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SOL (MSHA) V. SHAMROCK COAL
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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 81-228
A.O. No. 15-07212-03016

No. 21 Mine

DECISION

Appearances: Carole M. Fernandez, Attorney, U.S. Department of Labor,
Nashville, Tennessee, for the petitioner
Neville Smith, Esquire, Manchester, Kentucky, for the respondent

Before: Judge Koutras

Statement of the Proceedings

This proceeding concerns a proposal for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with one alleged violation issued pursuant to the Act and the implementing mandatory safety and health standards. Respondent filed a timely answer in the proceedings and a hearing was held on August 25, 1982, in London, Kentucky, and the parties appeared and participated fully therein.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulation as alleged in the proposal for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of civil penalty assessments, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of

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such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violations, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 3-5):

1. The subject mine is subject to the jurisdiction of the Act.
2. At the time the citation issued in 1981, the mine had an annual coal production of 200,000 tons.
3. The citation in question was issued by a duly authorized representative of the Secretary of Labor.
4. The proposed civil penalty will not adversely affect the respondent's ability to remain in business.
5. Once the citation was issued, the respondent acted in good faith in rapidly abating the cited conditions.
6. Respondent's history of prior violations is reflected in petitioner's exhibit G-1, a computer print-out listing such violations.

MSHA's testimony and evidence

MSHA Inspector Joe M. Burke confirmed that he issued the citation in question on April 8, 1981, because of the failure by the respondent to drill a test hole in the roof as required by its approved roof control plan dated January 7, 1980. He identified the applicable portion of the plan as section 9, page 7, and indicated that it required a test hole to be drilled to a depth of 12 inches above the anchorage horizon of the bolts being used during each production shift. The plan also required that such a test hole be left open, plugged with a readily removable plug, or painted with a distinctive paint to identify it as a test hole (Tr. 7-10).

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Mr. Burke stated that when he arrived at the mine for his inspection at 3:05 p.m., the first production shift had just ended. He determined that no work had been done on the second shift when he arrived at the section, and section foreman Corbett Caldwell told him that the roof bolting crew had not been in the place in question during the second shift. While examining some loose roof bolts with Mr. Caldwell, Mr. Burke started looking for a test hole, but could not find one. Mr. Caldwell informed him that the roof bolting work had been done on the previous first shift. The nearest test hole which could be found was 150 feet back from the face. Since a fresh cut had been taken out of the number 1 working place, a test hole should have been made in that area, and Mr. Burke indicated that he issued the citation for the first shift which had just completed its work. Had the work been done on the second shift he would not have issued any citation. He did so because he considered that the roof work had been done on the prior shift (Tr. 10-16).

Mr. Burke believed that the respondent should have been aware of the violation in that the first shift foreman should have conducted an examination of the roof for the oncoming second shift. Mr. Burke indicated that he checked the preshift record book and it did not indicate that any test holes were being drilled and it did not indicate any problems or roof abnormalities (Tr. 17).

Mr. Burke stated that during his inspection he detected that 24 out of 30 roof bolts were not properly torqued, and he determined that this was due to the roof bolting machine being out of adjustment (Tr. 18).

On cross-examination, Mr. Burke confirmed that out of the 51 feet mined in the number one entry of the 001 section, a fresh cut of approximately 20 feet taken out in the number one working place was not bolted as yet, but 31 feet of the roof was bolted (Tr. 22). He examined the 51 feet working area and found no evidence of any test hole being drilled, and Mr. Caldwell told him that all of the work had been done on the previous shift (Tr. 25). Had the first shift drilled a test hole, Mr. Caldwell would have the entire remainder of the second shift to drill a test hole based on the amount of coal he produced during his shift (Tr. 26).

Mr. Burke stated that the respondent's normal practice is to leave the test holes open and that on prior inspections at the mine he has observed such test holes drilled in the roof (Tr. 27). The purpose of such test holes is to determine the adequacy of the anchorage roof strata where the roof bolts will be installed (Tr. 30). A test hole was drilled in the area which had been permanently bolted in order to abate the citation, and this was done some five to ten minutes after he issued the citation (Tr. 33).

Respondent's testimony and evidence

James Napier, testified that he was the first shift foreman

on April 8, 1981, and he stated that the required test hole was drilled

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in the first cut of coal taken out of the number one working place that day. The location of the hole was approximately 40 to 45 feet from the face area, and the hole was left open but was not marked (Tr. 38-39).

Mr. Napier testified that the test hole complied with the roof control plan and that he personally observed it after Mr. Burke's inspection immediately the next morning. The hole was drilled approximately 10 feet in by the last open crosscut approximately five to six feet from the right rib (Tr. 40). He stated that when he learned that the citation had issued he asked the roof bolter to show him where he had drilled the test hole, and he personally saw that hole as well as the one which was drilled to abate the citation (Tr. 41).

On cross-examination, Mr. Napier confirmed that when he saw Mr. Burke the day after the citation issued he advised him that the test hole had been drilled on the first shift (Tr. 43). He also confirmed that he told Mr. Caldwell that the test hole was drilled (Tr. 45).

Corbett Caldwell, second shift section foreman, testified that on the day of the inspection he and Mr. Burke looked for the test hole and could not find it. The test holes are normally drilled through the middle of the roof, and in this case the hole had been drilled to the side. He determined that the hole had in fact been drilled when Mr. Napier advised him of this the next evening. He went to the area and found the hole and he indicated that it was hard to see because of the way the coal was cut. He indicated that this was the reason why he and Mr. Burke had not seen the hole during the inspection (Tr. 49).

On cross-examination, Mr. Caldwell confirmed that he found the test hole precisely where Mr. Napier said it was drilled, and he indicated that he and Mr. Burke missed it because they were not looking in that area. He could not recall whether he should Mr. Burke the test hole after he discovered it (Tr. 51).

Rebuttal testimony

Inspector Burke was called in rebuttal and he confirmed that when he returned to the mine the day after he issued the citation, Mr. Napier mentioned the test hole to him and indicated that one had been drilled. However, he could not recall Mr. Caldwell mentioning the test hole, nor could he recall looking for it on that day (Tr. 58).

Mr. Burke stated that even if he had found a test hole the next day there would be no way that he could determine when it was drilled. He indicated that at the time of his inspection, the person who would have drilled the hole and the shift foreman had already gone home (Tr. 62). He also conceded that the test hole could have drilled as stated by Mr. Napier, and had he gone back to look the next day he would not have vacated the citation because he found none during his inspection (Tr. 64).

Findings and Conclusions

The citation issued in this case charged the respondent with a failure to follow its roof control plan requirement that a test hole be drilled in the roof on a horizontal plane of 12 inches. In its answer to the charges the respondent maintained that under the roof control plan the respondent was only required to drill such a hole sometime during the shift, and that the inspector acted prematurely by issuing the citation before waiting for the end of the shift. In short, respondent initially argued that the test hole would have been drilled had the inspector not acted hastily and prematurely (Tr. 6-7).

At the hearing respondent's counsel stated that during his investigation of the facts surrounding the citation in preparation for trial he discovered evidence that the required test hole had in fact been drilled on the first shift. This evidence was presented at the hearing by testimony by the first shift foreman James Napier. I find Mr. Napier to be a credible witness, and I accept his testimony as proof of the fact that the test hole was in fact drilled, and I take note of Inspector Burke's testimony that it was possible that the hole was drilled as testified to by Mr. Napier.

It seems clear to me that on the facts of this case the inspector issued the citation because he found no test hole had been drilled on the first shift. He and the second shift foreman looked for the hole in an area where it would normally have been drilled. They apparently did not look at the area where the first shift foreman stated it was located.

The pertinent roof control provision, paragraph nine, exhibit P-2, requires that a test hole be drilled during each production shift. Since no production had taken place on the second shift at the time of the inspection conducted by Inspector Burke on April 8, 1981, his citation was issued because he found no evidence that the test hole had been drilled on the immediate preceding first shift which had just ended. The roof area which had been completed on that shift was fully bolted (Tr. 35-37).

Conclusion and Order

After careful consideration of all of the testimony and evidence adduced in this case, I conclude and find that the respondent has established that the required roof control test hole was in fact drilled as required by its plan. Under the circumstances, IT IS ORDERED that Citation No. 990824, issued on April 8, 1981, charging a violation of mandatory safety standard 30 CFR 75.200, IS VACATED, and this matter IS DISMISSED.

George A. Koutras
Administrative Law Judge