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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

Civil Penalty Proceeding

Docket No. DENV 78-512-P
A/O No. 29-00095-02021V

v.

York Canyon No. 1 Mine

KAISER STEEL CORPORATION,
RESPONDENT

DECISION

Appearances: Manuel Lopez, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner, Secretary of Labor David Reeves, Esq., Oakland, California, for Respondent, Kaiser Steel Corporation

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

In this case, Petitioner seeks a penalty for a violation of the mandatory standard contained in 30 C.F.R. 75.301 alleged in an order of withdrawal issued February 2, 1977. The case thus arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801(1970).

The order charged that the standard was violated in that the quantity of air reaching the last open crosscut in section 6L of the subject mine was far below the minimum 9,000 cubic feet per minute required. In addition, there was methane in the working face in excess of 3.5 percent. Respondent does not challenge either of these findings but contends that the proposed penalty of \$4,000 is excessive, because the drop in airflow was due to an improperly anchored brattice line. This condition, asserts Respondent, could not have existed for more than a few hours. The shift involved was a maintenance shift and it is not disputed that the foreman of the next working shift corrected the problem within an hour after the inspector issued an order.

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The Petitioner maintains that the brattice in question was too short and therefore improperly installed. It believes the lack of airflow had been present for some time and should have been noticed and corrected by company officials on the last working shift. This, combined with the fact that concentrations of methane nearing the explosive level were present within 15 feet of three mechanics working on an energized continuous miner, argues Petitioner, amounted to gross negligence on the company's part.

A hearing was held at Raton, New Mexico, on November 1, 1979, before Administrative Law Judge Michels. Witnesses were Lawrence Rivera, a federal mine inspector, George Krulyac, foreman for Respondent, and Paul McConnell, a mine safety inspector employed by Respondent. Because of the retirement of Judge Michels, the case was, with the consent of counsel, assigned to me for decision on the transcript of the hearing before Judge Michels. The parties have waived their rights to file written proposed findings of fact and conclusions of law.

ISSUES

1. Did Respondent on February 2, 1977, fail to ventilate the last open crosscut in section 6L with an airflow of at least 9,000 cubic feet per minute?
2. If so, was this failure due to Respondent's negligence?
3. Can accumulations of methane at the working face be taken into account in fixing an appropriate penalty for violation of 30 C.F.R. 75.301?
4. If a violation occurred, what is the appropriate penalty?

FINDINGS OF FACT

1. At all times relevant to this proceeding, Respondent was the operator of a coal mine in Raton, New Mexico, known as the York Canyon No. 1 Mine.
2. The York Canyon No. 1 Mine annually produces between 576,000 and 738,000 tons of coal and 350-450 employees are engaged in all of Respondent's York Canyon mines.
3. The proposed penalty will have no effect on the operator's ability to remain in business.
4. On February 2, 1977, in section 6L of the subject mine an air reading showed that there was less than 9,000 cubic feet per minute of air in the last open crosscut.

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5. The failure in airflow was due to a line brattice which was not functioning properly.

6. Whether the line brattice was improperly installed or damaged, or both, the condition was obvious and could have been noticed during the last working shift.

7. At 6 a.m., February 2, 1977, the air at the working face area in section 6L contained 3.55 percent methane.

8. Three miners were at or near the working face performing maintenance work on an energized continuous miner at the time the methane was detected.

9. Paul McConnell, a mine safety inspector working for Respondent, was with federal inspector Lawrence Rivera when the latter discovered a total absence of airflow at section 6L at about 6 a.m. He did not undertake to correct the problem at that time but left for other areas of the mine, before Mr. Rivera began to check for methane.

10. After ordering all miners out of the affected area and ordering the power deenergized, Mr. Rivera issued an order of withdrawal to George Krulyac, mining foreman, at 7:15 a.m. The violation was abated by 8:45 a.m.

DISCUSSION

It is not disputed in this case that the 9,000 cubic feet per minute airflow required by 30 C.F.R. 75.301 was not being maintained in section 6L. In fact, both Mr. Rivera and Mr. McConnell were unable to obtain any reading by an anemometer or by use of a smoketube. The parties agree that a faulty brattice "short-circuited" the airflow and was thus the cause of the violation. Mr. Rivera stated that the brattice was simply too short and that the deficiency was corrected when Mr. Krulyac hung a new curtain of sufficient length parallel to it. Mr. Krulyac stated that the brattice was merely loose in one corner, a condition he remedied by nailing it down. Yet Mr. McConnell, who discovered the lack of airflow earlier with Mr. Rivera, believes that if the brattice had been long enough he would have nailed it down himself. In this light, I accept Mr. Rivera's version of the brattice's condition. Further, the dispute is made somewhat less relevant since two other brattices in the section were ripped as well, which also could have contributed significantly to the loss of airflow.

The amount of time during which the violation existed is crucial to the issue of how much negligence, if any, should be ascribed to the Respondent. Respondent's pregraveyard shift report, made between 3 and 11 p.m. the previous night indicates a sufficient amount of air

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flow in section 6L. There is no indication that Mr. Rivera examined this report when he arrived at the mine that night, and Petitioner has not challenged its accuracy. Nevertheless, Mr. Rivera's expert opinion is that the rips in the brattices were caused by the movement of machinery which could have happened only during the production shift ending the previous night. I find that the loss of airflow dated back at least to the start of the February 1-2 graveyard shift.

Respondent urges that potentially harmful accumulations of methane cannot be considered in aggravation of the penalty imposed for violation of the ventilation standards in 30 C.F.R. 75.301. Admittedly, it was held by the Interior Board of Mine Operations Appeals that a citation charging "methane in excess of 5 percent" was properly dismissed when brought under 30 C.F.R. 75.301. *Mid-Continent Coal*, 8 IBMA 204 (1977). But the Board, declaring that 30 C.F.R. 75.308 provides for specific actions in response to methane accumulation, emphasized that the citation was issued solely for methane accumulation under a regulation designed to ensure proper ventilation. In fact, improper ventilation was not even charged in that case. Improper ventilation is the central concern in the case at hand. The regulation here involved seeks to ensure adequate ventilation so that miners will not be exposed to "harmful quantities" of "noxious or poisonous gases." Methane is such a gas, and an accumulation of 3.55 percent where 5 percent may produce an explosion is certainly harmful.

CONCLUSIONS OF LAW

1. On February 2, 1977, Respondent violated 30 C.F.R. 75.301 by failing to properly ventilate section 6L of its York Canyon No. 1 Mine, thereby allowing a dangerous concentration of methane to accumulate near the working face. The violation was serious.
2. Respondent's disregard of a known risk posed by the violation of 30 C.F.R. 75.301 constituted gross negligence.
3. Respondent is a large operator.
4. Respondent abated the condition promptly and in good faith after being cited.
5. Considering the six statutory criteria, I conclude that a penalty of \$4,000 should be assessed for the violation.

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ORDER

Respondent is directed to pay the sum of \$4,000 for the violation found herein within 30 days of the issuance of this decision.

James A. Broderick
Chief Administrative Law Judge