

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: OCTOBER 21, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2003-SC-0704-WC

DATE 11-11-04 ELLAGrou.H.D.C.

SIDNEY COAL COMPANY

APPELLANT

APPEAL FROM COURT OF APPEALS

V.

2002-CA-2582-WC

WORKERS' COMPENSATION BOARD NO. 00-58507

MARVIN THACKER; HON. LLOYD R. EDENS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

AND

2003-SC-0875-WC

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CROSS-APPELLANT

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CROSS-APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On December 1, 2000, the claimant was injured when a rock fell from the roof of the mine in which he was working. An Administrative Law Judge (ALJ) determined that the employer intentionally violated a federal safety regulation by failing to comply with the roof control plan for the mine, that its noncompliance partially caused the claimant's

injury, and that the employer must pay a 30% penalty under KRS 342.165(1). The Workers' Compensation Board (Board) and the Court of Appeals affirmed. Appealing, the employer continues to maintain that the decision was not supported by substantial evidence that its failure to comply with the roof control plan was intentional and caused the accident in which the claimant was injured. We affirm.

The claimant was born in 1953. He completed high school, earned mine foreman and electrician certificates, and worked in the mining industry for approximately 25 years. On December 1, 2000, he was attempting to splice the cable on a continuous miner when a rock fell from the roof of the mine, striking and injuring him. He later testified that he saw roof bolts in the mine that were placed 5 ½ to 6 feet apart and that they were 6 feet apart at the location where he was injured. A federal mine inspector had issued a citation for that reason on November 30, 2000, and spot bolting was being done to correct the situation. Roof bolters were rushed and were repeatedly urged to work faster. The claimant testified that although roof bolts were supposed to be no more than 48 inches apart, he noticed wide bolt patterns throughout the mine, including the area where he was injured. He testified that a bolt was hanging from the mine ceiling after the accident and that the rock that struck him was about 5 feet wide, 3 ½ to 4 feet long, and approximately 6 inches thick.

Chris Williamson was the operator of the continuous miner on which the claimant was working when he was injured and was assisting him. He testified that the rock in question was large, approximately 4 ½ feet long by 5 ½ feet wide. Williamson had previously worked as a roof bolter. Although he did not measure the distance between roof bolts in the area where he and the claimant were working, he thought that it was wider than five feet. Williamson stated that he was a contract miner and that he asked

to be assigned to a different mine because he thought the one in which he was working was unsafe. He explained that ribs were breaking off throughout the mine, that "it really didn't look safe," and that he had seen inspectors impose a time limit on spot bolting to correct the roof problem.

Billy Slone, a section electrician, finished the splice that the claimant had begun when he was injured. He testified that he and a foreman measured both the distance between roof bolts in the area of the accident and the size of the rock that fell on the claimant. Although he could not remember the exact measurement, he stated that the rock was more than 48 inches wide, that it fell from an area next to the rib, and that the roof bolt was more than 48 inches from the rib. Slone did not see any roof bolts hanging from the ceiling after the rock fell, but he did see roof bolts spaced wider than 48 inches and reported them to the mine foreman that evening. He stated that the area where the claimant was working was not properly spot bolted, explaining that the roof bolters were being pushed to work faster, that they were inexperienced, and that he thought their inexperience caused them to place the bolts too far apart.

Vernon Blackburn managed the mine at the time of the claimant's injury. He testified that to the best of his knowledge, neither he nor anyone else intentionally ignored or violated a known safety regulation. Blackburn stated that the claimant's accident occurred in Section 3 of the mine. That particular section had been "red tagged" (shut down) on November 20, 2000, due to wide roof bolts, but the citation was corrected, probably within 24 hours or less. Asked about a citation dated October 18, 2000, he stated that it involved an older area that had been spot bolted near the elevator shaft, not the area where the injury occurred. He later acknowledged, however, that all workers had to pass beneath that section of roof to use the elevator.

Blackburn testified that a citation was issued for wide bolts in Section 3 on November 30, 2000, the day before the claimant's injury. He explained that the mine was not red tagged at this time, so operations continued while spot bolting was performed. Asked how an inspector could find wide roof bolts but not shut down the section, Blackburn testified that evidently the inspector did not find the violation serious enough to do so. He stated that the situation was corrected within several days and that the inspector returned on December 5, 2000, at which time the citation was terminated. Asked why the company was cited twice within 10 days for wide bolts in the same section, Blackburn testified that the roof of a mine is not smooth, sometimes making it difficult for roof bolters to space the bolts exactly on four-foot centers. He testified that the purpose of a roof control plan was to protect employees and that the company followed it to keep them safe. He stated, however, that a company could follow its roof control plan and still have a roof fall.

Ms. Patsy Cain, the company safety director, testified that roof bolts are to be placed 48 inches apart. She identified citations that had been written against the company for placing roof bolts more than 48 inches apart. Attached to her deposition was a copy of a citation dated October 18, 2000, which listed several violations of the roof control plan. Also attached was a copy of the November 30, 2000, citation for noncompliance with the approved roof control plan for Section 3 of the mine. It indicated that the center rows of permanent roof bolts were installed 49 to 57 inches apart in various locations although the plan required bolts to be installed "48 by 48 INCHES." The December 5, 2000, termination notice indicated that the center rows of permanent roof supports were presently on 48 inch centers, and the other areas were spot bolted.

Addressing the applicability of KRS 342.165(1), the ALJ noted Ms. Cain's testimony that the roof control plan called for roof bolts to be placed no more than 48 inches apart; the November 30, 2000, citation, which indicated that the center rows of bolts were installed from 49 to 57 inches apart; evidence that the employer had previously been cited for improper roof bolting; and testimony from Ms. Cain, the claimant, and Messrs. Williamson and Slone that spot bolting was done on orders of the Mining Safety and Health Administration to correct roof bolting deficiencies. The ALJ determined that the employer knew its roof control plan required roof bolts to be installed no more than 48 inches apart. Relying on testimony by the claimant, Mr. Williamson and Mr. Slone, the ALJ determined that the rock that injured the claimant was more than 48 inches wide and fell from an area in which the employer did not comply with the roof control plan. The ALJ noted Mr. Blackburn's testimony that the purpose of a roof control plan was to protect workers and that the plan was followed in order to keep workers as safe as possible. In the absence of an investigative report addressing the size of the rock that injured the claimant, the ALJ relied upon his testimony it was about 6 inches thick and determined that it would have been anchored, at least in part, by a properly placed roof bolt. Concluding that the accident causing the claimant's injury was partially due to the employer's intentional failure to comply with its roof control plan as required by 30 CFR 75.220(a)(1), the ALJ ordered the employer to increase the claimant's weekly benefits by 30%. KRS 342.165(1).

As effective July 14, 2000, KRS 342.165(1) provides, in pertinent part, as follows:

(1) If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have

been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment.

Asserting that the imposition of a 30% penalty was not supported by substantial evidence, the employer argues that KRS 342.165(1) required the claimant to prove that its failure to comply with the roof control plan was intentional and that it contributed to causing his injury. The employer points to Mr. Blackburn's testimony that it is difficult to place roof bolts exactly on four-foot centers and to testimony by Messrs. Blackburn, Williamson, and Slone that following a roof control plan does not guarantee that a roof fall won't occur. It asserts that the citations on November 20 and 30, 2000, did not prove that the improper spacing of the roof bolts was intentional. Pointing to Mr. Slone's testimony, the employer argues that a spacing error committed by inexperienced roof bolters does not equate to intentional conduct.

The purpose of KRS 342.165(1) is to reduce the frequency of industrial accidents and injuries by penalizing those who intentionally fail to comply with known safety regulations. See Apex Mining v. Blankenship, Ky., 918 S.W.2d 225 (1996). In applying the provision, an employer is charged with the knowledge and conduct of its supervisory personnel. Id. KRS 342.165(1) does not excuse an employer's failure to comply with a known safety regulation on the ground that it is difficult to comply with the regulation or that the failure to comply is attributable to the inexperience of the workers who perform the tasks involved in compliance. It does not excuse a failure to comply on the ground that the regulation being violated does not always prevent accidents. Nor does it excuse a failure to comply simply because a federal mine safety inspector does not shut down the area where a violation occurred or waits several days to re-inspect the area.

Contrary to the employer's assertion, there was substantial evidence from which the ALJ could infer that this employer's failure to comply with the roof control plan was

intentional for the purposes of KRS 342.165(1) and that it contributed to the accident in which the claimant was injured. The employer does not dispute that it knew the roof control plan called for bolts to be placed within 48 inches of each other or that it knew the purpose of the plan was to protect workers from roof falls as much as possible. It was apparent from the October 18 and November 20 citations that the employer knew that roof bolts in certain areas were spaced more than 48 inches apart and more than 48 inches from the rib. Yet for whatever reason, it failed to assure compliance with the roof control plan and was cited again for improper roof bolting on November 30, the day before the claimant's accident. According to the claimant, Mr. Slone, and Mr. Williamson, the situation had not been corrected in the area where the claimant was working when the accident that caused his injury occurred. Furthermore, according to their testimonies, the rock that caused the claimant's injury was more than 48 inches wide and fell from an area in which roof bolts were spaced improperly. Under the circumstances, the ALJ could reasonably infer that the employer's failure to comply with the roof control plan was intentional and that it contributed to causing the accident from which the claimant's injury resulted. For that reason, the decision may not be disturbed on appeal. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). Contrary to the claimant's assertion, we are not persuaded that this appeal is so frivolous as to warrant the imposition of sanctions.

The decision of the Court of Appeals is affirmed.

All concur.

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