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

MATHIES COAL COMPANY,

CONTESTANT

Contest of Citation

Docket No. PENN 79-149-R

v.

Mathies Mine

SECRETARY OF LABOR,

MINE SAFETY AND HEALTH

ADMINISTRATION (MSHA),

RESPONDENT

DECISION

Appearances: William H. Dickey, Jr., Esq., Pittsburgh, Pennsylvania,
for Contestant James H. Swain, Esq., Office of the
Solicitor, U.S. Department of Labor, Philadelphia,
Pennsylvania, for Respondent

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding filed by Mathies Coal Company (hereinafter "Mathies") under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d), to contest the validity of a citation issued by the Mine Safety and Health Administration (hereinafter MSHA) for violation of a mandatory safety standard. The citation alleged a violation of 30 C.F.R. 75.316, violation of approved ventilation plan. A hearing was held in Pittsburgh, Pennsylvania, on January 23, 1980. Basil Zaycosky testified on behalf of MSHA and John Goroncy testified on behalf of Mathies. The parties filed briefs, proposed findings of fact, and conclusions of law.

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This case involves the alleged violation of 30 C.F.R. 75.316, failure to follow approved ventilation plan. Specifically, Mathies was charged with having only 16,200 cubic feet per minute (cfm) of air moving in entries 5 and 6 whereas its approved ventilation plan called for 18,000 cfm of air in the affected areas.

ISSUE

Whether Mathies violated the Act or regulations as charged by MSHA.

APPLICABLE LAW

30 C.F.R. 75.316 provides that a "ventilation system and methane and dust control plan" shall be adopted by the operator and approved by the Secretary for each coal mine. The approved ventilation plan for the mine in controversy provided that "a minimum quantity of 18,000 cfm will be directed to not more than two entries located just outby the line of blocks being mined" (Exhs. G-1 & G-2).

STIPULATIONS

The parties stipulated the following:

1. Mathies Mine is owned and operated by Applicant, Mathies Coal Company.
2. Mathies Coal Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The Administrative Law Judge has jurisdiction over this proceeding pursuant to Section 105 of the 1977 Act.
4. The inspector who issued the subject Citation was a duly authorized representative of the Secretary of Labor.

5. A true and correct copy of the subject Citation was properly served upon the operator in accordance with Section 104(a) of the 1977 Act.

6. Copies of the subject Citation and Termination are authentic and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

SUMMARY OF THE EVIDENCE

On August 24, 1979, Mathies was engaged in retreat mining at 2 Butt, 19 face section of the Mathies Mine. Basil Zaycosky, an MSHA inspector, performed a saturation spot inspection at that time. After performing some preliminary tests, the inspector decided to measure the air velocity at entries 5 and 6. He attempted to use an anemometer, an instrument for measuring air velocity. However, he was unable to obtain a satisfactory reading on the anemometer because of insufficient air velocity.

Thereupon, he decided to calculate the air velocities by use of a smoke cloud test. He took measurements which disclosed that each entry was 16 feet wide and 7-1/2 feet high. He then measured a distance of 10 feet in each entry. At one end of this 10-foot measurement, he would release a smoke cloud from an aspirator containing a smoke tube. At the other end of the 10-foot measurement, he stationed Jim Smith, chairman of the union safety committee. Jim Smith was instructed to "holler, "now" when the smoke cloud reached the end of the 10-foot measurement. From the time the inspector released the smoke cloud until he heard Mr. Smith say "now," the inspector watched the sweep second hand on his wrist watch. The inspector then wrote the number of seconds it took the smoke cloud to traverse the 10 feet on

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each test. He performed the smoke cloud test five times, at different places, in each of the two entries in controversy.

After the 10 smoke cloud tests were completed, he averaged the results to calculate the air velocity in each entry. The average time obtained for entry No. 6 was 9 seconds; the average for entry No. 5 was 9.6 seconds. Inspector Zaycosky then obtained the velocity in each entry by dividing the constant of 600 (60 seconds times 10 feet) by the average time obtained on the above smoke cloud tests. He obtained the cubic feet per minute by multiplying the velocity by the width and height of the entry. On the day the citation was issued, Inspector Zaycosky calculated cubic feet per minute of air as follows: Entry No. 5 had 8,220 cfm and Entry No. 6 had 8,040 cfm. Thus, he arrived at a total of 16,260 cfm at the involved entries whereas the approved ventilation plan called for 18,000 cfm. However, on the witness stand, Inspector Zaycosky conceded that he had committed a mathematical error in calculating the velocity at entry No. 5. The correct amount of cubic feet per minute at entry No. 5 should have been 7,500 rather than 8,220. Hence, the combined cubic feet of air reaching the affected entries was only 15,540.

Inspector Zaycosky testified that from the time he released the smoke cloud until he heard Mr. Smith say "now", he was continually observing the sweep second hand of his watch. He relied upon Mr. Smith's verbal act to obtain the necessary data for his calculations. In his 8 years as an inspector, he has performed approximately six smoke cloud tests.

Mathies called section foreman John Goroncy as a witness. Mr. Goroncy stated that the preshift examination for the shift in question showed

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19,696 cfm of air in entries No. 5 and 6. On the day in question, safety supervisor John Marn, now deceased, approached foreman Goroncy and told him that there was not enough air in the section. At that point, Mr. Goroncy shut off the power to the entire section and ordered everyone to stop mining and to begin correcting leaks in the canvas to increase the amount of air. Mr. Goroncy did not make any measurements of the air in the affected entries but he assumed that John Marn made such measurements. Mr. Goroncy did not observe Inspector Zaycosky and James Smith perform the smoke cloud tests.

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, arguments of counsel, proposed findings of fact and conclusions of law have been considered. Mathies has challenged the citation in controversy for the following reasons: (1) the smoke cloud test was improper; and (2) even if the volume of air in question was less than 18,000 cfm, no violation occurred.

The inspector was required to use a smoke cloud test to measure the amount of air in question because he was unable to obtain a sufficient velocity of air to use an anemometer. While Mathies aggressively challenges the validity of the smoke cloud test in this proceeding, its own evidence and statements of its counsel indicate that there was less than 18,000 cfm of air in the area in question. In the opening statement of Mathies counsel, he stated that "management was taking every possible method to correct it--to correct the lack of air or the slight drop in air and bring it up to 18,000." (Emphasis supplied.) (R. 9). Moreover, Mathies section foreman John Goroncy, testified that Mathies safety supervisor John Marn, stated,

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"I don't think you have enough air coming up your tramway" (R 67). Mathies did not present any evidence concerning the amount of air in the affected area. At the hearing, it did not offer any evidence concerning the proper method of performing a smoke cloud test. After the record was closed, in its posthearing brief, Mathies submitted a report and a bulletin from the Bureau of Mines concerning low-velocity airflow measurements in mines. This practice of submitting evidence after the record in the proceeding is closed, with no request to reopen the record, is to be discouraged. However, suffice it to say that nothing contained in the above-mentioned publications negates the validity of the tests performed by Inspector Zaycosky. While the inspector committed a mathematical error in his calculations of the cubic feet of air per minute, the error favored Mathies. The citation alleged 16,220 cfm whereas the correct amount should have been 15,540 cfm. I find that MSHA has established that the adopted and approved ventilation plan called for 18,000 cfm in the affected area and that Mathies had less than 18,000 cfm at the time the citation was issued.

Mathies contends that even though the approved ventilation plan required 18,000 cfm, no violation occurred. This assertion is premised on an analogy to the presence of methane in excess of 1.0 percent which does not constitute a per se violation. Mathies goes on to argue that, "if the operator is allowed to take corrective measures when methane is detected, it is certainly reasonable to permit the operator the same latitude to correct an air quantity deficiency prior to the issuance of a citation." Mathies' purported analogy to excessive methane accumulations is misplaced. Unlike accumulations or inundations of methane, the quantity of air delivered to

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an area of a mine is totally under the control of the operator. Moreover, the violation in controversy here was of the plan adopted by the operator itself. It is clear that the provisions of a ventilation plan adopted by the operator and approved by MSHA are enforceable as mandatory safety and health standards under the Act. *Ziegler Coal Co. v. Kleppe*, 536 F.2d 398 (D.C. Cir. 1976). Mathies' violation of the ventilation plan establishes a violation of a mandatory standard for which a citation was properly issued. Mathies' evidence concerning the quantity of air on the preshift examination and its decision to voluntarily terminate normal mining operations in the section is irrelevant to the question of whether it violated the adopted and approved ventilation plan.

I find that Mathies violated 30 C.F.R. 75.316 in that it failed to deliver 18,000 cfm of air to the affected area in violation of the adopted and approved ventilation plan.

ORDER

Mathies' contest of citation is DISMISSED and Citation No. 0623975 is AFFIRMED.

James A. Laurenson
Judge