

CCASE:
SOL (MSHA) V. SHAMROCK COAL
DDATE:
19900417
TTEXT:

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. KENT 90-32
A.C. No. 15-02502-03556

v.

No. 18 Mine

SHAMROCK COAL COMPANY,
RESPONDENT

DECISION

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

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging the Shamrock Coal Company (Shamrock) with six violations of mandatory standards and proposing civil penalties of \$3,685 for the violations. The general issue before me is whether Shamrock violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

At hearing the parties moved for approval of a settlement agreement with respect to five of the citations at issue and supplemented the motion post hearing. I have considered the documentation and representations submitted in support of the motion and find that the proposal meets the criteria under section 110(i) of the Act. Accordingly the motion is approved and an appropriate order will be incorporated in the final disposition of this proceeding.

The one citation remaining at issue, No. 3030499, alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. 75.202(b) and charges as follows:

The result of the investigation into the accident indicates, that as a minimum, the victim's head was extended inby the last row of permanent supports

into an area of unsupported roof at the time of the accident.

The cited standard provides in part that "[n]o person shall work or travel under unsupported roof . . ." The citation accordingly fails to allege an essential element of the violation charged, i.e. that anyone was either working or traveling under unsupported roof. It is therefore facially deficient and must be vacated.¹ In any event the Secretary has failed to prove that the victim in this case was either traveling or working under unsupported roof.

The essential facts are not in dispute. More specifically it is not disputed that the victim, at the time he was struck by falling rock, was positioned at least partially in by permanent roof support. The dispute arises as to how the victim got into that position. The resolution of this dispute depends on the opinions of the experts witnesses and the reasonableness of their conclusions. The accident at issue is described in the MSHA investigation report as follows:

On Monday, May 15, 1989, at about 2:30 p.m., the 009 section crew, under the supervision of Carter D. Sams, section foreman, entered the mine and arrived on the section at about 3:00 p.m., Sams examined the section and assigned duties and work locations to crew members.

Normal operations continued without incidence [sic] until about 6:45 p.m., when the Joy CM 14 Continuous Miner that was loading coal in the left crosscut of the No. 3 entry (accident scene) became inoperative due to a malfunction in the right traction motor. A Joy 10 SC Shuttle Car was used to tow the continuous miner from the working place to the next line of crosscuts outby. Sams decided that the continuous miner could not be repaired in the remainder of the work shift and that he would take the production crew to the 008 spare section

to continue producing coal for the rest of the shift. At about 6:55 p.m., Sams instructed all crew members, except for the No. 2 roof-bolting crew who were installing roof bolts in the face of the No. 1 Entry and David W. Baker, section mechanic, who was performing maintenance work, to travel to the 008 section to continue producing coal. At about 7:00 p.m., Sams gave instructions to Lee Carson Sizemore and Timothy Chadwell roof-bolting machine operators and Lyle Goings, roof bolter helper, that when roof-bolting operations were completed in the No. 1 Entry, to travel to the No. 3 entry and bolt the left crosscut (accident scene). Sams then made a routine examination of each working place and walked to the 008 section.

Upon completion of the roof bolting operations in the face area of the No. 1 Entry, Sizemore and Chadwell attempted to take the No. 2 roof bolter to the No. 3 entry, but were blocked by the continuous miner. They decided to use the No. 1 roof-bolting machine, however, when they arrived at the machine, Baker was working on the panic switch (deenergization device). Sizemore and Chadwell obtained pry bars and proceeded to the left crosscut in the No. 3 entry to pry down some loose draw rock that was left in the place when the continuous miner malfunctioned. Under normal circumstances, at the end of the cut, prior to the continuous miner leaving the working place, all loose rock would have been cut down and removed.

Sizemore stated, that at the time of the accident he was standing between the first and second roof bolt on the last row of bolts and was prying on a piece of draw rock on the left side with his back turned to Chadwell. to the best of his knowledge, Chadwell was located between the second and third roof bolt and was attempting to take down a piece of draw rock that was caught on a strap at the last row of roof bolts. Sizemore heard rock fall and when he looked around, he saw Chadwell lying on the mine floor with a piece of rock laying on his chest and the right side of his face. Sizemore removed the rock and summoned help.

Baker and Goings, who were working on the continuous miner one crosscut outby the accident area, responded to his call. Upon their arrival to the scene of the accident, Baker examined Chadwell and determined that he was unconscious and nonresponsive. realizing the seriousness of the

injuries, Baker proceeded to the mine phone and contacted the surface mine office and requested an ambulance and informed Owen Hensley, 2nd Shift Superintendent, that Chadwell had been seriously injured by a piece of falling rock. Baker then returned to the accident scene with first aid equipment. Sams overheard the phone conversation explaining the accident and immediately proceeded to the 009 section. Upon his arrival, he assisted in placing a bandage on Chadwell's head and securing him on the stretcher. Chadwell was then placed in a scoop bucket and transported to the end of the supply track where he was transferred onto a rail-mounted mantrip car. They left the 009 section at about 8:05p.m., at which time Chadwell was unconscious, but still had vital signs. They arrived on the surface with Chadwell at approximately 8:35 p.m., and placed him in the ambulance. The ambulance attendants examined Chadwell and finding no vital signs, they instructed Hensley to contact Dwayne Walker, Leslie County Coroner. The coroner arrive at the mine at about 9:30 p.m., at which time Chadwell was pronounced dead.

At hearing, MSHA Coal Mine Investigator Roy Parker testified that Chadwell was engaged in a lawful and indeed necessary procedure using a slate bar to pry loose rock from the roof and that it was not likely that Chadwell was prying rock directly over his head. Parker nevertheless concluded, based on the position of Chadwell's body after the accident, that Chadwell had been working with at least a portion of his head inby the last permanent roof support. While admitting that no one actually saw the accident, Parker nevertheless did not believe that Chadwell slipped and fell before being hit with falling rock. MSHA Investigator Maurice Mullins apparently also agreed with Parker's conclusion that the victim had been working beneath unsupported roof at least insofar as his head was inby the last permanent roof support.

While acknowledging that a portion of the victims body was indeed inby permanent roof support at the time he was struck by the falling rock Shamrock maintains that based on the evidence it is more reasonable to conclude that Chadwell had slipped and fallen and that he was actually on the mine floor when he was struck by the falling rock. Indeed I agree that this is the most reasonable inference to be drawn from the evidence.

Lee Sizemore, the miner working with Chadwell, testified that just before the accident he observed that Chadwell was using the pry bar but from a position outby the last row of

~735

permanent support. While Sizemore had his back turned to Chadwell at the time of the rock fall, he immediately turned and saw that Chadwell was lying with the rock on his chest with his legs up to his waist still remaining under the roof support.

According to Jeffrey Shell, a Shamrock Safety Coordinator who investigated the accident on May 16, 1989, the mine floor in the area of the accident was covered with loose material and the floor was higher on one side of the entry than the other i.e. it was sloped approximately 10 inches across the 18 foot-wide entry. Shell opined, based upon his extensive mining experience and knowledge of the activities of the deceased prior to the accident, that the deceased was most likely pushing at the loose roof rock from an outby position into the unsupported area. The evidence shows that the loose rock was being held by a roof support strap so according to Shell the victim most likely slipped from the outby position into the unsupported area and spun as he fell, landing on his back.

Ronald Turner, District Mine Inspector for the Kentucky Department of Mines and Minerals concurred with Shell. Turner also testified that MSHA Inspector Parker and MSHA Investigator Mullins had reached agreement during the accident investigation on May 16, 1989, that the deceased had indeed been working in the supported area trying to pry the rock loose before the accident.

Gordon Crutch, Shamrock's Safety Director and a former supervisory inspector and accident investigator for the Mining Enforcement and Safety Administration (MESA), the predecessor to MSHA, testified that he measured the slope in the accident area in October or November 1989 and found that the entry actually sloped 21ø from one side of the entry to the other. Crutch also opined that the victim had been working under the supported roof area, slipped while trying to push the rock from the roof support strapping and was already prone at the time the rock fell inby the permanent support. Crutch said his opinion was reinforced by the nature of the deceased's chest and facial injuries. Crutch observed that from his experience investigating roof fall injuries, when a victim is directly beneath the falling rock the resulting injuries are usually to the neck and, as the miner is thrust to the mine floor, to the pelvis. No such injuries occurred in this case.

With this framework of evidence I find Shamrock's explanation to be the most persuasive. For this additional reason I find that there was no violation of the cited standard and the citation must accordingly be vacated.

ORDER

Citation No. 3030499 is hereby VACATED. Shamrock Coal Company is directed to pay the following civil penalties within 30 days of the date of this decision: Citation No. 3205380 - \$100, Citation No. 3205504 - \$153, Citation No. 3205506 - \$112, Citation No. 3205512 - \$112, Citation No. 3205516 - \$87.

Gary Melick
Administrative Law Judge

AA

FOOTNOTES START HERE

1. In a citation issued May 25, 1989, for the same factual circumstances (Citation No. 3030497, Operator's Exhibit 1) the Secretary had alleged that the victim was "performing work" inby the last row of permanent roof supports. That citation was however subsequently vacated by the Secretary based on a determination that the victum was not performing work inby supported roof at the time of the accident. (Operator's Exhibit 1). The Secretary then issued the facially deficient citation at bar.