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

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

v.

SHAMROCK COAL COMPANY,  
RESPONDENT

Civil Penalty Proceeding

Docket No. KENT 80-292  
A.C. No. 25-02502-03018F

No. 18 Mine

DECISION

Appearances: George Drumming, Jr., Esq., Assistant Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; Neville Smith, Esq., Manchester, Kentucky, for Respondent.

Before: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Manchester, Kentucky, on May 19, 1981, and May 20, 1981. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during closing argument, I entered an opinion on the record.(FOOTNOTE.1) My bench decision containing findings, conclusions and rationale appears below as it appears in the record, aside from minor corrections.

This proceeding was initiated by the filing of a petition for a penalty assessment by the Mine Safety and Health Administration on August 25, 1980, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 alleging two violations of 30 C.F.R. 75.200 involving in turn two alleged infractions of the Respondent's approved roof-control plan on October 30, 1979. On this date, at approximately 6:30 p.m., a roof fall occurred in the No. 4 entry of the 005 section of Respondent's No. 18 Mine resulting in the death of section foreman Floyd D. "Dave" Burke. Following

the accident, Mine Safety and Health Administration inspector Lawrence Spurlock issued a withdrawal order pursuant to section 103(k) of the Act to assure the safety of the miners until the MSHA investigation was completed. This withdrawal order which issued at 10 p.m. on October 30 was terminated on October 31, 1979, at 5 p.m. On October 31, 1979, Citation No. 736789 was issued alleging noncompliance with the roof-control plan in that additional support, such as timbers or cribs, was not being used with metal straps where abnormal conditions were encountered and, furthermore, that a test hole was not drilled in the subject area. This citation, which issued at 4:30 p.m., was terminated 2 days later on November 2, 1979, when the inspector determined that the roof-control plan was being complied with inasmuch as additional support, such as cribs and timbers, were installed in the accident area and a test hole had been drilled.

The parties, both of whom were represented by counsel at the hearing, entered various stipulations covering the jurisdiction of the Administrative Law Judge and further indicating that Respondent is a large operator; that the operator's history of previous violations for the 24-month period prior to October 30, 1979, revealed that Respondent was assessed and paid penalties for eight violations of 30 C.F.R. 75.200; that Respondent demonstrated normal good faith in attempting to achieve compliance; that assessment of penalties would not affect Respondent's ability to continue in business; and that the injury frequency rate comparison of Respondent for the last quarter available prior to the accident was 9.62 for the coal mining industry and .62 for Respondent. That is, Respondent's injury frequency rate was .62 whereas the industry frequency rate was 9.62.

The paramount issues in this case involve the proper construction to be placed on pertinent language in the roof-control plan (Exh. P-8). That plan, at page 4, in pertinent part provides:

Crossbars to be used when pots, slips, horsebacks or hill seams are encountered. A minimum of two crossbars to be used at each location. At least one post to be used under each end of the crossbars and the posts are not to be more than fourteen feet apart. Crossbars to be installed on four foot centers and the foreman in charge shall determine when the installation of crossbars is to be discontinued.

Steel straps predrilled on not more than four foot centers and installed with roof bolts on not

more than four foot centers may be used in lieu of wood crossbars, as stated above, in areas where the roof structure is of such nature that it will provide adequate anchorage for roof bolts.

In areas where steel straps have been utilized in lieu of wood crossbars where abnormal roof conditions are encountered, the area shall be supported with cribs and-or posts set on four foot centers on each side of a sixteen foot wide roadway.

Counsel for both parties agree that the main legal issue is whether abnormal or subnormal roof conditions existed in the area where the roof fall occurred. The three-paragraph portion of the roof-control plan above quoted refers to abnormal roof conditions in the third paragraph thereof. At page 5 of the roof-control plan, an explanation is contained in paragraph 1 to this effect: "This is the minimum roof control plan and was formulated for normal roof conditions and the mining system(s) described. When subnormal roof conditions are encountered, indicated or anticipated, additional roof support such as longer and/or additional roof bolts, posts, or crossbars, shall be installed."

MSHA seeks penalties for two violations of the plan, the first being for the failure to install cribs or posts as required by the third paragraph of the plan quoted hereinabove and the second for failure to install a drill hole as MSHA contends is required by paragraph 12 of the plan shown on page 6 thereof which provides:

During each production shift at least one roof bolt hole in each active working place shall be drilled to a depth of at least twelve inches above the anchorage horizon of the bolts being used shall either: (a) be left open; (b) be plugged with a readily removable plug; or (c) a roof bolt compatible in length with the depth of the hole shall be installed and the plate shall be encircled with a paint distinctively different in color from the roof.

Inspector Spurlock testified on behalf of MSHA and indicated that after being notified of the accident he went to the mine, arriving there at approximately 8:30 p.m. on October 30. He returned on October 31 at approximately 9 a.m. and conducted an accident investigation. Among other things, he determined that the dimensions of the part of the roof which fell were approximately 40 feet long, 20 feet wide and 20 to 36 inches thick. These dimensions differ somewhat, but not in a material

way, from the dimensions provided in MSHA's Report of Investigation (Exh. P-7) at page 2 thereof.

The inspector testified that the Report of Investigation reflected what he found during his investigation. He also indicated that the roof fall covered approximately half of the entry in which it fell; that some of the roof which fell landed on a continuous miner and shuttle car which were in the area; and that there were hill seams present in the subject location, some three in number, running one side to the other about 30 to 40 feet as reflected in a sketch contained on page 3 of Exhibit P-7. Although at the commencement of the hearing Respondent challenged the accuracy of the sketch in a general way, I find that insofar as an evaluation of the accident scene for purposes of this proceeding are concerned, the sketch is sufficiently accurate to be accepted as an indication of the locations of the hill seams, equipment and personnel involved at the time and place of the accident. There was no substantial challenge or attack with respect to the accuracy of the sketch during the hearing.

The inspector also determined that the means of roof support employed was that designated in the second paragraph of the three-paragraph roof-control plan mentioned above, that is, steel straps installed with roof bolts. Steel straps and roof bolts were found at the place where the roof had fallen. The inspector testified that in his opinion the Respondent was not in compliance with the plan since it did not use cribs or timbers; that any fracture in the roof is "abnormal" and that in this respect he disagreed with the Respondent's safety director, Gordon Couch, with whom he had a conversation on October 31, 1979. According to the inspector, Mr. Couch's belief was that hill seams were normal because of their prevalence throughout the mine and in the section where the accident in question occurred.

With respect to the second alleged violation, the inspector testified that he was told by day shift foreman James Napier that he, Napier, had asked for a test hole to be drilled. The inspector, during his investigation on October 31, 1979, also conversed with the roof bolter on the day shift, Stanley Roark, who told the inspector that he was directed by Foreman Napier to drill a test hole but that he did not. The inspector testified that on November 31 he looked for a test hole but could not find one.

The No. 18 Mine has two production shifts each day, the first from approximately 7:30 a. m. to 3:30 p.m. and the second from 3:30 p.m. to 11:30 p.m.

The inspector indicated that in his opinion only a hairline crack in the roof would have been visible in the roof fall area prior to the fall. He was unsure whether a test hole, had one been drilled, would have made obvious any weakness in the roof. In that connection, the Report of Investigation, at paragraph 5 on page 2 thereof, indicates that the presence of draw rock in the No. 4 entry, "[p]revented the workmen from detecting the loose roof with sound and vibration tests."

The inspector confirmed that Respondent had a low injury frequency rate and he felt that the No. 18 Mine was a safety-conscious operation. With respect to hill seams, the inspector indicated that such may be manifested in the mine roof by only a hairline crack and that it may or may not be detectable by viewing the mine roof. He also indicated that the draw rock might not enable one to detect a loose roof with a sound-vibration test and that the 6 to 8 inches of draw rock in the roof would make it difficult to determine if the crack in the roof was simply a nondangerous crack or the manifestation of a hill seam. The record is clear, from the testimony of other witnesses, that the roof of the No. 18 Mine contains numerous cracks and according to Safety Director Couch, most of these hairline cracks throughout the mine are firm and safe when tested.

Focusing specifically on the roof fall itself, the record is also clear that the roof broke without significant prior warning about 3 hours into the second production shift and that the foreman on the first production shift, James Napier, had tested or sounded the roof with a hammer on his shift and found the roof to be safe in the sense that no structural weakness was ascertained. Napier testified that he made this test at approximately 2:50 p.m. and the roof sounded "solid." Napier indicated that 30 to 32 inches of rock can be sounded by this method (in this connection I note that the thickness of the roof which fell ranged from 20 to 36 inches according to the inspector). Napier indicated that he, as section foreman on the first shift, usually conferred with the foreman on the second shift prior to the changing of the shifts and that on October 30 he discussed with Section Foreman Burke the hill seams in the area of the roof fall. According to Napier, he did not recommend to Burke that Burke take any particular action on his shift with respect to the hill seams. It should be noted that although Napier confirmed that he had directed his employees to drill a test hole on his shift, that Napier did not check to see if the drill hole had been drilled before his shift ended. Thus, Napier did not mention to the decedent, Mr. Burke, that no test hole had been drilled in their conversation at the changing of the shifts.

I do find, on the basis of the inspector's testimony that during his investigation of the accident he was advised by the first shift roof bolter that no test hole had been drilled, and from Napier's testimony that his employees had reported to him after the accident that no hole had been drilled, that such was a fact.

Respondent has objected to the hearsay nature of this testimony. A report or statement made to an inspector during an investigation of an accident carries with it a higher degree of trustworthiness than may ordinarily be prevalent in a common conversation between two individuals. The testimony of Napier, a management person for Respondent, further vouches for this trustworthiness. According to the inspector, the reason that the roof bolter on the first shift did not drill a test hole was that he did not have any drill steel. This explanation given by the roof bolter to the inspector further supports the finding that a test hole was not drilled on the first shift. In any event, hearsay, by virtue of express provisions of the Administrative Procedure Act, is admissible in this proceeding. And for these various bases and various reasons, I credit the testimony of Napier and Inspector Spurlock in this connection.

I also find that the area where the roof fall occurred and where Napier directed that a test hole be drilled was in by the working place and that a test hole should have been drilled in this area during the first shift. This is vouched for by the fact that the section foreman during his shift directed that a test hole be drilled there. Although at one time during the proceeding, Respondent conceded that no test hole had been drilled on the second shift during the first 3 hours thereof before the accident occurred, Respondent subsequently withdrew this stipulation. Respondent's position is that the pertinent provision of the roof-control plan, paragraph 12 at page 6, permits the hole to be drilled "during each production shift" and that there could be no infraction thereof on the second shift since another 5 hours of the shift remained after the accident.

I concur with Respondent's position with respect to the second shift since it cannot be said that a bolt hole would not have been drilled during the shift. The regulation is a standard which determines the obligation of the mine operator. It does permit the drilling of the bolt hole at an unspecified time during each production shift. To constitute a violation in this case, insofar as the second shift is concerned, paragraph 12 would necessarily have required the drilling of a bolt hole at the beginning of a shift rather than "during the shift." However, I do find that

the area in question was an active working place on the first shift and that a bolt hole should have been drilled during Mr. Napier's shift. And since I find that one was not, and Respondent has introduced no evidence that one was, I conclude that a violation of 30 C.F.R. 75.200 did occur in this respect as alleged by MSHA.

In his gravity sheet (Exh. P-5), Inspector Spurlock indicated that:

The crew was questioned and they stated they did not drill a test hole in the area to evaluate the extent of the roof conditions. However, due to the firmness of the shale it is very doubtful if the test hole would have detected the crack in the top.

I therefore find, based thereon, as well as other testimony in the record, that it is conjectural whether or not the test hole would have disclosed a structural weakness (see testimony of safety director Gordon Couch) and that there is no causal relationship, direct or otherwise, between the violation and the roof fall which resulted in the death of Second Shift Section Foreman Burke.

Turning now to the question whether or not the failure to install cribs or posts in the accident area in conjunction with the steel straps which were used to support the roof constitutes a violation, it first should be noted that Respondent has stipulated that in fact no timbers or cribs were used and that only steel straps installed with roof bolts were used to support the roof in the accident area on October 30, 1979. I so find.

According to Denver Collins, a shuttle car operator who was called as a witness by MSHA, cribs and posts would not have been installed in the subject entry due to its width--that is, the entry was 20 feet wide and because the continuous miner working in the area was 10 feet 9 inches wide and the cribs would have been approximately 4 feet wide each, there would not have been maneuvering or operating room in the area. This testimony was not further developed on the one hand or challenged on the other so, accordingly, I do conclude that the physical size limitations of the area would have precluded the use of cribs and posts. However, the question remains whether or not the roof-control plan, which the parties agree does authorize the use of steel straps installed by roof bolts, should be construed so as to require the supplementary installation of cribs and posts at all times the "steel strap" alternative is utilized. If



so, the impossibility of installing cribs or posts in the area would in turn preclude the use of the steel strap alternative and require the mine operator to use crossbars as the only means of roof support specifically authorized by the pertinent three-paragraph plan.

To fully understand this plan, the three paragraphs must be paraphrased. The first paragraph unequivocally requires crossbars to be used when the hill seams are encountered. The second paragraph permits an alternative: Steel straps installed with roof bolts. The third paragraph thus becomes critical. It states: "In areas where steel straps have been utilized in lieu of wood crossbars where abnormal roof conditions are encountered, the area shall be supported with cribs and/or posts--", etc.

This plan is glorious in its ambiguity and pregnant with the confusion which it necessarily creates in the minds of the miners, the operators and the Government enforcement personnel who must work with it, implement it, live with it, and enforce it. Nevertheless, it is a minimum plan and we must endeavor to answer various subquestions which arise. MSHA contends that the third paragraph is a necessary qualification to the second paragraph, that is, cribs and posts must always be used to back up the use of steel straps. Respondent, on the other hand, contends that it has the option to use either crossbars or steel straps and that cribs and posts are required to be used only "[w]here abnormal roof conditions are encountered." Respondent contends that the "pots, slips, horsebacks or hill seams" language contained in the first paragraph are not abnormal roof conditions. Petitioner contends that they are and that paragraph 3's reference to abnormal roof conditions must be referenced back to the first paragraph.

I agree with the Petitioner's position with respect to the construction of this regulation. My reasons for doing so are based first on the general philosophic principles governing statutory construction of remedial legislation, secondly on ancillary provisions of the roof-control plan itself and finally because of the severe hazards roof-control regulations seek to prevent.

In Cleveland Cliffs Iron Company, Inc., Docket No. VINC 79-68-PM, the Federal Mine Safety and Health Review Commission, in a decision dated February 9, 1981, endorsed the principle of the liberal construction of the Act and its implementing regulations so as to promote the remedy sought by such standards.

The roof-control plan itself, as previously noted, recognizes that the three paragraphs are minimums and it anticipates that additional bolts, posts or crossbars would be installed in subnormal roof conditions when such are "encountered, indicated or anticipated." Considering the rule of liberal construction and the apparent abundantly cautious tenor of the plan itself, a reading of the three paragraphs is required which would promote rather than diminish safety even though I do believe that the three paragraphs can be read as Respondent contends without an absurdity resulting.

I conclude that hill seams, as mentioned in paragraph 1, are an abnormal roof condition within the meaning of paragraph 3 and a subnormal roof condition within the meaning of paragraph 1 of page 5 of the plan. I do so for two reasons. The first phrase of paragraph 3 ends with the word "encountered." This encourages the construction that cribs and posts must be used in all cases where steel straps are utilized. A contrasting punctuation would have been to place a comma after the word "crossbars" in paragraph 3, in which event the concept of abnormal roof conditions would stand out as a separate situational classification which, by itself, would call for cribs and posts.

The second reason I find that hill seams are abnormal or subnormal roof conditions is based upon my view of the evidence in this proceeding and observation of various witnesses who testified concerning the nature of hill seams. Section Foreman Napier, although he indicated that "[j]ust because you have a hill seam or crack someplace doesn't mean it's dangerous," also stated: "You never know about a hill seam. You can test hole them and they'll be solid and it would fall anyway. You can't tell by looking." Napier's actions on October 30 indicated a considerable concern with the hill seams in the roof fall area. I felt the inspector's opinion that hill seams were abnormal conditions was also credible and should be accepted over those of Respondent's witness Gordon Couch, who, on two occasions, indicated that he did not really know what a hill seam was. Mr. Couch wanted to treat a hill seam as a "seam" even though there is considerable evidence in this record that a hill seam runs from the top or outside of the mountain down into the mine and manifests itself as a crack or a seam visible to the naked eye in the mine roof. I conclude that hill seams are abnormal or subnormal roof conditions within the meaning of the roof-control plan; that they pose a significantly higher degree of risk of roof falls because of their susceptibility to water which, indeed, on occasion has been seen leaking from them, and since hill seams

require and in fact were and have been given a much higher degree of attention by the mine foreman and the miners than other normal mine conditions.

There is credible unchallenged testimony in the record that cribs would have supported the amount of roof that fell on October 30, 1979, but also that neither the steel straps installed with 36-inch roof bolts and crossbars would not have held up the part of the roof which fell at that tragic time. Thus, crossbars and metal straps would support only 3 to 4 tons, whereas cribs would have supported 100 to 150 tons, according to Safety Director Couch.

I conclude, therefore, that unduly peculiar factual situations were posed in this case; that even though steel straps were used, where abnormal roof conditions were encountered and where cribs and posts were not susceptible to being installed in the entry in question, that only two options remained with Respondent: (1) to either use crossbars, which would have not held up that amount of roof, or (2) not mine--that is, cut into the area in question. The option was available to the Respondent to use crossbars in the situation which it encountered on October 30, 1979. Thus, it cannot be said that there is a direct causal relationship on these unusual facts between the failure to use cribs and posts and the roof fall which resulted in the death of Mr. Burke. Again, this is because the option was available to use crossbars--which would not have held the roof up.

Whether a causal relationship exists between the violation and an accident greatly determines the degree of gravity which must attach to the violation. However, any violation of a roof-control plan is a serious violation. I thus conclude that since two miners were immediately exposed to the roof fall, that is the continuous miner operator and the shuttle car operator, and other miners on the crew were also exposed to any hazard which might result from the violation in question, that both the failure to drill a test hole and the use of steel straps without cribs or posts were both serious violations.

I find, therefore, that the failure to use crossbars in the area at the time constituted a violation of 30 C.F.R. 75.200. I find that the use of steel straps in the area, which was an area in which cribs and posts could not be utilized, is a corollary to this violation, that is, it is the other side of the coin.

With respect to negligence, which is the remaining statutory penalty assessment factor to be considered, in

view of the early stipulations of the parties, I find that Section Foreman Napier was negligent in not following through to determine whether the test hole he ordered drilled in the portion of the roof which fell was drilled. He also indicated that he did not tell Mr. Burke about the test hole--I infer this from his overall testimony including his testimony that he did not recommend any action on Burke's part when he spoke to Burke at the changing of the shifts. The record is clear that Napier recognized the danger the hill seam posed, as I have previously pointed out, and he did testify that he told Foreman Burke to "[w]atch and be careful." I thus find, based upon Napier's testimony, that at least one member of management considered the hill seams to be dangerous but that in the changeover of shifts, appropriate action failed to be taken by management with respect to the V-shaped hill seams in the accident area.

I do not find any negligence attributable to Respondent based on Napier's actions or nonactions to be of a high degree since Napier did sound the roof and did take action which he might have believed had been carried out by employees. I also find that culpability on the part of Respondent's management in the commission of the two violations found is substantially mitigated by the lack of clarity in the three-paragraph roof-control plan insofar as that particular violation is concerned. Weighing then the factors which must be considered in assessing penalties, the factors of the large size of the company, moderate degree of negligence, and seriousness of the violations, go toward raising any penalty which might otherwise be appropriate. Counterbalanced against those factors are the factors that Respondent's previous history of violations appears to be moderate, only relatively small penalties were paid for the eight prior violations of the cited regulation, and Respondent had a highly commendable injury frequency rate for the quarter immediately preceding the accident. Inspector Spurlock considered the Respondent to be a safety-conscious operation. Finally, it was stipulated that the Respondent demonstrated normal good faith in attempting to achieve compliance with the violated safety standard.

I would add that I believe the Respondent sincerely construed the roof-control plan in the manner that it urges here today and that such position is not a cynical one. Considering all of these factors, a penalty of \$750 is assessed for the violation in Citation No. 736789 relating to the failure to drill a test hole and a penalty of \$2,250 is assessed for the violation charged in Citation No. 736789 insofar as the same relates to the failure to comply with the

