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SOL (MSHA) V. GEX COLORADO
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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 ACTION DOCKET NO. WEST 79-28-M ASSESSMENT CONTROL NO. 05-00281-03012
v.	
GEX COLORADO, INC., RESPONDENT	ROADSIDE MINE

APPEARANCES:

Ann M. Noble, Esq., Office of Henry C. Mahlman, Associate Regional Solicitor, United States Department of Labor, Denver, Colorado
for the Petitioner

Curt Neumann, Assistant Safety Director, appearing pro se, Grand Junction, Colorado
for the Respondent

Before: Judge John J. Morris

DECISION

In this civil penalty proceedings Petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent, GEX Colorado, Inc. (GEX), violated regulations promulgated under the authority of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Pursuant to notice, a hearing on the merits was held in Grand Junction, Colorado on May 20, 1980.

The parties waived their right to file post trial briefs.

ISSUES

The issues are whether GEX violated the standards.

CITATION 242465

This citation alleges a violation of 30 C.F.R. 75.302-4(a) (FOOTNOTE 1)

The facts are uncontroverted.

1. MSHA Inspector Walter Blanc used a smoke tube test to determine the flow of the air current in the GEX mine (Tr. 5, 6, 10).

2. Air from the working face in the mine was being recirculated into the air intake entry and thus the air was again travelling to the working face (Tr. 4-5).

3. The recirculating air from the auxilliary fan was blowing under a line curtain instead of following the return air course (Tr. 5, 8, P5).

DISCUSSION

GEX contends the situation cited by the inspector was merely turbulent air which did not create a hazard. In addition, GEX asserts that MSHA failed in its burden of proof because the inspector did not follow the air to the working face (Tr. 90).

GEX's arguments lack merit. The inspector's testimony clearly establishes that a recirculation of air occurred. The regulation prohibits such a recirculation "at any time". The regulation in its present form presumes the existence of a hazard.

Concerning the second argument, it is not necessary for the MSHA inspector to follow the air to the working face. The movement of the recirculated air into the intake air entry is sufficient to establish the violation of 30 C.F.R. 75.302-4(a). Once it has entered the intake air corridor, the air can only be drawn to the working face (Exhibit P5). The citation should be affirmed.

In view of the statutory criteria (FOOTNOTE 2), I consider the proposed civil penalty of $114.00 to be appropriate.

CITATION 242467

This citation alleges a violation of 30 C.F.R. 75.403.

The parties by stipulation propose an amendment of the civil penalty and respondent agrees to withdraw its notice of contest.

An analysis of the supporting documentation indicates that the proposed settlement is warranted in view of the statutory criteria, 30 USC 820(i). Accordingly this citation and the proposed civil penalty, as amended, in the amount of $75.00 should be affirmed.

CITATION 242662

This citation alleges a violation of 30 C.F.R. 75.316 (FOOTNOTE 3.

The facts are conflicting and I find the following facts to be credible.

1. MSHA Inspector Matthew Biondich, using his anemometer, was unable to measure the air velocity in the mine (Tr. 33-38).

2. The stoppings in the mine were leaking "pretty bad" (Tr. 35).

3. Three smoke readings indicated an air velocity of 7025 cfm (cubic feet per minute). (Tr. 39-40).

4. After the stoppings were repaired, the velocity increased to 20,475 cfm (Tr. 44).

5. According to GEX's ventilation plan, 16,000 cfm should be maintained (Exhibit P-3).

Respondent's two fold argument is that the decrease in air velocity was due to necessary ventilation changes when moving from one side of the belt line to the other. Further, respondent asserts it cannot be expected to maintain air velocity in the last open cross cut.

~3502

I reject respondent's arguments. While a conflict exists as to the amount of the air velocity in this section of the mine, I find this to be basically a matter of expert testimony. Respondent conceded the expertise of the MSHA inspectors (Tr. 32-33).

Respondent's defenses cannot prevail since its ventilation plan requires air velocity at all places in excess of the 7025 cfm measured by the inspector.

This citation should be affirmed and in view of the statutory criteria4, I consider the proposed civil penalty of $180.00 to be appropriate.

ORDER

Based on the foregoing findings of fact, conclusions of law, and stipulation I hereby enter the following order:

1. Citation 242465 and the proposed civil penalty of $114.00 are affirmed.

2. Citation 242467 and the proposed civil penalty, as amended, in the amount of $75.00 are affirmed.

3. Citation 242662 and the proposed civil penalty of $180.00 are affirmed.

John J. Morris
Administrative Law Judge

~FOOTNOTE_ONE

1 75.302-4 Auxiliary fans and tubing.
(a) The fan shall be of a permissible type, maintained in permissible condition, so located and operated to avoid any recirculation of air at any time, and inspected frequently by a certified person when in use.

~FOOTNOTE_TWO

2 30 USC 820(i)
~FOOTNOTE_THREE

3 75.316 Ventilation system and methane and dust control plan.
[STATUTORY PROVISIONS]
A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at

least every 6 months.

~FOOTNOTE_FOUR
4 30 USC 820(i)