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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

Respondent is charged with a violation of 30 C.F.R. 75.301, a mandatory standard dealing with ventilation of working areas in underground mines. The order forming the basis for this charge was issued by a Federal mine inspector on February 2, 1977. The case thus arose under the Federal Coal Mine Health and Safety of 1969, 30 U.S.C. 801 et seq. (1970).

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.

I issued a decision on May 13, 1980. The Commission then granted Respondent's petition for discretionary review. Upon discovering that several of the exhibits introduced at the hearing were absent from the record, the Commission vacated my decision and

remanded the case for further proceedings or appropriate reconsideration. Copies of the missing exhibits have been received and placed in the record. I have reexamined the entire record, and reconsidered the contentions of the parties. Based on that reexamination and reconsideration, I am issuing a new decision which follows.

ISSUES

1. Did Respondent violate 30 C.F.R. 75.301 as charged by Petitioner?

2. If so, was the violation due to Respondent's negligence?

3. Can accumulations of methane at the working face be taken into account in determining the gravity of a violation of 30 C.F.R. 75.301?

4. If a violation occurred in this case, what is the appropriate penalty?

REGULATION

The portion of 30 C.F.R. 75.301 most pertinent to this case reads:

> All active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases; and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive fumes. The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be 9,000 cubic feet a minute, and the minimum quantity of air reaching the intake end of a pillar line shall be 9,000 cubic feet a minute.

FINDINGS OF FACT

1. Respondent is the operator of the York Canyon No. 1 Coal Mine in Raton, New Mexico.

2. Respondent's operations in York Canyon produce nearly a million tons of coal per year and it employs approximately 400 employees. I conclude that Respondent is a large operator and,

there being no evidence to the contrary, I further conclude that imposition of the penalty proposed by Petitioner would have no effect on Respondent's ability to continue in business.

3. On February 2, 1977, in section 6L of the subject mine, the last open crosscut was not being ventilated by a current of air at least 9,000 cubic feet per minute in velocity. Based on the testimony, I find that there was no perceptible movement of air in the last open crosscut.

4. The loss of air flow was caused by a brattice in the previous open crosscut which was not functioning properly.

5. The brattice was improperly installed; its condition was obvious and should have been noticed by Respondent during the prior working shift.

6. Another brattice, hung from the last open crosscut to the working face, was so severely damaged that it could not have provided sufficient air flow across the working face.

7. At the time the lack of air flow was detected, the air in the working face area contained 3.55 percent methane.

8. Four miners were in the vicinity of the face area at the time the methane was detected, three of them performing maintenance work on an energized continuous miner.

9. Paul McConnell, a mine safety inspector working for Respondent, was with Federal inspector Lawrence Rivera when the latter detected the absence of air flow in the last open crosscut at 6 a.m. He did not attempt 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, the foreman of the morning shift, at 7:15 a.m. The air flow was restored and the area cleared of harmful quantities of gas by 8:45 a.m.

DISCUSSION

Federal inspector Lawrence Rivera arrived at the York Canyon No. 1 Mine at about 1 a.m. on February 2, 1977. At 3 a.m., during the maintenance shift, he and Paul McConnell, a mine examiner employed by Respondent, entered the mine. The two arrived at section 6L at approximately 6 a.m. Mr. Rivera attempted to test the air velocity in the last open crosscut, first with an anemometer and then with a smoke tube. He was unable to obtain any readings.

He told Mr. McConnell that something was wrong with the air supply, whereupon, he says Mr. McConnell told him he had other locations to check and would have to leave (Tr. 20). Mr. McConnell admits that he left the section but thinks that on the way to his other duties, he tightened the brattice in the previous open crosscut to correct the loss of air flow (Tr. 86). Mr. Rivera disputes this (Tr. 37) and I find that Mr. McConnell left without investigating the condition further and attempting to correct it.

After Mr. McConnell departed, Mr. Rivera walked to the working face and obtained a reading of more than 2 percent methane. Laboratory tests on bottle samples taken by Mr. Rivera revealed that the methane concentration exceeded 3.5 percent (Exh. P-3). Mr. Rivera, recognized at the hearing as an expert on mine safety (Tr. 11), believed this to be a dangerous condition and ordered the miners in the area to deenergize the power center and leave the section. They had been performing maintenance work on an energized continuous miner. A concentration of methane at or above 5 percent is explosive. Less than 1 percent methane at the face is what is acceptable (Tr. 20-22).

Mr. Krulyac arrived at the section at 7:15 a.m. at which time he was handed the subject order. He left his crew behind the power center and proceeded to correct the loss of air flow. By ensuring that brattices at the previous open crosscut and the last open crosscut were functioning properly, he abated the violation before 8:45 a.m. I find that, as the parties stipulated, Respondent abated the violation in good faith.

Respondent does not deny that it violated 30 C.F.R. 75.301 and I find that it did. The issue is the appropriate penalty to be imposed. I have previously found that Respondent is a large operator, that its ability to continue in business will not be affected by the proposed penalty, and that Respondent displayed ordinary good faith in abating the violation. The criteria remaining to be evaluated are negligence, history of previous violations and gravity.

HISTORY OF PRIOR VIOLATIONS

Exhibit P-5 shows that during the period from February 2, 1975, to February 2, 1977, there were 170 paid violations of mandatory standards at the subject mine. Four were violations of 30 C.F.R. 75.301; 11 others were violations of other ventilation standards. In addition to these violations, Respondent was cited on February 1, 1977, the day before the order herein was issued, for a ventilation violation in another section of the mine. After a hearing before Judge Koutras, a penalty was assessed for a violation found to have been serious and caused by Respondent's negligence. The decision was affirmed by the Commission. MSHA v. Kaiser Steel Corp., DENV

78-31-P, 1 FMSHRC 984 (August 3, 1979). I find that these facts demonstrate a significant history of prior violations.

GRAVITY

The failure of ventilation in an underground coal mine can have serious, even tragic, consequences. The Senate Committee Report on the Federal Mine Safety and Health Act of 1977 states: "* * * ventilation of a mine is important not only to provide fresh air to miners, and to control dust accumulation, but also to sweep away liberated methane before it can reach the range where the gas could become explosive. In terms then of the safety of miners, the requirement that a mine be adequately ventilated becomes one of the more important safety standards under the Coal Act." S. Rept. No. 95-181, 95th Cong., 1st Sess. 41 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 629 (1978).

The evidence in this case shows the absence of any movement of air in the last open crosscut at a time when the continuous miner was energized, a short time prior to the beginning of a production shift. This is a serious violation of the standard. It is compounded by the finding that 3.55 percent methane was present in the air at the working face. Although the percentage of methane was not in the explosive range, it could easily and swiftly build up to that range. Ignition sources were present and an explosion could have resulted. I conclude that the condition was very serious. Respondent argues that the methane concentration should not be considered in assessing a penalty because it was charged with a ventilation violation. It is sufficient response to note that one of the most important reasons for the ventilation requirements is to "dilute, render harmless, and to carry away * * * noxious and harmful gases * * *."

NEGLIGENCE

The subject order charges a failure of ventilation. The evidence shows that it was primarily due to the condition of the brattice in the crosscut outby the last open crosscut (point "C" on Exh. P-6). There is evidence that the brattice cloth in the last open crosscut (point "B" on Exh. P-6) was "spaced and damaged" (Tr. 24). The latter condition, even if it did not cause the ventilation problem, is evidence that Respondent was careless in maintaining brattice in the section. The condition was obvious and had been present for some time.

The testimony is conflicting as to the condition of the brattice cloth at point C. The inspector testified that it was too short to cover the opening by about 3-1/2 feet, causing the air flow to be "short circuited." Mr. Krulyac testified that the brattice

was ripped and blowing open in one corner. The inspector stated that the condition was abated by adding a new strip of brattice across the "whole length" of the existing brattice. Mr. Krulyac stated that he corrected the condition by nailing a strip alongside the rip to a timber to hold it down.

I accept the testimony of the inspector and find that the brattice at point C on Exhibit P-6 was too short to seal the crosscut. The inspector's testimony was inconsistent on the question of whether this brattice was damaged, but he was steadfast in his insistence that it was too short to cover the crosscut opening. It seems to me inherently unlikely that the inspector would either invent such a claim or that his memory would fail him on a question so vital to his order. His notes (Exh. P-1) are not inconsistent with his testimony. Mr. Krulyac's written statement (Exh. R-5) describes what was done to abate the violation: "We went back to the next X cut and sealed it tight with brattice. Although there already was a curtain there but the air was going through in some places." This indicates that additional brattice was used to cover the crosscut.

Therefore, I find that the brattice was improperly installed. It is reasonable to infer that it was there at least since the prior production shift. I reject as unreliable the preshift report indicating sufficient ventilation in the section and conclude that the ventilation problem had existed since the production shift. Therefore, Respondent should have been aware of it and corrected it. The carelessness shown by the record includes (1) the improperly installed brattice; (2) an additional damaged brattice; (3) an energized continuous miner in the face area with no air ventilation and in the presence of 3.55 percent methane; (4) a ventilation violation had been cited in another section the previous day and, (5) the subject order was charged as an unwarrantable failure to comply with the standard as a part of a 104(c)(1) chain.

These factors persuade me that the condition was caused by Respondent's gross negligence.

In view of the fact that the violation in this case was very serious, a substantial penalty must be imposed to induce an operator of this size to prevent similar violations in the future.

CONCLUSIONS OF LAW

1. Respondent on February 2, 1977, violated 30 C.F.R. 75.301.

2. Accumulations of methane at the working face may be taken into account in fixing an appropriate penalty for violation of 30 C.F.R. 75.301.

3. Under the circumstances of this case, a similar violation occurring on February 1, 1977, at the same mine, is relevant and may be considered in fixing an appropriate penalty.

4. The violation described in Conclusion No. 1 was very serious.

5. The violation described in Conclusion No. 1 was the result of Respondent's gross negligence.

6. Based on the above findings of fact and conclusions of law, and considering the statutory criteria, I conclude that the appropriate penalty in this case is $4,000.

ORDER

Respondent is ORDERED to pay the sum of $4,000 within 30 days of the date of this decision.

James A. Broderick
Chief Administrative Law Judge