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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, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. KENT 83-131
A.C. No. 15-11065-03502

No. 10 Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
Neville Smith, Esq., Smith & Emmons, Manchester,
Kentucky, for Respondent.

Before: Judge Steffey

A hearing in the above-entitled proceeding was held on May 1, 1984, in Barbourville, Kentucky, pursuant to section 105(d), 30 U.S.C. 815(d), of the Federal Mine Safety and Health Act of 1977. At the conclusion of presentation of evidence, counsel for the parties made summations and I rendered a bench decision, the substance of which is set forth below.

The proposal for assessment of civil penalty filed in Docket No. KENT 83-131 seeks to have a penalty assessed for an alleged violation of 30 C.F.R. 48.5(d). The issues in a civil penalty case are whether a violation occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act. The witnesses' testimony and the exhibits in this proceeding support the following findings of fact:

1. Inspector Joe K. Burke went to the No. 10 Mine of Shamrock Coal Company on March 17, 1982. He arrived at the mine about 6:00 a.m. The miners went underground shortly after the inspector arrived, but the mantrip was so crowded that the inspector could not go underground at that time. It was about 8:05 a.m. before the inspector obtained a means of transportation into the underground mine.

2. The inspector proceeded to the 001 Section where mining was in progress. He noticed that a miner who was installing a safety jack was wearing a new hat, a new belt, and new rubber

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boots, and the inspector concluded that he was a new miner. He talked to the miner who confirmed the inspector's conclusion that he was working his first day in the No. 10 Mine or any other coal mine. The miner's name was Darrell Brock and he explained to the inspector that he had received 48 hours of new-miner training at the Hazard, Kentucky, Vocational School, but he stated that he had not been given any training at the No. 10 Mine that day. Specifically, he had not been given any training in roof control, or training as to entering and leaving the mine or in the mine escapeway system.

3. Shortly after the inspector had asked the last of the above-described questions about Brock's training, the electrical power for the entire section suddenly went off so that all miners had to be withdrawn. As a result of the power failure, the inspector came out of the mine about noon. On the surface, he talked to the mine foreman, Stanley Couch, who verified Brock's statements to the effect that no specific training had been given to Brock before he went underground.

4. On the basis of the information summarized above, Inspector Burke issued Citation No. 1112116 which alleged a violation of section 48.5(d) of the regulations. The "condition or practice" set forth in the citation reads as follows:

A newly hired inexperienced miner has commenced work at this mine on the 001 Section of the mine and the miner (Darrell Brock) is assigned duties as a roof bolt machine helper and the miner commenced work on this day. The miner has not been trained in the provisions of Part 48.6(b) and Part 48.7.

Section 48.5(d), the section alleged to have been violated, provides as follows:

Upon proof by an operator that a newly employed miner has received the courses and hours of instruction set forth in paragraphs (a) and (b) of this section within 12 months preceding initial employment at a mine, such miner need not repeat the training, but the operator shall give and the miner shall receive and complete the instruction and program of training set forth in paragraph (b) of 48.6 (Training of newly employed experienced miners), and 48.7 (New task training of miners), if applicable, before commencing work.

5. Exhibits 2 and 3 show that Brock received 48 hours of training at the Hazard Vocational School in compliance with the State of Kentucky's requirements under which a person is given 48 hours of training, instead of the 40 hours of training

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required by section 115(a) of the Act and by 30 C.F.R. 48.5(a). Exhibit 3 is a certification indicating that Brock on March 18, 1982, the day after the citation was issued, was given training in such subjects as "Introduction to Work Environment, Hazard Recognition, H & S Aspects of Tasks Assigned, Statutory Rights of Miners, Self-Rescue & Respiratory Devices, Transport & Communication Systems, Roof/Ground Control & Ventilation, Electrical Hazards, First Aid, Mine Gases, and Prevention of Accidents." That certification is signed by Ikie Whitaker who is an MSHA-approved instructor at Shamrock Coal Company's mines.

6. Gordon Couch was a witness for Shamrock Coal Company. He is the safety director at Shamrock's mines and he testified that, as far as he was concerned, Darrell Brock, the new miner, was given the instruction or training required by section 48.5(d). He explained that he believes the regulations are ambiguous in directing the sequence in which training must be given before work tasks are assigned. He said that it was not only the practice in March 1982, but is still the practice at the Shamrock No. 10 Mine, for a new miner to be trained on the job, so to speak, by the various people who are in charge of a given area of responsibility. For example, as to Exhibit 3 described above, Couch stated that the first aspect of the training given to Darrell Brock, that is, "Introduction to Work Environment", would have been done by the section foreman as they went underground, because the section foreman at that time would have tried to assure that the experienced miners did not frighten the new miner with erroneous allegations made in jest and the section foreman would have given correct information concerning the hazards which Brock would encounter underground.

7. Gordon Couch explained further that the health and safety aspects of the task assigned to Brock would have been explained by the section foreman on the section. Couch said that training with respect to the specific task to which Brock was to be assigned, that is, the position of helper to the roof-bolting machine operator, would have been given by the roof-bolting machine operator himself. Couch additionally stated that a category of training, such as "Electrical Hazards", would have been given by the mine electrician. Couch also testified that such subjects as "Statutory Rights of Miners, First Aid, Mine Gases, and Prevention of Accidents", would have been covered in Brock's training by the Hazard Vocational School, and that all Whitaker would have had to do before certifying that Brock had been trained in those subjects would have been to have asked Brock if he had been trained in those matters. If Brock had answered Whitaker's questions in the affirmative, those answers would have enabled Whitaker to certify on Exhibit 3 (or MSHA Form 5000-23) that Brock had received training in those areas.

I believe that the findings set forth above are the essential facts which the parties have presented. By way of argument, counsel for the Secretary of Labor stated that he believed that Shamrock was conducting its training of new miners in an entirely erroneous fashion because section 48.6(a) specifically refers to the fact that the program of instruction prescribed by that section has to be given before a new miner (FOOTNOTE 1) has been assigned to specific work duties. The Secretary's counsel believed that the regulations are so clear in specifying how training will be given that Shamrock operated in a flagrant manner in claiming that new-miner training can be given at random by assorted supervisors and other persons trained in a given position because that procedure fails to assure that the types of training described in the regulations and in Shamrock's training program (Exh. 4) are provided.

Counsel for Shamrock Coal Company responded to the Secretary's arguments by contending that there is no specific sequence set out in the regulations as to the order of training versus the assignment of working tasks. Shamrock's counsel stressed the provisions of section 48.7(e) which states that "All training and supervised practice and operation required by this section shall be given by a qualified trainer, or a supervisor experienced in the assigned tasks, or other person experienced in the assigned tasks."

The Secretary's counsel answered Shamrock's argument by emphasizing that while section 48.7(e) permits a non-MSHA-approved instructor to give training in the performance of a newly assigned task, section 48.6(a), which is also part of the program of instruction to be given to newly employed miners, clearly provides that "A newly employed experienced miner shall receive and complete training in the program of instruction prescribed in this section before such miner is assigned to work duties."

It seems to me that the Secretary's counsel presented a logical argument which is supported by the evidence and by the provisions of the regulations. The section which is alleged to

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have been violated is section 48.5(d) which has been quoted in Finding No. 4 above. If one examines section 48.5(d)'s reference to section 48.6, he finds that subparagraph (a) of that section states that the program of instruction prescribed for a new miner is to be completed before such miner is assigned to work duties. Thereafter, subparagraph (b) lists the instruction which is required to be given.

I can sympathize with the safety director's problems in reading regulations. I am required to read them frequently in order to interpret them and I run into ambiguities myself, but I think that it is clear from subparagraph (a) that the types of training described in section 48.6 must be given before the miner is assigned to work duties. It is true, as the safety director pointed out, that an operator could have a section foreman explain to a new miner the "work environment", referred to in section 48.6(b)(1), while they were going into the mine, and that could be done before a person has been assigned to work on a roof-bolting machine or elsewhere in the mine.

The second provision to be considered is subparagraph 48.6(b)(2) which states that "The course shall include the mandatory health and safety standards pertinent to the tasks to be assigned." It is true, as the safety director claimed, that a supervisor could explain to a new miner underground, before he starts doing assigned tasks, what health and safety standards are associated with such tasks.

Subparagraph 48.6(b)(3) refers to "Authority and responsibility of supervisors and miners' representatives," and that subsection states that "The course shall include a review and description of the line of authority of supervisors and miners' representatives and the responsibilities of such supervisors and miners' representatives; and an introduction to the operator's rules and the procedures for reporting hazards." It is conceivable that a section foreman would have time to do all of the instructing mentioned in the subparagraph I have just quoted, but it is extremely unlikely that such a course would be given on a working section. The section foreman can hardly stop and explain to a new miner all the rights of miners and miners' representatives, and explain the operator's rules for reporting hazards because he has a whole section to run, and I do not believe that those things would be explained underground before a new miner is assigned to work duties.

The next part of the training program is described in subparagraph 48.6(b)(4) which has the caption "Entering and leaving the mine; transportation; communications" and that subsection states that:

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The course shall include instruction in the procedures in effect for entering and leaving the mine; the check-in and check-out system in effect at the mine; and the procedures for riding on and in mine conveyances; the controls in effect for the transportation of miners and materials; and the use of the mine communication systems, warning signals, and directional signs.

Section 48.6(a) requires that all the instruction described above is to be given before any tasks have been assigned. I doubt that such instructions would be given underground on the working section before new miners are assigned to work duties.

Subparagraph 48.6(b)(5) provides that:

The course shall include a review of the mine map; the escapeway system; the escape, firefighting, and emergency evacuation plans in effect at the mine; the location of abandoned areas; and where applicable, methods of barricading and the locations of barricading materials. The program of instruction for escapeways and emergency evacuation plans approved by the District Manager shall be used for this course.

All of the above-described instruction is required to be given before work duties are assigned. Again, it is conceivable that such detailed instructions could be given by a section foreman underground before work duties are assigned, but there is no evidence in this proceeding to show that the section foreman in Shamrock's No. 10 Mine provided the detailed instructions prescribed by subsection 48.6(b)(5).

Subparagraph 48.6(b)(6) provides that:

The course shall include an introduction to and instruction on the roof or ground control plan in effect at the mine and procedures for roof and rib or ground control; and an introduction to and instruction on the ventilation plan in effect at the mine and the procedures for maintaining and controlling ventilation.

While the roof-bolting machine operator or section foreman could undoubtedly explain the roof-control plan before assigning a new miner his work duties, I doubt that the section foreman would also explain the ventilation plan before assigning work duties.

Finally, subparagraph 48.6(b)(7) provides for "Hazard recognition" and states that "The course shall include the recognition and avoidance of hazards present in the mine, particularly any

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hazards related to explosives where explosives are used or stored at the mine." A new miner could be trained in hazard recognition underground. Since the No. 10 Mine uses a continuous-mining machine, there probably are no explosives stored underground. Nevertheless, the foregoing review of section 48.6 in detail causes me to conclude that the courses prescribed by that section should be given before a new miner is taken underground and it is certain that section 48.6(a) requires that the course has to be provided before any work duties are assigned to a new miner.

It should be noted that certain aspects of the evidence cast considerable doubt on the question of whether Shamrock's section foremen and other personnel were providing new miners with the kind of instruction required by section 48.6 before work duties are assigned. The new miner, Brock, and the other miners had gone into the mine to work about 7:00 a.m. so that they had been underground for about 3 hours and 45 minutes before the inspector observed Brock setting a safety jack. At that time the roof-bolting machine operator was drilling a hole in the roof. He was not just standing there instructing the new miner in the technique of installing safety jacks. There was every indication that the inspector was observing a working section and that Darrell Brock was routinely performing the duties of a helper to the operator of the roof-bolting machine. The mine was otherwise engaged in mining coal and the only reason that Brock went out of the mine at that time, so far as the record shows, is that the electricity went off and all miners had to be withdrawn until power was restored. Consequently, the questions which the inspector might have asked the roof-bolting machine operator about Brock's new-miner training were never asked.

Other aspects of the evidence which cause me to doubt that Shamrock was properly performing new-miner training is that the mine foreman, when asked whether Brock had been given the required training, said that he had not. If the mine foreman knew that the variegated training discussed above was supposed to be provided by the section foreman, the roof-bolting machine operator, the chief electrician, etc., as explained by Gordon Couch, surely the mine foreman would have explained those procedures to the inspector, but he failed to do so.

The evidence, considered in its entirety, causes me to conclude that if Shamrock did intend to train Darrell Brock in all of the subjects which are required by section 48.6, that the company is failing to give the training in the manner required by that section, that is, before work duties are assigned. Additionally, I believe that Shamrock's safety director had failed to instruct his supervisors in the kind of training which they are required to give new miners. The legislative history in Senate Report No. 181, 95th Congress, 1st Session, at page 49, refers to the lack of training provided for the miners who were

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working in the Scotia mine at the time it exploded. It was the fact that miners were not being thoroughly trained that caused Congress to insert section 115 into the Act. While it is certain that Darrell Brock had received a lot more training than the Scotia miners had, I fear that the use of underground personnel to provide training, as described by Shamrock's safety director in this proceeding, amounts to a failure to carry out the intent of Congress and the requirements expressed in section 48.5(d). Therefore, I find that a violation of section 48.5(d) occurred.

Section 110(i) of the Act requires consideration of six criteria in assessing civil penalties. There was introduced as Exhibit 6, for the purpose of explaining the criterion of the size of the operator's business, one of the proposed assessment sheets submitted in Docket No. KENT 83-131, and that shows that the No. 10 Mine produces approximately 500,000 tons of coal per year. Exhibit 6 also shows the controlling company's production to be over 13,000,000 tons annually. Counsel for Shamrock stated that the aforesaid figure may or may not be the production of Sun Oil Company and further stated that he believes Shamrock's annual production from all of its mines was in the neighborhood of 2,500,000 tons per year. Those production figures support a finding that Shamrock is a large operator, and to the extent that the penalty is determined under the criterion of the size of the operator's business, it should be in an upper range of magnitude.

The second criterion is whether the payment of penalties would cause the operator to discontinue in business. No specific information was submitted in connection with the operator's financial condition. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), that if an operator fails to produce facts about its financial condition, the judge may presume that payment of penalties would not cause the operator to discontinue in business.

The third criterion is the history of the operator's previous violations. There was introduced as Exhibit 5 a sheet from the proposed assessment and that shows that Shamrock had 68 previous violations over an applicable 24-month period during 132 inspection days. If those figures are used in accordance with the provisions of MSHA's assessment formula set forth in 30 C.F.R. 100.3, the result would be to assign four penalty points under the assessment formula which would indicate a moderate history of previous violations. Therefore, no portion of the penalty will be assigned under the criterion of history of previous violations because of the operator's relatively favorable history.

There was a stipulation by the parties that the operator demonstrated a good-faith effort to achieve rapid compliance after the citation was issued. It has been my practice to

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increase a penalty only if there is a showing of a lack of effort to achieve compliance, and to decrease a penalty only if there is evidence indicating some outstanding effort to achieve compliance. In this case, the compliance was normal. Therefore, the penalty should neither be increased nor decreased under that criterion.

The remaining two criteria are gravity and negligence. They are the criteria which normally cause a penalty to be high if either criterion is shown to exist in any serious degree. Counsel for the Secretary emphasized that Shamrock had no basis for proceeding as it did and asserted that there was a rather high degree of negligence involved, but when I discussed above the provisions in section 48.6(b) prescribing the training that is required before a new task is assigned, I found that it would have been within the realm of possibility for an operator to give the required new-miner instruction underground, but the preponderance of the evidence in this proceeding did not show that the training had been given.

In such circumstances, the evidence does not support a finding of gross negligence. Shamrock contested the citation here involved because it believed that its method of training new miners was in compliance with the regulations. Therefore, I cannot conclude that it did anything other than stand by the procedure which its safety director believed was a proper way to provide training to new miners. Nevertheless, at least a low degree of negligence was associated with the violation because the evidence indicates that the safety director had not properly instructed the mine foreman and other personnel in the training methods which he expected them to follow in connection with new miners.

The criterion of gravity remains to be considered. I believe that the violation was serious because Darrell Brock was not aware of having received any training during his first day of employment, based on the inspector's testimony. Of course, as counsel for Shamrock pointed out, only the inspector's version of his conversation with Brock was introduced at the hearing because Brock did not appear as a witness. It is possible that Brock, in retrospect, might say that the section foreman did explain various safety matters to him underground, but the available evidence shows that Brock was not aware of having received any specific training when questioned by the inspector. There were strong indications that Brock had worked as a helper for the roof-bolting machine operator for quite a while before being brought out of the mine after the mine's electrical power was unexpectedly cut off. When the inspector first saw Brock, he was setting a safety jack and appeared to be working as part of a full production crew with no particular emphasis being given to the training of a new miner. The possibility that Brock could have been injured because of a lack of the kind of training which the regulations require causes me to conclude that the violation was serious.

