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C F & I STEEL v. SOL (MSHA)

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

C F & I STEEL CORPORATION,
APPLICANT

APPLICATION FOR REVIEW

v.

DOCKET NO. WEST 80-350-R

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

Order of Withdrawal No. 827038

Mine: Allen

DECISION AND ORDER

APPEARANCES: Phillip D. Barber Esq.
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For the Applicant
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For the Respondent

BEFORE: Judge Jon D. Boltz

STATEMENT OF THE CASE

This proceeding involves an application for review of an imminent danger order of withdrawal pursuant to the provisions of section 107 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1978) [hereinafter cited as "the 1977 Act" or "the Act"]. On June 12, 1980, Applicant, C F & I Steel Corporation [hereinafter "C F & I"], filed with the Commission its Application for Review. Respondent, the Secretary of Labor, Mine Safety and Health Administration (MSHA) [hereinafter "the Secretary"] responded to the application for review by filing an Answer with the Commission on July 14, 1980. Pursuant to notice, a hearing on the merits was held in Pueblo, Colorado.

FINDINGS OF FACT

1. C F & I is the operator of an underground coal mine located near Weston, Colorado, known as the Allen Mine.

2. Products of the Allen Mine enter or affect interstate commerce.

3. On May 8, 1980, a C F & I section foreman, in the company of MSHA inspectors, was conducting face checks for accumulations of methane prior to the commencement of work by his crew. In the crosscut between entries No. 2 and No. 1, the section foreman detected a 1.5 per centum concentration of methane near a rib. Utilizing a permissible methane detector similar to the one used by the foreman, an inspector detected accumulations of methane in concentrations of 1.8 and 2.1 per cent. Two vacuum bottle air samples were taken by the inspector at a point twelve inches from the roof, the right rib and the face area of the advancing crosscut. Upon subsequent analysis, the two air samples revealed methane concentrations of 1.53 and 1.83 per cent.

4. Order of Withdrawal No. 827038(FOOTNOTE.1) was issued to C F & I by the inspector pursuant to the imminent danger provision of the Act, section 107(a), and a citation provision of the Act, section 104(a). In the part and section category of the order, the inspector alleged a violation of

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30 C.F.R. 75.308.(FOOTNOTE.2) The inspector did not mark the "CITATION" box on the order issued to C F & I, but the "ORDER OF WITHDRAWAL" box was marked with an "X".

5. Upon discovering the accumulation of methane, the section foreman assembled his crew and put them to work clearing the mine atmosphere of the gas. The crew tightened the existing brattice line, eliminating any gaps, and installed additional brattice in the crosscut extending towards the face area. Within 35 minutes of the time the order of withdrawal was issued, the condition was abated by increased ventilation of the crosscut.

6. Methane is potentially explosive in air when present in concentrations of 5 to 15 per cent by volume.

7. At the time the imminent danger withdrawal order was issued, and immediately prior thereto, no miners were present at the working face where the methane was detected. The miners waited in a lunchroom in a different entry while the section foreman completed his face checks for methane. No power was energized in the section at the time the order was issued or prior to its termination. No production was ongoing. The area covered by the order of withdrawal was well rock dusted. A volume of approximately 13,000 c.f.m. of air was present at the last open crosscut at the time the order issued. After the order of withdrawal was issued, only authorized personnel were allowed into the subject area and the only work performed there were attempts to establish a greater volume of ventilation.

ISSUES PRESENTED

1. Whether the conditions which existed in C F & I 's Allen Mine, at the time the order of withdrawal was issued, constituted an imminent danger?

2. Whether a violation of a mandatory safety and health standard, capable of supporting a penalty, occurred at C F & I 's Allen Mine?

DISCUSSION

Supporting its case for vacation of the imminent danger order of withdrawal, C F & I cites the decision of Secretary of Labor, Mine Safety and Health Administration (MSHA) v. C F & I Steel Corporation, 3 FMSHRC 99 (1981). In that case, I dismissed an imminent danger order of withdrawal issued to C F & I when mine personnel were in the process of attempting to clear an accumulation of methane in a belt haulage entry by increasing ventilation of the area. The concentration of methane involved was demonstrated to be somewhere between 1.42 and 1.86 per cent.

The significant fact involved in that case was that when the inspector issued the order of withdrawal, C F & I was already doing everything it possibly could do to abate the condition. The work was being done only by those persons who would have been authorized to be in the area had an imminent danger order been in effect. The critical distinction between the cited case and the case at bar is that, in the former case, abatement was already in progress and being performed by authorized personnel. Here, even though no production was ongoing, abatement had not yet commenced.

C F & I emphasizes that no miners were present in the section covered by the imminent danger order of withdrawal. Pursuant to C F & I preshift policy, the miners waited in a lunchroom located in a different entry, some 300 feet from where the methane was detected, while the section foreman completed his face checks for methane. Following that practice, only when the section foreman had completed his face checks, determined it was safe and personally energized the section power source would the miners be allowed to enter the working section. I must conclude, however, that the conditions which existed at C F & I 's Allen Mine, at the time the order of withdrawal was issued, constituted an imminent danger.

For the proposition that the presence of 1.5 volume per centum or more of methane, as a matter of law, requires the issuance of a withdrawal order, the Secretary cites the decision of Pittsburgh Coal Company, 2 IBMA 277 (1973). The Secretary contends that an imminent danger order must be issued even though no miners are in the affected area since one purpose of a withdrawal order is to insure that miners remain out of the affected area until the condition is corrected. For this proposition, the Secretary cites the decision of The Valley Camp Coal Company, 1 IBMA 243 (1972).

I would characterize the holding of the first cited case somewhat differently. Pittsburgh Coal Company, supra, stands for the proposition that the presence of 1.5 volume per centum or more of methane will support the issuance of an imminent danger withdrawal order. Id. at 277, 279. The Valley Camp Coal Company, supra, stands for the proposition that an order of withdrawal can properly be issued if no miners are in the mine because an order of withdrawal not only takes the miners out of the mine, but also keeps them out until the danger has been eliminated. Id. at 248. In Secretary of Labor, Mine Safety and Health Administration (MSHA) v. C F & I Steel Corporation, supra. I concluded that the danger presented by the accumulation of methane had been eliminated. That is not the case with the matter at hand. The accumulation of methane that existed on May 8, 1980, having been only recently discovered, could reasonably be expected to cause death or serious physical harm before the danger posed had been eliminated. No abatement was in progress. Therefore, I find that the order of withdrawal is valid and should be affirmed.

On the issue of whether or not a mandatory safety or health violation occurred, I find for the Applicant. The mandatory safety and health standard allegedly violated was 30 C.F.R. 75.308 (see footnote 2 page 2). Given the facts as found, it is clear that when the air at the working face was found to contain 1.0 volume per centum or more of methane, C F & I at once made changes or adjustments in the ventilation of the Allen Mine to reduce the methane concentration to less than 1.0 per cent. While such changes or adjustments were underway and until they had been achieved, the power to electric equipment in the area remained off, no production was ongoing, and due precautions were exercised by C F & I so as not to endanger other areas of the mine. Additionally, all persons other than those referred to in section 104(c) of the Act were withdrawn to a safe area of the mine. On these facts, no violation of the mandatory safety and health standard contained in 30 C.F.R. 75.308 occurred and I cannot sustain the violation alleged in Order of Withdrawal No. 827038.

The condition or practice cited in the order also makes reference to an alleged violation of 30 C.F.R. 75.302-4(d). (FOOTNOTE.3) No evidence is contained in the record regarding the use vel non of auxiliary fans, the existance of scheduled idle periods or the ventilation scheme in use at the Allen Mine. Therefore, I have no basis upon which to sustain the violation of 30 C.F.R. 75.302-4(d) alleged in Order of Withdrawal No. 827038.

As no violation of a mandatory safety or health standard was found to exist, it is not necessary for me to rule on the significance of the fact that the "CITATION" box on the order was not marked, how that fact affects the sufficiency of the order as a section 104(a) citation or whether C F & I was given adequate notice that a citation alleging a violation of 30 C.F.R. 75.302-4(d) was being issued.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.
2. The conditions which existed at C F & I 's Allen Mine on May 8, 1980, did constitute an imminent danger at the moment that Order of Withdrawal No. 827038 was issued.
3. The order was valid and should be affirmed.
4. The alleged violation of 30 C.F.R. 75.308 contained in Order of Withdrawal No. 827038 was not proven by a preponderance of the evidence.
5. The allegation was not sustained and should be vacated.
6. The alleged violation of 30 C.F.R. 75.302-4(d) contained in Order of Withdrawal No. 827038 was not proven by a preponderance of the evidence.
7. The allegation was not sustained and should be vacated.

ORDER

Based upon the foregoing findings of fact and conclusions of law, Order of Withdrawal No. 827038 is AFFIRMED, the violation of 30 C.F.R. 75.308 alleged therein is VACATED and the violation of 30 C.F.R. 75.302-4(d) alleged therein is VACATED. This proceeding is hereby DISMISSED WITH PREJUDICE.

Jon D. Boltz
Administrative Law Judge

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~FOOTNOTE_ONE

The "CONDITION OR PRACTICE" cited alleges:

"Upon arriving in section 1 south off 1 east section [unintelligible characters] 041-0 at 7:00 a m an accumulation of methane was detected in the face by a prmissible (sic) methane detector The CH4 ranged from 1.8 to 2.1 per centum citation 75.308 This section is normaly (sic) provided ventilation by an auxiliary fan had been deenigized (sic) by the night shift and no means was provided to ventilate the face area to prevent accumulations of methane a citation of 75.302-4(d) This condition was observed in the last crosscut between No 1 and 2 -

entry".

~FOOTNOTE_TWO

75.308 Methane accumulations in face areas.

[STATUTORY PROVISIONS]

If at any time the air at any working place, when tested at a point not less than 12 inches from the roof, face, or rib, contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in such mine so that such air shall contain less than 1.0 volume per centum of methane. While such changes or adjustments are underway and until they have been achieved, power to electric face equipment located in such place shall be cut off, no other work shall be permitted in such place, and due precautions shall be carried out under the direction of the operator or his agent so as not to endanger other areas of the mine. If at any time such air contains 1.5 volume per centum or more of methane, all persons, except those referred to in section 104[c] of the Act, shall be withdrawn from the area of the mine endangered thereby to a safe area, and all electric power shall be cut off from the endangered area of the mine, until the air in such working place shall contain less than 1.0 volume per centum of methane.

~FOOTNOTE_THREE

75.302-4 Auxiliary fans and tubing.

(d) In places where auxiliary fans are used, the ventilation during scheduled idle periods such as weekends and idle shifts, shall be by means of the primary air current conducted into the place in a manner to prevent accumulations of methane.