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SOL (MSHA) V. FURGURSKI & KAPISKOSKY  
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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

CIVIL PENALTY PROCEEDING  
  
Docket No. WEVA 91-2094  
A. C. No. 46-01436-03861-A

v.

Shoemaker Mine

JOHN FUGURSKI,  
EMPLOYED BY  
CONSOLIDATION COAL COMPANY  
RESPONDENT

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

CIVIL PENALTY PROCEEDING  
  
Docket No. WEVA 91-2095  
A. C. No. 46-01436-03663-A

v.

Shoemaker Mine

ERNIE KAPISKOSKY,  
EMPLOYED BY  
CONSOLIDATION COAL COMPANY  
RESPONDENT

DECISION

Appearances: Tana M. Adde, Esq., U.S. Department of Labor,  
Office of the Solicitor, 4th Floor, Arlington,  
Virginia for Petitioner;  
David J. Hardy, Esq., Jackson & Kelly, Charleston,  
West Virginia for Respondent

Before: Judge Weisberger

These cases which have been consolidated for purposes of hearing, are before me based on petitions for assessment of civil penalty filed by the Secretary of Labor (Petitioner) seeking civil penalty pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. 820(c). Pursuant to notice the cases were scheduled for April 7 and 8, 1992 in Pittsburgh, Pennsylvania. Subsequently, Respondents presented a request in a telephone conference call with Petitioner and the undersigned, to have the cases heard instead in Steubenville, Ohio. Petitioner did not object to this request and the cases were rescheduled and subsequently heard in Steubenville, Ohio on the dates previously assigned. Subsequent to the hearing, the parties each filed proposed findings of fact

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and a brief on July 14, 1992. Respondents filed a reply brief on July 28, 1992, Petitioner did not file any reply brief.

## Findings of Fact and Discussion

### I. Introduction

Sometime prior to 1971 when the entry in question was originally developed, the roof was supported by bolts. Additional bolts were also installed. In 1977, a false roof was installed below the original roof. The false roof consisted of 12 foot wooden boards bolted between horizontal I-beams that were placed 4 feet apart and perpendicular to the ribs of the entry. The I-beams, 12 feet long, 6 inches wide, and 6 inches high, were supported by vertical steel legs that were approximately 6 feet in height. Square pad plates approximately 6 feet by 6 inches by 6 inches wide were welded to the tops of the vertical beams and were bolted to the horizontal beams. Subsequent to the installation of the horizontal I-beams, wooden material, 2 inches thick, approximately 5 feet high and 4 feet wide was placed between the vertical legs. At a later date, straps were placed in the middle of the horizontal beams to support them.

During the day shift on March 19, 1990, a line of coal cars travelling on tracks in the entry in question derailed, dislodging some of the vertical steel legs. The next day, during the afternoon shift, when the area was examined by MSHA inspector Donald Moffitt, Jr., he issued a Section 104(d)(2) Order alleging a violation of 30 C.F.R. 75.202(a) in that 13 steel legs were dislodged, and no action was taken to support the area until 4:00 p.m., on the next shift. Subsequently, Petitioner filed petitions pursuant to Section 110(c) of the Act alleging in essence that Respondents knowingly violated Section 75.202(a) supra.

### II. Violation of Section 75.202(a) supra

Section 75.202(a) provides as follows: "The roof, face and ribs of areas where persons work or travel shall be supported or, otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

The area in question denominated as "Leo's turn" commences immediately inby a steel arch covering the intersection of the entry in question and an adjoining entry, and continues inby approximately 550 feet. According to Moffitt, when he examined the area on March 20, he looked up in the gap between the arch and the first horizontal beam immediately inby the arch, and saw that one roof bolt was 3 feet below the roof, and two other bolts were 1/2 to 2 feet below the roof. He also observed that material around the bolts had deteriorated, and that there were stones and coal on the horizontal beams. Moffitt indicated that

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he was able to see only 1 to 2 feet inby the arch and only 2 feet along the length of the beam, and that he could not make an adequate examination of the roof bolting system by looking over the first I-beam outby, because the beams were "uptight against the mine roof" (Tr.94).

In addition, Moffitt testified that he climbed up the rib on the clearance side of the entry, at a point approximately 12 feet further inby. He said that he saw 2 bolts that were dislodged, and that there was deteriorated material around the bolts. He said that he could not see more than a foot and a half, looking diagonally across the entry. At another point 10 to 12 feet inby on the clearance side, he saw 2 bolts dislodged and some material on the beams. He indicated that he could only see 2 bolts because the beams were "uptight against the roof", and there was material on the beams (Tr.104).

In essence, according to Moffitt, since he observed that some roof bolts were not providing support, and that it was impossible to examine the entire original roof in the area, he concluded that the system of horizontal I-beams and vertical support legs were providing the main support for the roof. Hence, according to Moffitt, if some vertical legs were dislodged, then the roof was unsupported.

Robert E. Merrifield an MSHA inspector/roof control specialist opined that the vertical legs create a barrier between the tracks and the ribs, in order to protect the tracks from sloughage off the ribs, but that their primary function is to support the roof. He explained that, given the fact that roof bolts were loose, and that it was impossible to examine and inspect the integrity of the roof, he concluded that the roof was not adequately supported.

Howard Snyder a union safety-man who accompanied Moffitt corroborated the latter's testimony with regard to the observation of bolts that were not firmly in place. None of the Respondents' witnesses contradicted the testimony of Moffitt and Snyder with regard to the existence of bolts that were not providing support.(FOOTNOTE 1)

Thomas W. Duffy, a safety inspector employed by Consolidation Coal Company ("Consol"), has worked for 25 years at the subject mine. He testified that he had observed the entry in question when it was originally developed, and saw that it was

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bolted with extra bolts. He indicated that when he observed the entry area in question on March 20, 2 or 3 bolts were dislodged in the center of the roof. However he indicated that, looking outby approximately five feet, inby 20 feet, and from the wire side to the clearance side, he did not see any indication of unsupported roof. In connection, due to the expertise of Merrifield, I place considerable weight on his testimony that, generally, bolts are placed in patterns, and that even though only one bolt is not in place, destabilization of the roof could result. Hence, based on the testimony of Snyder, Moffitt and Merrifield, I find that, in the area in question, at least 6 bolts were not in place firmly against the roof, and were not providing support.

Ernie Kapiskosky, one of Consol's shift foremen testified that he had installed the steel sets that are in issue, and that their purpose was to keep the air in the mine from the roof in order to prevent it from deteriorating, and also to keep sloughage from the roof off the track. In the same fashion, Mike Yarish, a section foreman, testified that foremen who supervised the installation of the steel sets had told him that the false roof was installed to keep sloughage from coming down, and to keep air velocity off the top off the roof.

Taking into account the width of the horizontal I-Beams, their placement four feet apart, their being supported by vertical steel beams with a supporting surface approximately 6 inches by 6 inches, and their being placed tight against the surface of the roof, I find credible the testimony of Moffitt and Merrifield, that, in essence, the steel sets provided some measure of support to the roof. Even though the horizontal I-beams were supported by straps, there is no evidence that the straps themselves provide roof support. Hence, when some vertical steel beams were dislodged and not replaced, some degree of roof support was lacking. Accordingly I find that Section 202(a) supra, was violated.

III. Whether the violation of Section 75.202(a) supra was knowingly authorized, ordered or carried out.

Sometime during the day shift on March 19, 1990, coal cars driven by Everette Auten derailed, and knocked out some of the vertical steel legs along the wire side of the entry at Leo's turn. Neither Auten nor Charles Whitlatch, another motorman, counted the number of legs that were knocked out.

Howard Snyder, a track timberman, and member of the union safety committee, indicated that when he went to the area in question on March 19, at approximately 4:30 p.m., he observed that there were 12 horizontal I-beams without any legs under them, and that there were 3 to 5 legs that were dislodged and leaning against the rib. Although Whitlatch and Auten did not

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count the number of legs that were knocked out, they each indicated that there were "probably" five legs dislodged.

Richard L. Schrickel, a foreman who was present on March 19, testified that 4 to 6 legs were dislodged and in the ditch, and that he subsequently removed them after the violation was abated. The testimony of John P. Figurski an assistant superintendent who also was present was to the same effect. Ernie Kapiskosky, the shift foreman, observed on the day of the derailment that five legs were out, and one was not strapped which he then jacked.

I thus find that, on the basis of the weight of the testimony, that at least five steel legs were knocked out by the derailment on March 19, 1990.

a. Respondents Conduct

After Kapiskosky was advised of the derailment and went to Leo's turn, he examined the area in question for "immediate" movement in the roof occasioned by the derailment, and looked at beams, straps, bolts, and lag boards. He also looked to see if any dust had been "jarred" (Tr.104). He did not see any indicia of movement. Kapiskosky testified that he pulled himself up to the false roof on the wire side at shoulder level with the planks, and observed that bolts were intact and that in general the roof looked "sufficiently supported". (Tr. 104). At another point 6 to 8 feet further outby on the wire side he again pulled himself up to the false roof, and observed up that the bolts were intact, and that the beams were flush up against the roof. After the area was cleaned and the legs that were dislodged were removed, he authorized resumption of the travel and transportation through the area.

John Figurski testified that he also inspected most of the beams and there was nothing to indicate the existence of a bad roof. He said that bad roof is evidenced by twists in the beams which indicate weight has been placed upon them. In addition, Figurski said that if the roof is bad, boards will separate and crack, and bolts will drop out or be sucked up the straps holding the beams. However, he did not see such evidence of bad roof, and he concluded that the roof was supported.(FOOTNOTE 2) He agreed with Kapiskosky's judgment that travel could be resumed in the area.

b. Petitioner's case

Merrifield opined that if only 5 legs had been knocked out, the entire area at Leo's turn, rib-to-rib, and extending 48 feet from arch to arch should have been examined as ". . . all these things are more or less tied into one another. When you disturb 1 or 2 or 5 or 15 or how many there is, it has adverse effects on the other ones or it could have" (Tr.305). (sic) He further stated, in essence, that a conclusion that Leo's turn was properly supported can not be based on an examination limited to the area directly above where the steel legs had been dislodged.

Both Moffitt and Snyder testified that on March 20, they walked the entire area covering a distance of approximately 48 feet inby the arch at Leo's turn, and that the only places where it was possible to see above the false roof were at the three areas testified to by Moffitt. In this connection, Moffitt testified that he spent approximately 2 to 2 1/2 hours examining the entire area. Also, Moffitt was asked how hard it was to see over the top at the first I-beam outby the arch where he had observed 3 bolts not in place, and he answered as follows: "I thought it was fairly easy to look for" (Tr.81). Also, Moffitt and Snyder testified that it would have been impossible to have climbed up to look at the false roof on the wire side as testified to by Kapiskosky, because the beams were flush up against the roof and there was no room. I do not find this testimony to be of sufficient weight to impeach the testimony of Kapiskosky who, based upon his demeanor, I find credible with regard to what he actually did. In this connection I note that none of the Petitioners' witnesses attempted to climb up to shoulder level with the planks on the wire side as did Kapiskosky.

According, to Snyder, Joe Fahay, a motorman, had complained to him about motors rubbing against the vertical steel legs that had been dislodged. Snyder also said that on March 19, Whitlatch and Auten had come to him and told him of their concern about the roof falling subsequent to the derailment which had dislodged some legs. However, the record does not establish that either of these two had complained to either Figurski or Kapiskosky with regard to any hazardous roof condition. In their testimony Auten and Whitlatch each expressed concern that the roof could possibly have fallen after the derailment, but did not indicate any facts which formed the basis for their conclusions.

According to Snyder, on March 19, shortly before the commencement of the evening shift he informed Yarish that the violation should be corrected "before they run" and Yarish said "yeah, I know we do." (Tr.246) Snyder stated that Yarish called the shift foreman and told him that the legs were dislodged, and that some beams needed either jacks or posts to be set under them. He also stated that he told Yarish that the straps holding

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the I-beams were more than 6 feet from the rib, and Yarish agreed that additional support was needed.

Yarish indicated that he could not recall the conversation with Snyder, and that on his shift he installed 13 wooden posts. When asked why he installed 13 posts, Yarish stated installed them to replace the legs that were dislodged, and that "I know that if I didn't put them legs back in that they would've been put in before" (Tr. 258) (sic). Yarish said he "felt comfortable with the posts being there" (Tr.260). I find that Snyder's version more credible based upon my observations of both of these witnesses.

#### c. Case Law

In *Kenny Richardson*, 3 FMSHRC 8 (1981), aff'd 689 F.2d 632 (6th Cir. 1982) cert. den. 461 U.S. 928 (1984), the Commission reviewed the legislative history of the term "knowingly" as used in Section 109(c) of the Federal Coal Mine Health and Safety Act of 1969, (the 1969 Act), whose exact language was continued in Section 110(c) of the 1977 Act and held that the term means "knowing or having reason to know", (*Kenny Richardson*, supra, at 16) Specifically, the Commission stated as follows: "If a person in a position to protect employees safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner of contrary to the remedial nature of the statute." *Kenny Richardson*, supra at 16.

In *Roy Glenn*, 6 FMSHRC 1583 (July 1984), the Commission applied its holding in *Kenny Richardson* supra to a factual situation where the violation of a mandatory standard did not exist at the time of the alleged failure of the corporate agent to act. The Commission stated as follows:

We hold that a corporate agent in a position to protect employee safety and health has acted "knowingly" in violation of section 110(c) when, based upon facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventative steps. To knowingly ignore that work will be performed in violation of an applicable standard would be to reward a see-no-evil approach to mine safety, contrary to the strictures of the Mine Act. (6 FMSHRC supra at 1586).

Further, the Commission in *Roy Glenn*, supra at 1587, provided the following interpretation of its concerns and principles it had set forth in *Kenny Richardson*, supra:



\*\*\*[t]he Commission held in Kenny Richardson that a supervisor's blind acquiescence in unsafe working conditions would not be tolerated. Onsite supervisors were put on notice by our decision that they could not close their eyes to violations because of self-induced ignorance. (Emphasis added.)

Based on the language of the Commission in Kenny Richardson, supra, and Roy Glenn, supra, set forth above, wherein the Commission described the type of conduct that falls within the scope of the term "knowingly" in the context of Section 110(c) supra, I conclude that a violation of Section 110(c), supra occurs where one ignores an unsafe condition or ignores information that gives him reason to know of the existence of a violative condition. Applying these principles to the case at bar, I find that neither Respondents "knowingly" violated Section 75.202(a) supra. Figurski and Kapiskosky, testified that they examined the roof in the area, and did not observe any of the indicia indicative of a bad roof. Neither did Shrickel and Yarish who were also in the area on March 19. None of Petitioner's witnesses specifically contradicted or impeached this testimony with regard to the non-existence of the various factors testified to by Respondents' witnesses as being indicative of a bad roof. Also, since none of Petitioner's witnesses actually climbed or attempted to climb on the rib of the wire side to get a view of the roof above the false roof, I accept Kapiskosky's testimony that when he did climb in these areas the roof observed by him was well supported. For these reasons I find that neither Respondents ignored any information that gave them reason to know the existence of a violative condition. I conclude that it has not been established that Respondents knowingly violated Section 75.202(a).

ORDER

It is hereby ORDERED that this case be dismissed.

Avram Weisberger  
Administrative Law Judge  
(703) 756-6215

FOOTNOTES START HERE-

1. Respondents' witnesses testified they did not observe any indicia of bad roof on April 19 and 20. I do not find this testimony sufficient to contradict or impeach the testimony of Moffitt and Snyder with regard to the condition of the bolts actually observed by them.
2. Testimony to the same effect was provided by Schrickel and Yarish Shrickel, who also was present on March 19, opined that the roof was properly supported as there was no movement of the boards, or movement or bowing of the beams. According to Yarish when he arrived at Leo's turn on March 19 after 4:00 p.m., the boards between the beams "did not take any weight", as the

bolts "didn't stuck up through the boards". (Tr. 248) (sic).