

CCASE:
MATHIES COAL V. SOL
DDATE:
19811116
TTEXT:

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

MATHIES COAL COMPANY, CONTESTANT	Contest of Citation
v.	Docket No. PENN 81-213-R Citation No. 1050312; 7/10/81
SECRETARY OF LABOR, RESPONDENT	Mathies Mine

DECISION

Appearances: Jerry F. Palmer, Esq., Consolidation Coal Company,
Pittsburgh, Pennsylvania, for Contestant;
James P. Kilcoyne, Jr., Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for Respondent

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This proceeding was commenced by Mathies Coal Company (hereinafter Mathies) on July 21, 1981, by the filing of a notice of contest of Citation No. 1050312 issued by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815 (hereinafter "the Act"). Also on July 21, 1981, Mathies filed an application for temporary relief from the above citation and a motion for expedited hearing on the notice of contest. On August 4, 1981, I issued an order granting the motion for expedited hearing and denying the application for temporary relief.

A hearing was held on the above matter in Pittsburgh, Pennsylvania on August 27, 1981. Francis E. Wehr, Sr., and Joseph Garcia testified on behalf of MSHA. William Porter and George Kostelnik testified on behalf of Mathies. At the hearing, Mathies renewed its motion for interim relief requesting that the Secretary of Labor be prevented from enforcing the escapeway regulations pending the outcome of this decision. Noting that to prevent enforcement of the safety regulation would possibly affect the health and safety of the miners, I found that Mathies had not satisfied its burden under Rule 46, 29 C.F.R. 2700.46. I further found that Mathies was using this application as a means to avoid the process of seeking and obtaining a bypass variance. I, therefore, denied Mathies' application for temporary relief.

ISSUE

Whether Mathies violated 30 C.F.R. 75.1704-2(a).

APPLICABLE LAW

30 C.F.R. 75.1704-2(a) provides as follows:

In mines and working sections opened on and after January 1, 1974, all travelable passageways designated as escapeways in accordance with 75.1704 shall be located to follow, as determined by an authorized representative of the Secretary, the safest direct practical route to the nearest mine opening suitable for the safe evacuation of miners. Escapeways from working sections may be located through existing entries, rooms, or crosscuts.

STIPULATIONS

The parties stipulated as follows:

1. Mathies Coal Company is the owner and operator of the subject mine.
2. The operator and the mine are subject to the 1977 Act.
3. The Administrative Law Judge has jurisdiction over the parties and the subject matter of this controversy.
4. The inspector who issued this citation was a duly authorized representative of the Secretary of Labor.
5. A copy of the citation is authentic and was properly served upon the operator.

FINDINGS OF FACT

I find that the preponderance of the evidence of record establishes the following facts:

1. On July 10, 1981, MSHA inspector Francis E. Wehr issued Citation No. 1050312 for a violation of 30 C.F.R. 75.1704-2(a) in that the Linden intake escapeway was bypassed while the Linden Portal elevator was inoperable due to electrical problems. The citation alleged that instead of withdrawing its miners from the affected area, the operator redesignated the intake escapeway to the Kerr intake shaft which was not the nearest mine opening suitable for the safe evacuation of miners.
2. Linden Portal was opened in September 1980, after the effective date of section 75.1704-2(a).

~2616

3. Prior to the development of the Linden Portal, the approved escapeway plan for the working sections 21 Face, 25 Face, West Mains and 1 South off West Mains, provided that the intake escapeway go to Thomas Portal while the return escapeway be routed to Kerr Fan.

4. After Linden Portal went into operation, the approved escapeway plan provided that the intake escapeway go to Linden Portal and the return escapeway go to Kerr Fan.

5. The safest direct practical route from the above working sections is to Linden Portal which is the nearest mine opening suitable for the safe evacuation of miners.

6. On July 9, 1981, the Linden Portal was shut down due to electrical problems with its elevator.

7. On July 9, 1981, while the Linden Portal was closed, the miners were not withdrawn from the affected area. The workers were directed to alternative escapeways which were not approved as being the nearest mine opening suitable for the safe evacuation of miners.

8. Mathies did not receive permission from the MSHA District Manager to bypass the Linden Portal when it became inoperable.

DISCUSSION

Mathies' primary contention in challenging the validity of this citation centers upon its assertion that section 75.1704-2(a) does not apply to Linden Portal. Linden Portal, one of seven escapeways at Mathies Mine, was opened in September, 1980. The safety and health standard at issue was promulgated October 31, 1973. See 38 Fed. Reg. 30000. Mathies determined that the safety standard does not apply to Linden Portal because of the policy statements contained in the MSHA underground manual. The manual states in pertinent part:

The term "mine opening suitable for the safe evacuation of miners" as used here indicated that some mine openings developed prior to the effective date of this regulation may or may not be suitable for safe evacuation of miners. For example, an old mine shaft may not be safe for travel because of badly deteriorated shaft lining, timbers, etc., even though it is still suitable for mine ventilation purposes, or a mine shaft developed and equipped with a ventilating fan prior to the effective date of this regulation may or may not be suitable for the safe evacuation of miners, if necessary alterations would adversely affect the mine ventilation in the event of an emergency. Ex. G-2.

~2617

Since the manual shows a concern for "some mine openings developed prior to the effective date of this regulation," Mathies concludes that Linden Portal, which was developed after the effective date of the regulation, is not subject to the provisions of the regulation.

The plain language of section 75.1704-2(a) refutes this interpretation of the regulation. The regulation directs that the authorized representative of the Secretary determine the safest, most direct, and most practical route to the nearest mine opening suitable for the safe evacuation of miners. As Linden Portal is the newest and closest escapeway to the working sections in issue, it had been properly designated as the intake escapeway. The fact that the policy manual explains the use of the words "mine openings suitable for the safe evacuation of miners" as resulting from the fact that some old mine openings were not safe for travel because of deteriorated shaft linings and inadequate ventilation, is not a reason to exclude new and safe escapeways from the coverage of the regulation. The regulation is concerned with providing safe escapeways and the obvious intent is to insure that the safest and most direct routes are taken.

Furthermore, it is well established that the MSHA Inspection Manual is not binding on our interpretation of the Act or its regulations. In *Secretary of Labor v. King Knob Coal Company*, 3 FMSHRC 1417, 1420 (1981), the Commission discussed the legal status of the Manual and stated "that the Manual's "instructions are not officially promulgated and do not prescribe rules of law binding upon [this Commission].'" *Old Ben Coal Company*, 2 FMSHRC 2806, 2809 (1980)." The Commission noted that "cases may arise where the Manual or a similar MSHA document reflects a genuine interpretation or general statement of policy whose soundness commends deference and therefore results in our according it legal effect." *Ibid.* However, the case at hand does not require reference to the policy statements of the MSHA Manual. It has already been determined that the stated policy does not exclude Linden Portal from the regulation's coverage and, therefore, the express language of the regulation is not in conflict with either the Manual or its policy. Accordingly, section 75.1704-2(a) is applicable to the Linden Portal.

The evidence indicates that the elevator at Linden Portal became inoperable on July 9, 1981, and that management redesignated the escapeway routes rather than withdraw the miners from the affected working sections. While the testimony conflicts as to whether both the intake and return escapeways were to Kerr shaft or whether the intake escapeway was redesignated to Thomas while the return escapeway remained at Kerr, this is not relevant to a finding of a violation of section 75.1704-2(a). No allegation of a violation of 75.1704 has been made; and therefore, whether the redesignated escapeway plan involved either two mine openings or only one need not be resolved.

Mathies argues that once Linden Portal became unuseable due

to the elevator malfunction, it was unsuitable for the safe evacuation of miners. Therefore, by not using Linden Portal, Mathies contends that it complied with section 75.1704-2(a) by redesignating the escapeways to those mine openings

~2618

which did provide for a safe evacuation of miners. Mathies' position would allow the operator to bypass its approved escapeway plan whenever it became impossible to comply. This interpretation of the regulation calls for one to ignore the words "as determined by an authorized representative of the Secretary." The regulation requires that escapeways be approved and does not provide an exception granting the operator discretionary authority to modify that plan whenever it becomes inconvenient to follow it.

Mathies contends that the suitability of an escapeway plan requires flexibility allowing it to be determined based upon the existing facts at the time the escapeway designation or redesignation is made. It argues that a "suitable" mine opening is bypassed as part of every operator's escapeway plan because MSHA requires there to be both an intake and return air escapeway. Therefore, even though the intake escapeway is closer, it is not suitable for the return escapeway. This argument relies on a distorted construction of the regulation and the word "suitability." Section 75.1704-2(a) is, after all, a subpart of section 75.1704. "Suitability," therefore, takes into consideration the fact that section 75.1704 requires two escapeways and incorporates that requirement into the standard which the authorized representative of the Secretary must apply. The word "suitability" implies no right to bypass the approved escapeway without authorization.

The fundamental question becomes whether Mathies received permission to bypass the Linden Portal on July 9, 1981. The evidence supports a finding that MSHA policy required that any bypass be granted in writing by the District Manager (Ex. G-3). At no time, has Mathies contended that it received a written bypass from the District Manager. On these facts alone, MSHA could sustain a violation of 75.1704-2(a).

Mathies maintains that it received permission to bypass the Linden Portal from Coal Mine Inspection Supervisor Earl Rudolph and Coal Mine Electrical Inspector Stanley Karpetta. This is premised upon the apparent authority of Mr. Rudolph and Mr. Karpetta to bind MSHA on this matter. Testimony and evidence refutes this claim of any reliance upon the above inspectors' authority to grant a bypass.

William Porter's letter of February 11, 1981, to Supervisor Rudolph, asking him to confirm their conversation about escape procedures does not indicate that any alternative escape plan was approved. (Ex. O-1). The last sentence states, "I would like to ask for your opinion of this procedure and if there are any differences, additions or deletions please advise." This is a request for comment and shows that there had been no resolution of the escapeway redesignation plan. Indeed, Mr. Porter admitted that he received no written response to this letter (Tr. p. 115).

Mr. Porter's testimony indicates that Mathies knew it had no authority to bypass Linden Portal. Mr. Porter stated:

On March 11th, Al Shade, whose name has been mentioned previously in the hearing here, was -- who is a coal mine Inspector, he wasn't on temporary assignment at that time,

he was a coal mine Inspector; and he came to the Linden Portal and, yes, in a conversation prior to the commencement of his inspection that day, he informed us that if we had an elevator which was down, that a Citation would be written and a time would be given us to withdraw the people, or in his words, other things would happen, and that was all that was said.

And, of course, that obviously telegraphed to me that what I proposed was unacceptable somewhere along the line, and I involved Mr. Parisi and other gentlemen again in the problem as to what to do when the elevation [sic] at Linden was down. (Tr. p. 115). [Emphasis added.]

The only conclusion that can be made from these statements is that Mathies knew that it had received neither written nor oral permission to bypass Linden Portal in the event the elevator broke down. It is not contested that Mathies did in fact bypass Linden Portal on July 9, 1981. Accordingly, its failure to exhaust its administrative remedy in obtaining a written bypass from the District Manager justifies a finding that the citation was properly issued.

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.
2. Mathies and its Mathies Mine are subject to the Act.
3. Citation No. 1050312 issued on July 10, 1981, charging a violation of mandatory safety standard 30 C.F.R. 75.1704-2(a) is affirmed.

ORDER

WHEREFORE IT IS ORDERED that Mathies contest of Citation No. 1050312 is DENIED and Citation No. 1050312 is approved.

James A. Laurenson
Judge