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ITMANN COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ITMANN COAL COMPANY, CONTESTANT
v.

Docket No. HOPE 79-307
Order No. 0662348
February 26, 1979

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

Itmann No. 3 Mine

UNITED MINE WORKERS OF AMERICA, RESPONDENT

Contest of Order

DECISION

Appearances: Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant
Leo J. McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent MSHA Joyce A. Hanula, Legal Assistant, UMWA, Washington, D.C., for Respondent UMWA

Before: Judge Stewart

On March 14, 1979, Itmann Coal Company filed for review of Order No. 0662348, dated February 26, 1979, pursuant to the provisions of section 105(d) of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act). MSHA and United Mine Workers of America (UMWA) subsequently filed answers admitting the issuance of the order but denying the other allegations set forth in the contest of order. The hearing in this matter was held on August 29, 1979, in Charleston, West Virginia. The parties chose to present oral argument at the conclusion of the hearing.

On February 23, 1979, inspector Claude R. Hall issued a section 104(a) citation to Contestant at its Itmann No. 3 Mine in the course of a safety and health inspection. The inspector alleged a violation of 30 CFR 75.1103-4(a) and described the condition or practice as follows: "The automatic fire sensor and warning device system was not provided with a device between the Nos. 2 and 2-1/2 Bee Tree Belts to identify a fire within each belt flight." Section 75.1103-4(a) requires that automatic fire sensor and warning device systems shall provide identication of fire within each

belt unit operated by a belt drive. The sensor is a device approximately 5 inches long, 2 inches wide and 1-1/2 inches thick. Each device has a plug and a socket by which it is connected to the sensor line. A single sensor line extends for the entire length of the belt system. As noted on the citation, the inspector observed that only one such device had been provided for the Nos. 2 and 2-1/2 belts. He directed that the condition be abated by 8 a.m. on February 26, 1979.

On Friday, February 23, at quitting time, Cecil Farley, a maintenance foreman at the No. 3 Mine, was charged by Contestant's chief electrician with the responsibility for correcting the condition. He was to correct it during the Saturday shift. On Saturday morning, Mr. Farley gave a sensor to an electrician and instructed him to install the device in the fire sensor line at the belt drive of the No. 2-1/2 belt. Because he was unaware on Saturday that a plug and socket were not located in the sensor line at the intersection of the Nos. 2 and 2-1/2 belts, Mr. Farley did not mention the necessity of splicing a plug and socket into the sensor line. The electrician walked along the belt in an outby direction until he located a plug and socket approximately two crosscuts outby the No. 2-1/2 belt drive. He connected the sensor at that location.

Mr. Farley did not see the electrician again that Saturday. He did not question the electrician or examine his work. As a consequence, he did not learn of the misplacement until Monday morning when the electrician informed him that he had installed the sensor two crosscuts outby the drive. Mr. Farley thereupon notified Denny Smith, a belt foreman, that the box had been installed at the wrong location so that Mr. Smith could, in turn, notify the inspector.

The inspector returned to the affected area on Monday, February 26, 1979, and was informed by Mr. Smith, that the sensor had been installed at a point along the belt a number of crosscuts outby the intersection of the two belts. The inspector thereupon issued order of withdrawal No. 0662348, pursuant to section 104(b)(FOOTNOTE 1) of the Act. He described the condition or practice which led to the order as follows: "Not enough effort has been made to install a device between Nos. 2 and 2-1/2 Bee Tree Belts on the sensor line to identify a fire within each belt flight." Order No. 0662348

was terminated 70 minutes later at 1:20 p.m., after the requisite device was installed between the Nos. 2 and 2-1/2 belts.

In order to abate the condition, the operator cut a plug and socket from a roll of cable, cut the existing sensor line at the drive, spliced the plug and socket into the sensor line, plugged in the monitoring device at the drive, and unplugged the device located two crosscuts outby. The spool of sensor cable from which the plug and socket used to abate the condition were taken had been ordered on Friday, February 23. It arrived at the mine on Monday.

Darrel Worley, a miner operator at the No. 3 Mine, testified that the materials necessary to abate the condition were available elsewhere. He observed available materials 1 week before the issuance of the order. These materials were located in an adjacent and accessible, but technically separate mine--the No. 4 Mine. Mr. Worley testified that materials could be and were regularly obtained from the No. 4 Mine for use in the No. 3 Mine

Inspector Hall related a conversation that he had with Mr. Beard, one of Contestant's superintendents. The inspector quoted Mr. Beard as admitting that there were "plugs all over the mine."(FOOTNOTE 2) The inspector also testified that he was told by another of Contestant's superintendents that the necessary materials were available in the mine.

Section 104(b) of the Act requires that an inspector shall issue an order under that subsection when he finds that a violation described in a citation issued pursuant to section 104(a) has not been totally abated within the time specified and that the time for abatement should not be further extended. Contestant admitted, through counsel, that the 104(a) citation was properly issued. That is, the monitoring device was not located at the belt drive as required. Moreover, it was clearly established that the device had not been installed at the No. 2-1/2 belt drive on Monday when the inspector issued the subject order. Counsel for Contestant asserted the following at the hearing: "The only reason for this hearing is whether or not the circumstances justified the issuance of the (b) order, whether or not (Contestant) made a reasonable effort under the circumstances."

The test as to whether a 104(b) order was properly issued was enunciated by the Board of Mine Operations Appeals in United States Steel Corporation, 7 IBMA 109, 116 (1976).(FOOTNOTE 3) It was stated therein that "the inspector's

determination to issue a section 104(b) order must be based on the facts confronting the inspector at the time he issued the subject withdrawal order regarding whether an additional abatement period should be allowed." The critical question is whether the inspector acted reasonably in failing to extend the time for abatement and in issuing the subject order.

At the outset, it must be noted that the violation was nonserious in nature. The No. 2 belt was 1,360 feet in length, while the No. 2-1/2 belt was 1,852 feet long, for a total of 3,212 feet. When the violation was first noted, the Nos. 2 and 2-1/2 belts were monitored by a single device. This device would have warned of a fire which occurred anywhere along these two belts, but would not have distinguished between the two belts.

The placement of the sensing device two crosscuts outby the belt drive would have warned of any fire which occurred along the No. 2-1/2 belt and 160 feet of the No.2 belt. The sensor located at the No. 2 belt drive would have warned of any fire occurring along the No. 2 belt except for the most inby 160 feet.

The length of time specified for abatement by the inspector was more than adequate. The inspector estimated that the length of time needed to install the device would be 20 minutes. Darrell Worley estimated that the installation should take 30 minutes. Seventy minutes actually elapsed between the issuance and termination of the order. As noted above, the inspector allotted almost 3 full days for abatement.

Contestant interposed the argument that the materials with which to abate the condition were ordered on Friday, but were not on hand until Monday.(FOOTNOTE 4)

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This argument is rejected. The testimony of the inspector and Mr. Worley established that plugs and sockets were available. Although the plug and socket which were used for abatement were taken from a fresh spool of sensor wire, they could have been obtained within the mine during the 3 days set for abatement. For instance, a suitable plug and socket were located on the sensor line two crosscuts outby the No. 2-1/2 belt drive, at the point where the electrician connected the monitoring device on Saturday. Other plugs and sockets were located on the sensor line at intervals of 250 feet.

Contestant also maintained that reasonable efforts had been made to abate the condition prior to the issuance of the order--a superintendent ordered Mr. Farley to correct the situation and Mr. Farley had, in turn, directed an electrician to place a sensor at the No. 2-1/2 belt drive. The inference that these actions absolved Contestant of fault in the failure to abate is rejected. Blame for the failure cannot be laid entirely to the electrician. Mr. Farley did not know that the sensor line did not contain a socket and plug at the belt drive, and he could not, therefore, fully inform the electrician of the actions necessary for abatement. In addition, he did not question the electrician or examine his work afterwards. In sum, mine management did not adequately supervise the electrician's efforts. Applicant did not demonstrate that it made reasonable efforts to abate the condition prior to the issuance of the order.

Despite the fact that the condition was nonserious and rendered even less serious by Contestant's abatement efforts, the inspector reasonably exercised his authority in refusing to extend the time specified for abatement. The abatement effort requested by the inspector was appropriate and the time specified for abatement was ample. Although an extension of time might be appropriate when mine management through no fault of its own is unable to abate a condition within the time as originally set or extended, an extension in this instance would have amounted to condonation of Contestant's inadequate abatement efforts.

The facts with which the inspector was confronted on February 26, 1979, did not warrant an extension of time for abatement. The issuance of Order No. 662348 was, therefore, entirely proper.

ORDER

It is ORDERED that the above-captioned contest of order is hereby DISMISSED.

Forrest E. Stewart
Administrative Law Judge

~FOOTNOTE 1
Section 104(b) of the Act reads as follows:
"If, upon any follow-up inspection of a coal or other

mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (104(a)) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

~FOOTNOTE 2

Throughout the transcript the term "plug" was used to refer to both sockets and plugs.

~FOOTNOTE 3

The Board was addressing section 104(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1970), which reads as follows:

"Except as provided in subsection (i) of this section, if, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation. If, upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated."

This section of the 1969 Act and section 104(b) of the 1977 Act are substantially similar with respect to the requirements each imposes on an inspector confronted with an operator's failure to abate a violation within the time specified.

~FOOTNOTE 4

Parenthetically, Contestant's assertion that materials were not on hand to abate the condition is at odds with its assertion that the failure to abate was the fault of a non-management employee rather than management. Contestant is asserting on the one hand that it was aware of a lack of materials necessary for abatement and, on the other hand, that management absolved itself by ordering an electrician to abate the condition on Saturday morning, but that he failed to abate the condition as ordered.