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SOL (MSHA) V. SHAMROCK COAL
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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. BARB 78-494-P A.O. No. 14-02502-02020V
v.	No. 18 Mine
SHAMROCK COAL COMPANY, RESPONDENT	

DECISION

Appearances: John H. O'Donnell, Attorney, Office of the Solicitor, U.S. Department of Labor, for Petitioner
Neville Smith, Attorney, Manchester, Kentucky, for Respondent

Before: Judge Littlefield

Introduction

This is a proceeding for assessment of a civil penalty against the Respondent and is governed by section 110(a) of the Federal Mine Safety and Health Act of 1977 (1977 Act), P.L. 95-164 (November 9, 1977), and section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969 (1969 Act), P.L. 91-173 (December 30, 1969). Section 110(a) provides as follows:

> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

Section 109(a)(1) provides as follows:

> The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a

> separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

Petition

On June 23, 1978, the Mine Safety and Health Administration (MSHA),(FOOTNOTE 1) through its attorney, filed a petition for assessment of a civil penalty charging one violation of the Act as follows:

Order No.	Date	30 CFR Standard
7-0132	11/01/77	75.329

Answer

On July 21, 1978, Respondent, Shamrock Coal Company, filed a detailed answer thereto, which denied the allegation and requested a hearing thereon.

Tribunal

A hearing was held on Wednesday, February 14, 1979, in Knoxville, Tennessee. Both MSHA and Shamrock Coal Company (Shamrock) were represented by counsel. Posthearing briefs were filed by both parties.

Evidence

1. Stipulations

The following stipulations were entered:

(a) The proceeding is governed by the 1969 Act and 1977 Act (Tr. 6).

(b) The Judge has jurisdiction (Tr. 6).

(c) Shamrock is the operator of the No. 18 Mine and is subject to the Acts' jurisdiction (Tr. 6).

(d) The No. 18 Mine currently employs 262 people (Tr. 7).

(e) The total production of Shamrock for 1977 was 1.3 million tons. The total production for the controlling interested party, Mr. B. Ray Thompson, was 1.4 million tons in 1977 and projected to be 1.5 million tons in 1978 (Tr. 7).

(f) The ability of Respondent to stay in business will not be affected by any civil penalty assessed in this matter (Tr. 7).

(g) The inspectors who issued the notices and orders herein at issue were duly authorized representatives of the Secretary (DAR) (Tr. 7-8).

(h) Copies of the notices and orders which are the subject of the hearing were properly served on a representative of the operator (Tr. 8).

(i) The No. 1 mine's previous history of violation is as follows: January 1, 1970 through April 8, 1974, 113 violations, $6,623 penalty paid; January 1, 1970, through May 1, 1977, 249 violations, $17,117 penalty paid (Tr. 8).

2. Testimony

A. Michael F. Detherage

MSHA initiated its case through the testimony of Mr. Detherage, the DAR who issued the 104(c)(2) order herein at issue (Tr. 9-15). The inspector has been a DAR since 1975 (Tr. 11-12). Previously, he had worked in Southeastern Kentucky during his apprentice period (Tr. 12). He had been certified as an electrician by the Federal Government but was not certified as a foreman by any jurisdiction (Tr. 13-14). He identified Government Exhibit No. 99 as Order No. 1 MFD, herein at issue, as served on Mr. Charles L. Rice, superintendent of the mine (Tr. 15; Govt. Exh. No. 99).

The order charges Respondent with the failure to establish a bleeder system for a panel in the F section of the mine (Tr. 16-17). There were, however, other bleeders in this active working section (Tr. 17). The area was not sealed (Tr. 18). The system that they had previously been following had involved cutting across a previously mined set of rooms leaving a path for ventilation (Tr. 19). They mined out the pillars with a continuous miner (Tr. 18). They were doing nothing in lieu of this system (Tr. 19-20). The required ventilation was 9,000 cfm in the last open crosscut. This was complied with (Tr. 20). Small amounts of methane were released at the mine (Tr. 21).

He testified there was a ventilation system, however, according to him, there was no bleeding for the area that had been pillared (Tr. 21). He concluded that there had been an unwarrantable failure because there could have been a buildup of methane and an ignition (Tr. 21-22). The inspector understood "unwarrantable" as meaning that the operator knew or should have known of the violation (Tr. 22). The operator knew of the violation because it was working in the area every day and the operator turned a map into the district office that showed the crosscuts to the old works had been left out (Tr. 23).

This left-out area was brought to the attention of the inspector by someone in the district office (Tr. 23). One of the reasons he went to the mine was to investigate conditions seemingly appearing on the district office map (Tr. 23). He could not enter the area because it had been pillared out and fallen (Tr. 23). Therefore, all he could rely on was the aforementioned map (Tr. 24).

On November 2, 1977, the next day, he issued a termination of the order (Tr. 25; Govt. Exh. No. 100). It was issued because there were two bleeders cut across to the righthand from the place from which they were mining (Tr. 25). The operator demonstrated good faith in affecting rapid compliance (Tr. 25-26).

The inspector is 30 years old and has had no experience in operation management or control of the general practices of mining (Tr. 26A).

Though he did not remember whether he prepared the withdrawal order before he arrived at the mine, he did know he was going to prepare it based on the map (Tr. 27-28). Testimony with respect to the district office map was accepted into evidence over Respondent's objection, however, no ruling as to probative value was made at that time and this fact will be addressed here (Tr. 33). The map was never introduced. The map, it was alleged, was not presented by counsel for MSHA because the inspector who possessed it was part of another case which had been resolved (Tr. 31).

Respondent's lawyer averred that he did not know that Shamrock also lacked a copy of the map (Tr. 31-32).

At the office, prior to the inspection, Messrs. Ken Dixon and Larry Lang went over the map and showed Inspector Detherage the deficiency and suggested that the inspector take action as the condition was dangerous (Tr. 34).

Mr. Lang had had a disagreement with an employee of Shamrock Coal Company (Tr. 34). The order was issued on the suggestion of Mr. Lang and Mr. Dixon (Tr. 34-35).

Mr. Detherage made no attempt to observe the actual condition as it was impossible to get into the area to check it out (Tr. 35), therefore, the only source of information with reference to the violation was on the map submitted (Tr. 36-37).

In May of 1977, Mr. Detherage and Mr. Lang had previously written an order of this type (Tr. 38), however, the inspector had never been in this particular set of rooms, though he was a regular MSHA inspector.

According to the map, with respect to other panels, Shamrock was establishing a bleeder system (Tr. 39). The .01 of 1 percent of methane that was found at the mine was not found in the F section (Tr. 40-41). The mine was approximately 7 square miles and the sample showing methane had been taken more than a mile away from the F section, at the fan (Tr. 42).

The witness believed that there would have been the possibility of an ignition (Tr. 45). There also could possibly have been a methane buildup (Tr. 46). He failed to bring the map because nobody told him to bring it (Tr. 49). He further testified that the map for which the order was issued, showed a set of rooms that was stopped. He was unable to testify which of two separate panels the order referred to (Tr. 52). The map used herein did not purport to show the pillar recovery system (Tr. 53). Said map was provided by Respondent and was submitted for the ventilation plan (Tr. 54).

Mr. Detherage did not remember checking the map posted at the mine on November 1, 1977, which was the most up-to-date map including prescribed changes (Tr. 59).

Inspector Detherage attempted to sketch the panels involved, but stated that there was no way that the absence of a bleeder could be observed (Tr. 63), nor would a smoke tube test be conclusive on the subject (Tr. 64).

In again discussing the missing map, Mr. Detherage stated that he thought inspector Albert F. McFarland was supposed to have had it, however he did not know if Mr. McFarland had actually found it (Tr. 65).

The sketch drawn by Inspector Detherage was acceppted into the record, over Respondent's objection, however, no ruling as to probative value was made at that time (Tr. 66; Govt. Exh. No. 99A).

B. Gordon Couch

Respondent initiated its case through the testimony of Gordon Couch, who has worked at Shamrock as company safety inspector since

August of 1977 (Tr. 76). He has worked in mining for about 20 years (Tr. 73). Previously, he had worked as a mine foreman and had been a Federal mine inspector (DAR) since 1970 (Tr. 74). He had became a coal mine inspector supervisor in 1975 at the subdistrict office in Barbourville until August of 1977 (Tr. 75-76). The order at issue was issued after he went to work for Shamrock (Tr. 77).

He testified based on what he personally observed of bleeder systems at Shamrock (Tr. 78). The map upon which the order was based was submitted to MSHA as part of an effort to get a ventilation plan approved (Tr. 79), however, the map was not returned to Shamrock (Tr. 79-80).

The witness remembered the bleeder system because a road had sunk in the area of the panels in question (Tr. 81). He knew they had a bleeder system because they cut in two places (Tr. 81). The bleeder had been established at the time the order was issued (Tr. 82).

The reason that he knew the bleeders had been established before the order was issued is that this area at issue is two panels behind where a continuous miner had been covered up and removed from the surface (Tr. 83). Several mountain breaks were between the covered continuous miner panel and the panel at issue. They had several bleeders where the surface had slid in (Tr. 83-84).

The map, which had to be kept up-to-date at the mine, did reflect the bleeder system (Tr. 84-85). The witness believed that any violation was on the map, not in the mine, however, to his knowledge there was no violation on the map submitted (Tr. 86).

Mr. Couch testified as to the description of the bleeders (Tr. 90-94). He further testified that no methane was being released by the F section as shown by an MSHA report of May 16-31, 1978 (Tr. 94-98). However, it probably would not show the situation in November 1977 (Tr. 99).

The witness believed that the map submitted did not reflect the bleeder system because they were not pillaring at the time (Tr. 101). He thought that they were in the development process (Tr. 101).

C. John Henry Sizemore

Respondent's second witness was John Henry Sizemore, general mine foreman at the mine (Tr. 105-106). He stated that the area in question was provided with a bleeder system which was adequate and proper (Tr. 107, 112).

Mr. Detherage brought the violation with him from the Barbourville office and laid it on Mr. Sizemore's desk. He never went to check the bleeder system and did not take a smoke tube test and did not check an outcrop (Tr. 108).

Where the road collapsed as referred to, supra, they had to place a 2-inch plastic pipe to retain the integrity of the bleeder system (Tr. 110-111), however, he believed the pipe was added after the violation was written (Tr. 172).

Mr. Sizemore never detected methane from the section (Tr. 116).

Issues Presented

1. Whether Order No. 1 MFD, November 1, 1977, recites a violation of 30 CFR 75.329.

2. Assuming that a violation has been established, what is the appropriate penalty to be imposed?

Discussion

A. General

The standard herein at issue provides as follows:

Bleeder Systems

> On or before December 30, 1970, all areas from which pillars have been wholly or partially extracted and abandoned areas as determined by the Secretary or his authorized representative, shall be ventilated by bleeder entries or by bleeder systems or equivalent means, or be sealed, as determined by the Secretary or his authorized representative. When ventilation of such areas is required, such ventilation shall be maintained so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from the hazards of such methane and other explosive gases. Air coursed through underground areas from which pillars have been wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split. When sealing is required, such seals shall be made in an approved manner so as to isolate with explosion-proof bulkheads such areas from the active workings of the mine.

Two aspects of proof have been put in contest by the litigants with respect to the existence of a violation.

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The first issue is whether MSHA has established a prima-facie case in demonstrating the existence of a violation on November 1, 1977. The question presented is whether the best-evidence rule is properly invoked by Respondent to bar the testimony of Inspector Detherage with reference to the ventilation map forwarded to the Barbourville office.

The second issue, on the merits, is whether, assuming MSHA has established its prima-facie case, the testimony of Respondent's witnesses Mr. Couch and Mr. Sizemore, successfully rebuts the Petitioner's showing.

B. Best Evidence

The best evidence rule has been defined as requiring that "in proving the terms of a writing, where the terms are material, the original writing must be produced unless it is shown to be unavailable for some reason other than a serious fault of the proponent." McCormick on Evidence, 230 (2nd ed., 1972). The rule has been limited to legally operative documents. See Id. at 233-23

The map in question is clearly a legally operative document as Inspector Detherage testified that he did not inspect the mine, but issued the order based on the map (Tr. 24, 27-28, 36-37).

The issue, of whether the map is a writing within the meaning of the rule, must give greater pause. It has been suggested that the limitation of the rule to writings rests on the principle that writings exhibit a finess of detail generally lacking in other chattels. Id. at 232. The rationale prohibiting alternative admission is the protection of this detail. See id. Modern comment has suggested that a judge should have the discretion to apply the rule to other chattels in light of the need for precision, the ease and difficulty of production, and the simplicity or complexity of the inscription. Id.; 4 Wigmore, Evidence, 1182 (1972); cf. United States v. Duffy, 454 F.2d 809 (5th Cir. 1972) (shirt with three-letter laundry mark not required for testimony on mark). In the Judge's view, the exercise of discretion should also rely on the quality and nature of the proferred secondary evidence, see McCormick, at 231, 23

The proponent explained the failure of production on three grounds: (1) the inspector who possessed the map was a part of another case which had earlier been resolved, therefore, the inspector was no longer available, as he had left the hearing room (Tr. 31), (2) Inspector Detherage's testimony that he did not bring the map because nobody told him to bring it (Tr. 49), and (3) Inspector Detherage's testimony that he did not know whether Inspector McFarland, who was supposed to have brought the map, had actually found it (Tr. 65). Clearly, MSHA has not presented a case of dire necessity for the production of its secondary evidence.

Further, though these explanations could rationalize the failure to introduce the original map, they do not serve as adequate to justify the failure to introduce a copy of that map. Nor has MSHA attempted to explain this failure (Brief of MSHA, pp. 2-4). The void created by the absence of the map is purportedly filled by testimony of Inspector Detherage and a sketch made during the hearing in support of his testimony (Govt. Exh. No. 99A).

The inspector testified that he had never been in this particular set of rooms, though he was the regular MSHA inspector for the mine (Tr. 38). Further, when shown a map, the inspector was unable to state which set of rooms, as between two separate panels, were involved in the alleged violation (Tr. 52). Further, Inspector Detherage had not originally identified the alleged deficiency on the submitted map. MSHA employees Dixon and Lang had identified it at the Barbourville office (Tr. 34), and recommended action (Tr. 34). I conclude that the probative value to be given Inspector Detherage's testimony is of de minimus value on the subject of the contents of the map on which this alleged violation was based.

Therefore, as there is obviously a need for precision, there was no apparent difficulty of production, the map's inscriptions are relatively complex, and the proffered secondary evidence is inherently and in actuality, unreliable as to the crucial issue of which panels were alleged to be in violation (Tr. 52), I conclude that no probative value will be given the testimony of Inspector Detherage with respect to the district office map, as it fails to meet the requirements of the best-evidence rule. The motion of Respondent to strike said testimony will be granted. Without said testimony, MSHA has failed to establish a prima-facie case for the existence of the violation.

C. Merits

Assuming, arguendo, that the testimony of Inspector Detherage were admissible, MSHA has still failed to preponderate. The inspector introduced no evidence that pillar recovery had been initiated when the map was submitted. The regulation, by its terms, is not effective until the process has at least begun.(FOOTNOTE 2) 30 CFR 75.329. It was Mr. Couch's opinion that the map at issue, if it did not show a bleeder system, did not show one because the operator had not started pillaring (Tr. 101). Therefore, even if MSHA had introduced the map, it could very well be that there would have been no violation established.

As noted, supra, Inspector Detherage had not seen the panels (Tr. 38) or checked the up-to-date map at the mine (Tr. 59) which would allegedly have reflected the system (Tr. 84-85).

On the other hand, Mr. Couch stated that he had personally observed the bleeder system (Tr. 78). He remembered this particular one because a continuous miner had covered two panels behind this panel (Tr. 83). Mr. Sizemore and Mr. Couch testified that they remembered this bleeder because of a road collapse which affected it (Tr. 110-111; 78-83).

Weighing the personal observations of Respondent's witnesses backed by detailed explanations in support of their memories against the testimony of the inspector who could not remember from the map on which the violation was based, which panel was involved, I conclude that Petitioner has failed to preponderate.

Findings of Fact

Upon consideration of the record as a whole, I find:

1. The Judge has jurisdiction over the subject matter and the parties in this proceeding.

2. A bleeder system sufficient to comply with 30 CFR 75.329 did exist at the Shamrock No. 18 Mine on November 1, 1977.

3. The inspector did not inspect the mine, but issued the order based on the district-office map that was not offered into evidence.

4. The inspector neither saw the panels involved nor checked the up-to-date map at the mine.

5. The accumulated probative evidence fails to establish the fact of a violation cited above.

Conclusions of Law

1. This case arises under the provisions of sections 110(a) of the 1977 Act and 109(a)(1) of the 1969 Act.

2. All procedural prerequisites established in the statutes cited above have been complied with.

3. Testimony by Inspector Detherage with reference to the map upon which this order was issued is given no probative value and is struck for failure to comply with the best evidence rule.

4. Exhibit No. 99A is given no probative value and is struck for failure to comply with the best evidence rule.

5. The Government has failed to establish a violation of either 30 CFR 75.329 or the Act.

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ORDER

WHEREFORE the above-captioned is DISMISSED.

Malcolm P. Littlefield
Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE

1. Successor-in-interest to the Mining Enforcement and Safety Administration (MESA).

~FOOTNOTE_TWO

2. I express no opinion as to whether the regulation requires bleeders to be in place during or after recovery.