serious.

#### Penalty

Respondent is assessed a penalty of \$1,000 for the violation of 30 C.F.R. 75.200 found to have occurred.

#### ORDER

Wherefore it is ORDERED that Respondent pay to MSHA the penalty herein assessed of \$1,000 within 30 days from the date of this decision.

Michael A. Lasher, Jr.  
Judge

#### ~FOOTNOTE 1

However, in fact, the room was not timbered in accordance with the roof-control plan which called for at least 12 props.

#### ~FOOTNOTE 2

The record is unclear as to how many posts were installed at the moment of the fatality. Apparently, there were four posts along the left side which were put up prior to Costlow's installation of an additional four or five.

#### ~FOOTNOTE 3

According to MSHA's Report of Investigation (Exhibit P-8), the "two dislodged posts were supporting the rock that fell."