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MSHA V. SHAMROCK COAL
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TTEXT:
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 26, 1983
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. KENT 80-292

SHAMROCK COAL COMPANY

DECISION

This civil penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), and involves two alleged violations of a roof control standard for underground coal mines, 30 C.F.R. § 75.200. 1/ The administrative law judge held that the operator, Shamrock Coal Company, violated the standard and assessed penalties. 2/ We granted review of Shamrock's petition for discretionary review on the issue of whether the operator violated its roof control plan, and thus the cited standard, by failing to (1) install appropriate roof support, and (2) drill a test hole. For the reasons that follow, we affirm in part and reverse in part.

1/ The standard provides in pertinent part:
Section 75.200 Roof control programs and plans.

[STATUTORY PROVISIONS]

Each operator shall undertake to carry out in a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form....

The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or

inadequacy of support of roof or ribs.

2/ The judge's decision is reported at 3 FMSHRC 1858 (July 1981)(ALJ).

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On October 30, 1979, a roof fall at Shamrock's No. 18 underground coal mine in Clay County, Kentucky, resulted in the death of Shamrock's second-shift foreman, Floyd D. Burke. After an investigation, a Mine Safety and Health Administration inspector issued a citation alleging two violations of section 75.200. The citation stated:

The roof control plan was not being complied with in that additional support such as timber or cribs was not being used along with metal straps where abnormal conditions were encountered in the No. 4 entry of 005 section, and a test hole was not drilled.

Shamrock has a "full bolting" roof control plan. In addition to roof bolts, the plan also requires conventional support (e.g., crossbars, posts, etc.) under some circumstances. The pertinent provisions of Shamrock's roof control plan state:

Crossbars to be used when pots, slips, horsebacks or hillseams are encountered. A minimum of 2 crossbars to be used at each location. At least one post to be used under each end of the crossbars and the posts are not to be more than 14 feet apart. Crossbars to be installed on 4-foot centers, and the foreman in charge shall determine when the installation of crossbars is to be discontinued. Steel straps pre-drilled on not more than 4-foot centers and installed with roof bolts on not more than 4-foot centers may be used in lieu of wood crossbars, as stated above, in areas where the roof structure is of such nature that it will provide adequate anchorage for roof bolts.

In areas where steel straps have been utilized in lieu of wood crossbars where abnormal roof conditions are encountered, the area shall be supported with cribs, and/or posts set on 4-foot centers on each side of a 16-foot wide roadway.

Safety Precautions For Full Bolting and Combination Plans

1. This is the minimum roof control plan and was formulated for normal roof conditions and the mining system(s) described. When subnormal roof conditions are encountered, indicated or anticipated, additional roof support such as longer

and/or additional roof bolts, posts, or crossbars, shall be installed.

* * * *

12. During each production shift at least one roof-bolt hole in each active working place shall be drilled to a depth of at least 12 inches above the anchorage horizon of the bolts being used....

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The roof fall occurred in the roof in the No. 4 entry. Prior to the accident, that roof was supported by 36-inch conventional roof bolts on four foot centers, and by 10 to 12 metal straps secured by additional roof bolts. These metal straps covered four hillseams, or cracks, in that entry. 3/ The entry was 20 feet wide in the immediate fall area. Shamrock installed the roof bolts and supplementary metal straps during the day shift immediately preceding the accident. As was its normal practice, it did not install any cribs or posts in the area prior to the accident, although it set them afterwards to permit recovery.

There were numerous cracks and hillseams throughout the mine and in the fall area. Hillseams were more likely to be encountered and to pose a hazard the closer an entry was to the outcrop. 4/ The accident area was approximately 100 feet from the outcrop boundary. Three or four small falls had previously occurred in the accident area near the outcrop. There was disagreement as to the condition of the roof in the immediate accident area and the hazards posed by hillseams. Where roof control in the mine was difficult or impossible, Shamrock usually declined to mine, or abandoned, those entries.

On the shift before the accident, James Napier, the day-shift foreman, observed the hillseams in the No. 4 entry. Toward the end of his shift, he instructed a roof bolter to drill a test hole in the entry, 'at what was later the accident site, to determine the extent of the hillseams. That test hole apparently was not drilled because the bolter had no drill steel. Whether a test hole in the No. 4 entry was drilled during the earlier part of the day shift is a major factual question in this case. (From the beginning of the second shift to the time of the accident, it is undisputed that no test hole was drilled.)

At about 2:50 p.m., Napier also sounded the roof in the entry with a hammer (about 30 to 32 inches of the immediate roof could be sounded), and determined to his satisfaction that it was solid. At the end of his shift, Napier informed Burke, the second shift foreman, of the hillseams, but neither recommended particular action nor mentioned his order to drill the test hole. He warned Burke, however, "to watch that night and be careful."

3/ There was some disagreement at the hearing as to the exact definition of a "hillseam." Everyone agreed that, basically, it is a crack in the roof, often filled with earth or mud. Some witnesses described it as a crack extending all the way to the surface. See also *Dixie Fuel Co.*, 7 IBMA 71, 76-77 n. 3 (1976).

4/ An outcrop is defined as the "part of a rock formation that appears on the surface of the ground." Bureau of Mines, U.S. Department of the Interior, *A Dictionary of Mining, Mineral, and Related Terms* 778 (1968) ("DMMRT").

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The day shift had advanced the No. 4 entry about 70 feet from the beginning to the end of the shift. The second shift advanced approximately an additional 20 feet to the accident site. The accident occurred about 2-1/2 hours into the second shift, during normal mining operations, and without significant prior warning. As the continuous miner operator and the shuttle car operator loaded out a shuttle car of coal from the crosscut, they noticed mud and loose rock falling from the roof. Almost immediately the roof fell, killing Burke instantly. The area of the roof fall was approximately 20 feet wide, 40 feet long, and 20 to 36 inches thick. The fallen mass weighed about 100 to 150 tons, and covered most of the intersection of the entry and crosscut where it occurred.

The judge found two violations of section 75.200. First, he concluded that Shamrock violated its roof control plan because it continued to mine in the presence of abnormal conditions, i.e., hillseams, without using the type of roof support required by its plan under such conditions. Second, he concluded that Shamrock failed to drill a test hole in the No. 4 entry during the day shift as required by its plan. We affirm the judge as to the roof support violation, but reverse as to the alleged test hole violation.

The roof support violation

On review, Shamrock repeats arguments previously made before the judge. The operator stipulates that the roof in No. 4 entry was supported solely by roof bolts and metal straps secured by additional roof bolts. Shamrock argues that its roof control plan requires cribs and posts to supplement metal straps only where miners encounter abnormal conditions. Because, in Shamrock's view, hillseams are not per se abnormal conditions and because these particular hillseams were not abnormal, its failure to use cribs and posts did not violate the plan.

It is clear that the first paragraph of the plan quoted above requires the use of crossbars supported by posts when "pots, slips, horsebacks, or hillseams are encountered." 5/ It is also clear that the second paragraph permits the use of metal scraps secured by roof bolts as an alternative means of support, in lieu of the crossbars

permitted by the first paragraph, when any of the conditions listed in the first paragraph are encountered. The parties do not dispute the meaning

5/ A pot is defined as a round piece of shale separated from the rest of the roof by a crack. Tr. 68; DMMRT 850. Slips and horsebacks are defined as joints or faults in the roof, which may be slippery and likely to fall. Tr. 68-69; DMMRT 1027. See also definitions of kettle bottom (often a synonym for slip or horseback): "A smooth rounded piece of rock, cylindrical in shape which may drop out of the roof of a mine without warning and sometimes causing injuries to miners"; and seam: "A joint, cleft, or fissure." DMMRT 609, 976. See n. 4 for definition of a hillseam. The inspector testified that all these conditions were "abnormalities." Tr. 32 33, 68-69, 70 71. This evidence and these accepted definitions indicate that hillseams and the other listed conditions are generally regarded as abnormal roof conditions in mining.

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of these two paragraphs. Rather, the dispute centers on the third paragraph. "In areas where steel straps have been utilized in lieu of wood crossbars where abnormal roof conditions are encountered, the area shall be supported with cribs, and/or posts set on 4-foot centers on each side of a 16-foot wide roadway."

The judge rejected Shamrock's interpretation of the third paragraph. He construed the paragraph as requiring the supplemental use of cribs and posts whenever the second paragraph's metal strap alternative is utilized. He thus reasoned that the "abnormal conditions" referred to in the third paragraph are synonymous with the "pots, slips, horsebacks, or hillseams" referred to in the first paragraph. Stated otherwise, he concluded that hillseams are "abnormal" or "subnormal" conditions within the meaning of Shamrock's plan. He further determined, relying in large part on the testimony of the inspector and Napier, that these particular hillseams in the No. 4 entry were abnormal.

Under his construction of the plan and the evidence presented, the judge concluded that Shamrock "fail[ed] to comply with the ... plan by using steel straps to support the roof without supplemental cribs and posts being utilized." 3 FMSHRC at 1868-69. He also found, however, that there was not enough space to use cribs and posts while the continuous miner and the shuttle car were working in the cited area. He expressed the opinion that Shamrock could either have used crossbars instead of the metal straps, or declined to mine the area. Because the operator did neither, the judge concluded it had violated its roof control plan, and thus the cited standard. 3 FMSHRC at 1865-67. We agree with the judge that Shamrock violated its plan, but

we do not endorse all of the judge's reasoning.

We first construe the requirements of Shamrock's plan. We agree with the judge's determination that the third paragraph refers back to the first two and is to be read in conjunction with them. Read together, the three paragraphs require that when abnormal conditions such as hillseams are encountered, either crossbars or metal straps are to be used, but if the straps are used they must be supplemented by cribs and/or posts. Thus, hillseams and the other listed conditions are "abnormal" or "subnormal" roof conditions within the meaning of the plan. The plan uses the term "abnormal" in a qualitative not quantitative sense, and does not distinguish between serious and less serious roof abnormalities. In sum, regardless of the frequency or varying seriousness of hillseams in the mine, the plan requires the installation of the support indicated above when the hillseams are encountered.

The foregoing construction is consistent with the plan's purpose, structure, and grammar. The plan makes clear that it is a "minimum roof control plan" and that when "subnormal" roof conditions are encountered, "additional roof support ... shall be installed." The interpretation adopted by the judge, and affirmed by us, furthers this purpose. The sequential arrangement of the three paragraphs and their internal cross-references also support reading them as an interrelated whole. As the

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judge correctly reasoned, because the crucial phrase in the third paragraph ("where steel straps have been utilized in lieu of the wood crossbars where abnormal roof conditions are encountered") has a comma only after the final word "encountered," the phrase must be read as a unit. It is merely a reference back to the first two paragraphs and does not add new qualifications. Finally, as noted above, the testimony in this case and accepted definitions show that conditions like hillseams and pots are regarded as roof abnormalities, and we reject Shamrock's contentions to the contrary.

Applying the above construction of the plan to these facts, we first note Shamrock's concession that it did not provide cribs and/or posts to supplement the metal straps. The evidence overwhelmingly supports a finding that hillseams were encountered. The testimony of Napier, the dayshift foreman who was concerned about the hillseams, is decisive on this point. Because the hillseams were encountered and the metal strap alternative was used, the plan required supplementation by cribs and/or posts. In addition, Napier's actions--his sounding of the top, his ordering of the test hole, and his warning to Burke--all indicated his concern that these particular hillseams in the fall area were potentially dangerous. Shamrock offered no credible evidence in rebuttal. We also note that the No. 4

entry was near the outcrop, where hillseams were potentially most dangerous, and that other roof falls had occurred nearby. We agree with the judge that the evidence shows there was not enough space to use cribs in the same area as the continuous miner, but we disagree with his statement that crossbars were a feasible alternative. The first paragraph of the plan requires that crossbars be supported by posts no more than 14 feet apart. Thus, the crossbars arguably would present the same problem posed by the cribs. The third paragraph, however, allows the supplemental use of posts alone as an alternative to cribs. Contrary to the judge's rather general statements with regard to "cribs and/or posts," the evidence does not clearly show that supplemental posts on each side of a 16-foot roadway would have rendered continuous mining impossible. Thus, it may have been possible to supplement the metal straps with posts alone, as authorized by the third paragraph. We need not resolve that question. The operator did not try to use posts, and if it found its approved and adopted plan to be impractical, it could either have sought revision of the plan or declined to mine the area in question. Shamrock explored none of these alternatives and instead departed from the requirements of its plan. We therefore affirm the judge's conclusion that Shamrock violated the standard by failing to comply with its plan. 6/

6/ We merely construe Shamrock's plan, although we note that it may well have certain practical defects. For example, the plan does not distinguish between dangerous and minor hillseams, etc., but requires the designated support whenever these conditions are encountered. The plan also does not acknowledge practical difficulties of using certain types of support. The sole issue before us is whether Shamrock complied with its plan, not the plan's intrinsic merits. As noted above, Shamrock could have sought revision of the plan. We also note that the issue in this case is not whether extra or different support would have prevented the accident, but whether the plan was followed.

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The test hole violation

The judge determined that because the cited area, the No. 4 entry, was in by an active working place on the first shift, Shamrock's roof control plan required a test hole to be drilled in the No. 4 entry during that shift. 7/ He found that the test hole ordered by Napier toward the end of the first shift was not drilled. The judge, however, did not satisfactorily resolve the question of whether a test hole was drilled anytime during the day shift, i.e., whether a test hole had been drilled earlier in the day shift at some location in the No. 4 entry other than the immediate fall area. 3 FMSHRC at 1861, 1863-64.

Shamrock's plan requires: "During each production shift at least one roof bolt hole in each active working place shall be drilled..." The plan is unambiguous on its face, and the parties do not question its meaning. We therefore interpret the plan to require that, in an active working place as here (3 FMSRHC at 1863). Shamrock was required to drill at least one test hole "throughout the continuance or course of" or "at some point in the course of" the day shift. Webster's Third New International Dictionary 703 (1971). The plan does not specify where in the working place, or when during the shift, the test hole must be drilled, and thus grants the operator considerable flexibility in testing. Hence, drilling a test hole anywhere in the active working place, the No. 4 entry, during the day shift would have satisfied the plan.

The question before us is factual. The Secretary did not establish Shamrock's failure to drill a test hole anywhere along the 70 feet of the No. 4 entry advanced during the day shift. Before the judge, the Secretary's evidence pertained only to the immediate fall area. See Tr. 38-39, 43-45, 161-62. We reject the Secretary's unsupported assertion that Shamrock's employees checked the entire entry and could find no test hole; the evidence shows only that there was no test hole in the immediate fall area. We also reject the Secretary's speculative argument that, because the roof bolter had no drill steel at the end of the shift, he also had none earlier and could not have drilled a test hole. Given the Secretary's failure to establish a prima facie case, Shamrock was under no obligation to prove it actually drilled a test hole. Consequently, while the evidence supports

7/ The citation did not specify on which shift the alleged violation occurred. The judge accepted Shamrock's argument that there could be no violation for any failure to drill a test hole on the second shift because the plan merely required a test hole "during" each production shift, and it was conceivable that the operator could have drilled a hole sometime during the remaining five hours of the second shift. 3 FMSHRC at 1863. We concur. (The Secretary does not dispute that determination, but argues only that Shamrock failed to drill a test hole on the first shift).

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the judge's finding that no test hole was drilled in the immediate fall area, we conclude that substantial evidence fails to support a finding that no test hole was drilled anywhere in the active working place during the first shift. 8/

Accordingly, on the bases discussed above, we affirm the judge's determination that Shamrock violated its roof control plan and thus

the standard by failing to provide appropriate roof support in the presence of abnormal roof conditions. We reverse the judge's conclusion that the operator violated its plan by failing to drill a test hole in the No. 4 entry during the first shift, and vacate the \$750 penalty assessed for that violation.

8/ We note that, on grounds remarkably similar to those articulated in this decision, a Commission judge recently vacated a citation alleging that Shamrock failed to drill a test hole at another of its mines. Shamrock Coal Co., 4 FMSHRC 2037 (November 1982)(ALJ). Similar, or identical, test hole plan provisions were in effect.

The judge concluded:

It seems clear to me that on the facts of this case the inspector issued the citation [during his inspection on the second shift] 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.

4 FMSHRC at 2041 (emphasis added). The Secretary must either require more specificity in Shamrock's plan as to exactly when and where test holes will be drilled, or must inspect more thoroughly for indications of test holes.

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Distribution

Ann Rosenthal

Office of the Solicitor

U.S. Department of Labor

4015 Wilson Blvd.

Arlington, Virginia 22203

Neville Smith

P.O. Box 441

Manchester, Kentucky 40962

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