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MABEN ENERGY v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

MABEN ENERGY CORPORATION,
CONTESTANT

v.

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

Contest of Citation

Docket No. WEVA 80-437-R

Citation No. 653368
May 19, 1980

Maben No. 3 Mine

DECISION

Appearances: James M. Brown, Esq., File, Payne, Scherer & Brown,
Beckley, West Virginia, for Contestant
Stephen P. Kramer, Esq., U.S. Department of Labor,
Office of the Solicitor, Arlington, Virginia for
Respondent

Before: Judge Melick

Hearings were conducted in this case on September 17, 1980,
in Beckley West Virginia following which I issued a bench
decision. That decision, which appears below with some
modification, is affirmed at this time.

This case is before me under Section 105(d) of the Federal
Mine Safety and Health Act of 1977. Maben Energy Corporation
(Maben) is contesting Citation No. 653368, a citation issued
under the provisions of section 104(d)(1) (FN.1) on May 19, 1980,
by MSHA Inspector James Ferguson for a violation of the standard
at 30 C.F.R. 75.316, i.e. a violation of Maben's methane and
dust control plan. Maben does not question that the cited
violation did occur and contests only the special finding of
"unwarrantable failure" made in connection therewith.

The standard cited facially requires only that the operator file and have in effect a methane and dust control plan approved by the Secretary. The standard has been construed however as requiring also that the operator comply with its approved plan. Zeigler Coal Company, 4 IBMA 30 (1975), aff'd, 536 F.2d 398 (D.C. Cir. 1976). It is specifically charged in this case that Item No. 7 on page 2 of the operator's plan was violated because there was no perceptible movement of air in the cross cut left off of the No. 4 entry of 7 Left 013 section. That part of the plan requires that if a blowing system of ventilation is used, as the evidence shows was used in this case, the minimum amount of air at the end of the line curtain must be 3,000 cubic feet per minute. It has been stipulated that at the time the citation was issued on May 19, that that minimum amount was not met.

The issue before me is whether this violation was the result of the unwarrantable failure of the operator to comply with the law. A violation is a result of "unwarrantable failure" if the violative condition is one which the operator knew or should have known existed or which the operator failed to correct through indifference or lack of reasonable care. Zeigler Coal Company, 7 IBMA 280 (1977).

According to the testimony of Mr. Fred Ferguson, superintendent of the Maben No. 3 mine, this mine and in particular this section that we are talking about today had a history of deficient ventilation and, in fact, on occasion -- and I got the impression, not infrequently -- was less than the required 3,000 cubic feet of air per minute. I conclude from that history that management was on notice that special precautions were required that might not otherwise be called for to keep the working areas of that section properly ventilated. Superintendent Ferguson indeed conceded that because of this known history he had given section foreman Campbell the special duty to keep him currently informed as to what areas could safely be worked.

Now, it is essentially undisputed that as part of his on-shift inspection section foreman Campbell went to the cited No. 4 entry between 7:30 and 7:55 of the morning in question and at that time thought that he felt a "perceptible" movement of air on his face and hands. In spite of the fact that Campbell was aware of the recurring problem of air deficiency in this section and that there was only a "perceptible" movement of air that morning he made no effort to determine whether that working place in fact had sufficient ventilation.

Inspector Ferguson's testimony is undisputed that when he arrived at the No. 4 entry where men were installing roof bolts there was dust in suspension and absolutely no movement of air. Since the vanes on his anemometer would not move for lack of air velocity he released smoke from a chemical smoke tube. The smoke did not move in any direction. According to mine superintendent Ferguson this test was made between 7:30 and 8:00 that morning. Since section foreman Campbell made his determination of only "perceptible" air in the same entry during that same time

(between 7:30 and 7:55 that morning) it is reasonable to infer that there was indeed an obviously deficient flow of air when Campbell made his inspection. Campbell therefore knew or should

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have known of that deficiency. If indeed he detected only perceptible air movement it was incumbent on him to verify the adequacy of that air before allowing his men to work there. He was apparently also failing to comply with the company policy of verifying the air flow in this section. His failure to do so and to correct that condition through indifference or lack of reasonable care shows that the violation was the result of "unwarrantable failure" to comply with the law. The actions and negligence of foreman Campbell are of course imputed to the operator.

I also conclude that the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety and health hazard under section 104(d)(1) of the Act. The absence of ventilation at a working face could result in the buildup of explosive methane gas and coal dust and cause a respirable dust health hazard to the miners. The citation herein is therefore affirmed, and the contest dismissed.

Gary Melick
Administrative Law Judge

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(FOOTNOTES START HERE.)

~FOOTNOTE_ONE

1 Section 104(d)(1) provides in part as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act."