FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 30, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 97-65
Petitioner	:	A.C. No. 15-02502-03708
	:	
v.	:	Shamrock #18 Series
	:	
	:	
SHAMROCK COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee and Tommy Lee Frizzell, Conference & Litigation Representative, U.S. Department of Labor, MSHA, Barbourville, Kentucky for Petitioner;
Neville Smith, Esq., Attorney at Law, Manchester, Kentucky for Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a petition for assessment of penalty filed by the Secretary of Labor (Petitioner) alleging a violation by Shamrock Coal Company (Shamrock) of 30 C.F.R. § 75.211(c). Pursuant to notice the case was heard in Corbin, Kentucky on April 9, 1997. William H. Sharp Jr., testified for Petitioner, and Jeffrey Stephen Shell, Charles Alvin Morgan, and Douglas Wayne Adams testified for Shamrock. Subsequent to the hearing the parties filed briefs on June 9, 1997.

I. Findings of Fact and Discussion

A. Violation of 30 C.F.R. § 211(c)

1. Petitioner's evidence

On July 22, 1996, William H. Sharp Jr., an MSHA ventilation specialist, inspected Shamrock's No. 18 Series mine. Sharp traveled by mantrip inby in the No. 2 entry which was utilized as the main travelway. At a point six crosscuts from the surface, Sharp exited the

mantrip, and proceeded on foot. He observed an area 50 to 70 feet long, and 20 feet wide that contained fractures in the roof. He did not detect any roof bolts that had broken or shifted position. However, he observed that some of the supporting crib blocks were broken and others were "squeezed down" (Tr.20). He also noted that the cap wedges used to tighten the blocks against the roof were being squeezed. In addition, he noted that some steel I-beams, placed length-wise along the surface of the roof, and supported by a set of crib blocks, one at either end of the steel beam, were twisted and bent. He noted the existence of roof falls in adjoining crosscuts.

According to Sharp, men travel through the area in a man-trip entering and exiting the work area. He noted that it was not "dangered off or barricated" (Tr.22). Sharp issued a citation alleging a significant and substantial violation of 30 C.F.R. § 75.211(c) which provides as follows:

> When a hazardous roof, face or rib condition is detected, the condition shall be corrected before there is any other work or travel in the affected area. If the affected area is left unattended, each entrance to the area shall be posted with a readily visible warning, or a physical barrier shall be installed to impede travel into the area.

According to Sharp, he concluded that the roof in the area was hazardous. This conclusion was based upon the following: the occurrence of a roof fall in an adjoining crosscut; fractures in the roof; bent and twisted steel beams, broken and squeezed crib blocks; and squeezed cap wedges. According to Sharp, those conditions indicated that the roof was heavy.

2. Respondent's evidence

Shamrock does not contest Sharp's testimony that men travel in the area, but maintains that the roof was not hazardous. Jeffrey Stephen Shell, Shamrock's Safety Director, indicated that initially in 1985 the area was bolted with five-inch resin bolts. Sometime around 1987 or 1988 the area in question was re-bolted with six-foot and seven-foot point anchor bolts. On June 17, 1996, a roof fall occurred in a crosscut between the track entry in question, and the adjacent No. 1 entry approximately 80 to 90 feet from the cited area. Shell explained that the roof that fell was supported only by five-foot bolts, and neither cribs, additional bolts, nor jacks had been utilized to support the roof. As a consequence of this roof fall, 12-foot bolts were added in the cited area, and steel I-beams, between 17 to 18 feet long and four to five inches wide, pressured against the roof by hardwood cribs placed at either end, were added for support. In addition, approximately six 16-foot bolts were added for support between the beams.

Shell indicated, in essence, that the fact that the steel I-beams were bent does not indicate a hazardous condition, as they were supported by blocks at each end and were designed to bend. However, no facts were adduced to provide a basis for his opinion that the I-beams were designed to yield.

Shell opined, in essence, that cribs may have shifted or broken as a result of being bumped by large pieces of equipment that were hauled in and out of the area. However, this testimony is too speculative to be relied upon.

On June 17, 1996, Shell marked three different jack sets in the cited area in a fashion that would clearly indicate if a jack would be subject to an increase in pressure from the roof above it. Shell checked the marks eight to ten times from then to July 22, and did not observe that the jacks had shown any downward movement. Similarly, Charles Alvin Morgan, Shamrock's General Foreman, opined that the area was not hazardous as he checked the marks on the jacks two times a week from June 17, to July 22, and observed that there was no evidence that the roof was pressing down on the beams. On July 22, the date the area in question was cited, Shell checked the jacks, and none evidenced any movement. Morgan made the same observation on July 23.

Shell indicated that in the six week period subsequent to July 22, no additional support was provided to the cited area, and it did not experience any falls. Nor was movement detected in the jacks.

Shell opined that the roof in the cited area did not constitute in a hazardous condition. He indicated that MSHA inspectors traveled through the area in a mantrip on July 1, July 9, July 10, July 16, July 17, July 18, July 22, 1996, but none of these inspectors cited the area in question. However, the record is not clear as to whether these inspectors merely traveled through the area from a mantrip, or actually walked and inspected the area in question on foot as Sharp did. Thus, the fact that other inspectors did not issue citations is insufficient to rebut Sharp's testimony regarding his observations.

3. Discussion

None of Respondent's witnesses contradicted the testimony of the Inspector that the roof in the area in question was fractured. Also, there was no impeachment or contradiction of the Inspector's testimony that the cap wedges used to tighten the blocks against the roof were being squeezed. Further, it was not controverted that some cribs were broken, I-beams were bent, and most significantly, there was a roof fall, on June 17, in an adjacent cross cut approximately 80 to 90 feet from the cited area. For these reasons I find that when cited, the roof was hazardous. Although additional supported had been provided on June 17, the hazardous conditions was not fully corrected, and miners still traveled in the area. For these reasons I find that it has been established that Shamrock did violate Section 75.211(c) supra.

B. Significant and substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significant and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial, "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co. 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Sypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to be the violation, (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula 'required that the Secretary establish likelihood that the hazard contributed to will result in an event in which there is an injury.' U.S. Steel MiningCo., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the continuation of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

It is clear, as discussed above, that Shamrock did violate Section 75.211(c) supra, and that this violation contributed to the hazard of a roof fall. Hence, the first two elements set forth in Mathies, supra have been met. It remains to be resolved whether the evidence establishes the third and fourth elements set forth in Mathies supra.

According to Sharp, given continued mining and continued travel in the area, a roof fall causing fatalities would have been reasonably likely to have occurred, as evidenced by the roof fall on June 17 in an adjacent crosscut, and the condition of the cited roof. Sharp asserted that the roof fall in an adjacent crosscut indicated the existence of adverse roof conditions which could deteriorate in minutes.

There was no actual observable deterioration in the roof, as evidenced by the lack of pressure on the jacks between June 17, and six weeks later when the area was supported by additional cribs. However, even Shell admitted on cross-examination that roof conditions can deteriorate quickly "in an area such as this" (Tr.76).

I have considered Shamrock's evidence that, when cited, there remained only approximately two hours of work to complete the installation of tracks in the adjacent entry No. 1, in order to transport miners by entry No. 1, rather than subject them to hazardous of travel through entry No. 2. However, I place most weight on the existence of uncontraverted indicia of adverse roof including fractures in roof, bent I-beams, squeezed cap wedges, and most significantly a roof fall that had occurred in a crosscut only 80 to 90 feet from the cited area. Shamrock also has not controverted the Inspector's testimony that, since eight men regularly traversed the area in question going in and out of mine, if the violative condition would not have been corrected, it would have been likely that a roof fall would have resulted in eight fatalities. Within this context, I find that the third and fourth elements set forth in Mathies, have been met. I conclude that it has been established that the violation was significant and substantial.

C. Penalty

In assessing a penalty under the criteria set forth in section 110(i) of the Act, I note that it has been stipulated that a reasonable penalty will not affect Shamrock's ability to remain in business. In addition, I find that, as discussed above, the violation herein was of a high level of gravity. However, the history of Shamrock's violations in the two year period ending July 21, 1996, is not excessive. It is significant that in this two year period there were not any violations issued for Section 75.211(c). Further, the record establishes that Shamrock exercised a high degree of care in decreasing the hazard of a roof fall once it became aware of adverse conditions on June 17, when the roof fell in an adjacent entry. I note that Shamrock commenced to work on laying track in an adjacent entry so that miners would no longer have to travel through entry No. 2. Also, Shamrock added additional support to the roof in the cited area by way of 12 foot and 16 foot bolts, cribs, and I-beams. I find that Shamrock's negligence to have been only minor, and as a consequence the penalty to be assessed should be mitigated to a high degree. For all the above reasons I find that a penalty of $500 is appropriate.

ORDER

It is ordered that Shamrock pay a civil penalty of $500 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

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