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

BARNES & TUCKER COMPANY, CONTESTANT	Contests of Citations
v.	Docket No. PENN 80-246-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Citation No. 848844 April 29, 1980
	Docket No. PENN 80-247-R
	Citation No. 848845 April 29, 1980
	Lancashire No. 24-B Mine

DECISION

Appearances: Michael T. Heenan, Esq., Smith, Heenan, Althen & Zanolli, Washington, D.C., for Contestant
Michael C. Bolden, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent

Before: Judge Charles C. Moore, Jr.

At approximately 7:50 a.m. on April 23, 1980, a fire was discovered in the penthouse containing the hoisting equipment for the elevator at the Teakettle Portal of Contestant's No. 24-B Mine. Upon being notified, the mine superintendent, mine foreman and a number of others attempted to extinguish the fire with CO2 firefighting equipment. At approximately 8 a.m., they called the local fire department which was 7 miles from the mine. It was estimated, and the basis for the estimation seems reasonable, that the fire department could have arrived at the mine no later than 8:15. They began extinguishing the fire using a 1-1/2-inch water hose, but there is no evidence as to when the firemen actually extinguished the fire. There is evidence, however, that they had returned to the firehouse by 9:15 a.m. At 8:40 a.m., Inspector Niehenke was inspecting another mine and was informed that the fire at Contestant's Teakettle Portal was being broadcast on CB radio as well as commercial radio. Inspector Niehenke called his supervisor, Mr. Gobert, to see if Mr. Gobert knew of the fire. Mr. Gobert did not, but said he would call the company, which he immediately did. Mr. Gobert called Inspector Niehenke at 8:50 a.m., confirmed the fact of the fire and directed him to proceed to the Teakettle Portal. The inspector arrived at the Teakettle Portal at 9:15 a.m., the approximate time the firemen returned to their station.

The inspector arrived at the mine while it was being evacuated and when he reached the penthouse workers were attempting to clean the area and restore order. Upon entering the penthouse, he saw electrician Fred Gormish cut an electric cable that led from a disconnect switch to a space heater. He told Mr. Gormish that he was destroying evidence and immediately (at 9:30 a.m.) issued an order under section 103(k) of the Act which prohibited further restoration activities. (FN.1)

An accident investigation commenced at 9:45 that morning and lasted 5 days. After the investigation, two citations were issued charging the company with failing to immediately report an accident and altering the scene of an accident. The citations allege violations of 30 C.F.R. 50.10 and 30 C.F.R. 50.12, respectively. (FN.2)

Twelve situations are defined in 30 C.F.R. 50.2(h) as accidents reportable to MSHA under 30 C.F.R. 50.10, supra. Four of the 12 definitions include a 30-minute time period; two of those four are relevant to the facts of this case.

Subsection (h)(6) defines as an accident: "An unplanned mine fire not extinguished within 30 minutes of discovery * * *" and subsection (h)(11) defines as an accident: "Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than 30 minutes."

Whether the 30-minute time period refers to the time within which the above occurrences are to be reported to MSHA or whether it refers to a time period which must elapse before the fires become reportable accidents was disputed at the hearing. Both the inspector and his supervisor were of the opinion that the 30-minute period referred to the time within which an accident must be reported, but MSHA decided not to charge Barnes & Tucker for

failing to report a subsection (h)(6) accident as they were unable to determine how long the fire lasted (Tr. 150).(FN.3) My interpretation is that, contrary to the Government's testimony, 30 minutes must elapse before the accidents defined in subsections (h)(6) and (h)(11) become reportable.

Section 50.10 states that if an accident occurs "an operator shall immediately contact the MSHA district or subdistrict office * * *." The regulations do not say what is meant by the words "immediately contact" but certainly in the case of an injury MSHA would not expect a miner or a supervisor to run for a telephone rather than give aid to an injured miner. It seems that reasonable promptness is what should be expected of the mine operator. But in the case of those accidents which only become reportable if they last a certain length of time, the "reasonable promptness" time period cannot be expected to start until after the time period has passed. There is no accident to report until after the time has elapsed.

During the course of the firefighting effort by the fire department, the electrical hoist machinery was soaked and there was testimony that it should not have been operated without having first been cleaned and dried. The machines were not damaged in any way by the fire itself. It is impossible to determine exactly when the firemen sprayed the hoisting equipment. Inasmuch as the firemen probably did not arrive at the mine until 8:15 a.m. and the damage was done sometime after that, and inasmuch as MSHA was notified of the accident at 8:45 a.m. there is no way that 30 minutes could have passed (even if that were the correct rule, which it is not) between the time the hoists were damaged and MSHA was notified of the accident. MSHA has thus failed to establish that the company violated 30 C.F.R. 50.10 and the citation alleging such a violation is vacated

The allegation that the mine operator altered the accident site prior to completion of the investigation presents a more difficult problem. The inspector's description of the physical layout of the penthouse is at variance with the photographic evidence and testimony presented by the Contestant. The inspector testified that the wire which he saw the electrician cut extended from the heater to a breaker switch which was in the open position. The electrician, however, testified that he had removed the breaker switch before the inspector arrived. The electrician also testified that in cutting the wire he thought he was eliminating an imminent danger, but obviously if the breaker switch had already been removed no power could reach the line he severed, and thus there was no imminent danger. There was also the fact that Mr. Dolges, an electrician, removed a burned wire from one of the three boxes on the penthouse wall but refused to tell the inspector about that when he was questioned. It was this missing wire which apparently led the inspector and the rest of the investigation team to suspect devious acts on the operator's part. I suspect that no citations would have been issued if

Mr. Dolges had testified during the investigation. But all of these matters become unimportant if the damage to the hoisting equipment was not a reportable accident, because if it was not, there was no duty to maintain the accident scene in an unaltered state.

In my opinion, MSHA has failed to establish that the damage to the hoisting equipment was a reportable accident. Otis Elevator Company employees informed the Contestant that the hoist could be run immediately without further maintenance, but they could not guarantee further damage would not be done. In addition, there is no way to know how long it would have taken the operator to blow the motors dry and resume operation since the inspector halted the restoration operations by issuing his section 103(k) order. The order was issued at 9:30 a.m. but as stated before, it is unknown when and to what extent the hoist machinery was damaged by the firemen's water. And although the inspector stated that he issued his 103(k) order at 9:30 a.m., he also stated that when he earlier accused Mr. Gormish of destroying evidence, Mr. Gormish ceased further restoration operations. I hold that MSHA has failed to carry its burden of showing that this was a reportable accident. I further hold that there was no devious intent on the operator's part to hide any phase of this accident, but that it was merely trying to restore the penthouse to operating condition and thus protect its equipment from whatever deleterious effect might result from letting the hoist stay wet.

Citation Nos. 848844 and 848845 are vacated, and all proposed findings not included above are rejected.

Charles C. Moore, Jr.
Administrative Law Judge

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~FOOTNOTE_ONE

1 There is an implication in the inspector's testimony and in the Government's brief that the issuance of a 103(k) order is the proper way to preserve evidence. While this may be true if the preservation of evidence also insures "the safety of any person in the * * * mine," preservation of evidence alone will not justify such an order. Eastern Associated Coal Co. HOPE 75-699; 2 FMSHRC 2467 (September 2, 1980).

~FOOTNOTE_TWO

2 Section 50.10 states:

"If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, toll free at (202) 783-5582."

Section 50.12 states:

"Unless granted permission by a MSHA District Manager or Subdistrict Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment."

~FOOTNOTE_THREE

3 The Secretary's brief appears to argue to the contrary, but it is clear that the citation was for failure to report the damage to the hoisting equipment rather than the fire itself.