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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 Proceeding

Docket No. LAKE 82-3
A.C. No. 11-02236-03081

v.

Crown No. 2 Mine

FREEMAN UNITED COAL MINING
COMPANY,
RESPONDENT

DECISION

Appearances: Rafael Alvarez, Esq., and Richard J. Fiore, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Chicago, Illinois, for Petitioner
Harry M. Coven, Esq., Gould & Ratner, Chicago,
Illinois, for Respondent

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

In this proceeding, the Secretary seeks civil penalties for two alleged violations of mandatory safety standards for which citations were issued during an inspection on July 29, 1981. Each citation contained a finding that the violation was significant and substantial. Respondent challenges with respect to each citation the fact of violation and the significant and substantial finding. The latter finding is not necessarily at issue in a civil penalty proceeding, but both parties have introduced evidence and advanced argument concerning the issue, and, following the precedent of Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981) (also a penalty proceeding), I will decide the issue.

Pursuant to notice, the case was heard on the merits in St. Louis, Missouri on October 26, 1982. John D. Stritzel, a federal coal mine inspector, and Rick Reed testified for the Petitioner. David Lee Webb and Paul Budzak testified for Respondent. Both parties have filed posthearing briefs.

Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT APPLICABLE TO BOTH CITATIONS

1. At all times pertinent to this proceeding, Respondent was the owner and operator of an underground coal mine located in Macoupin County, Illinois, known as the Crown No. 2 Mine.

2. The operation of the subject mine affects interstate commerce.

3. The subject mine produces approximately 6,000 tons of coal daily. It employs approximately 90 miners on the surface and 465 miners underground on three shifts. I find that Respondent is a large operator.

4. During the period from January 1, 1980 to July 28, 1981, the operator had a history of approximately 243 paid violations, approximately 25 of which were ventilation violations. Government's Exhibit No. 6 covers the period from January 1, 1980 to August 25, 1982, the latter date being more than 1 year after the citations in question were issued. For that reason, it is of limited relevance. I find that Respondent's history of prior violations was moderate.

5. There is no evidence that penalties assessed for the alleged violations will affect Respondent's ability to continue in business. Therefore, I find that they will not.

FINDINGS OF FACT APPLICABLE TO CITATION NO. 1114857

6. On July 29, 1981, Federal Coal Mine Inspector John D. Stritzel conducted a regular inspection of the subject mine. He was accompanied by David L. Webb, assistant to the mine superintendent, and Rick Reed, a miner and union walkaround representative. They proceeded to the face of the 4th southwest section which was at Room 24. The rooms were approximately 20 feet wide, and 6 to 8 feet high.

7. Inspector Stritzel issued Citation No. 1114857 at about 9:30 a.m., on July 29, 1981, charging a violation of 30 C.F.R. 75.316 because there was no ventilation to the working face in the section in question.

8. The MSHA-approved ventilation plan in effect at the subject mine on the date of the above inspection provided (Exhibit No. M-3, page III, para. E, subpara. (a)): "Exhaust fan tubing or exhaust line curtain "*Used only in case of auxiliary fan failure." (inby end maintained within 10p of face). Both must have minimum mean entry velocity of 60 FPM."

9. At the time of the inspection referred to above, the continuous miner was cutting coal from Room 24 and it was being removed by

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shuttle car. The miner was taking a right-sided cut and had penetrated 8 to 10 feet into the face.

10. At the time of the inspection, the fan was being moved from the No. 4 entry between Room 21 and 22 and the tubing had been removed from the face area of Room 24.

11. At the time of the inspection, there was little or no air going to the working face. The miner operator was sitting about 5 feet outby the inby rib and was in fresh air. The air movement at the face was substantially less than 60 feet per minute. The continuous miner and the shuttle car did not act as a line curtain in ventilating the face area. I find that the miner was positioned at approximately a 90 degree angle to the face cutting coal straight on. On this issue I am accepting the testimony of Inspector Stritzel, which is supported by the testimony of Mr. Reed, as against the contradictory testimony of Mr. Webb.

12. At the time of the inspection the atmosphere in the face area where the continuous miner was operating was dusty and there was little or no air movement. The room was well rockdusted.

13. The methane monitor on the continuous miner was operating properly at the time of the inspection. There were no permissibility violations on the continuous miner.

14. The subject mine was classified as a gassy mine because it had been found to liberate excessive quantities of methane and was on a 10-day spot inspection program under section 103(i) of the Mine Safety Act.

15. Checks for methane on July 29, 1981, did not reveal any methane accumulations in the face area of the fourth southwest section of the subject mine.

16. The alleged violation was abated and the citation terminated by the repositioning of the fan in the last open crosscut between Room 23 and 24, with three or four sections of tubing on the fan extending to within 10 feet of the face. Thereafter, an air reading was taken which showed the air velocity was 64 feet per minute.

FINDINGS OF FACT APPLICABLE TO CITATION NO. 1114859

17. After the abatement described in finding 16, the inspector, Mr. Webb and Mr. Reed proceeded to the last open crosscut between Rooms 21 and 22. The inspector attempted to take an air reading with his anemometer but was unable to do so. He then took an air reading by using a chemical smoke cloud test which showed a volume of 7,654.5 cubic feet of air per minute.

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18. Inspector Stritzel issued a citation for a violation of 30 C.F.R. 75.301 because the minimum quantity of air reaching the last open crosscut was less than 9,000 cubic feet per minute.

19. I find that the air reaching the last open crosscut between Rooms 21 and 22 in the 4th southwest section of the subject mine was approximately 7,654.5 cubic feet per minute when the inspector performed the test described in finding 17. I reject the testimony which attempted to challenge the accuracy of the test.

20. At the time the citation was issued the continuous miner was not operating. There were seven miners working on the section.

21. The alleged violation was abated and the citation terminated by reerecting a curtain which had been partially knocked down and tightening other curtains separating the intake from the return air. Following this, an air reading was taken which showed 10,800 cubic feet of air per minute reaching the last open crosscut.

REGULATIONS

30 C.F.R. 75.316 provides:

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.

30 C.F.R. 75.301 provides:

75.301 Air quality, quantity, and velocity.

[STATUTORY PROVISIONS]

All active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities

of other noxious or poisonous gases; and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive fumes. The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be 9,000 cubic feet a minute, and the minimum quantity of air reaching the intake end of a pillar line shall be 9,000 cubic feet a minute. The minimum quantity of air in any coal mine reaching each working face shall be 3,000 cubic feet a minute. The authorized representative of the Secretary may require in any coal mine a greater quantity and velocity of air when he finds it necessary to protect the health or safety of miners. In robbing areas of anthracite mines, where the air currents cannot be controlled and measurements of the air cannot be obtained, the air shall have perceptible movement.

CONCLUSIONS OF LAW

1. Freeman United Coal Mining Company was subject to the provisions of the Federal Mine Safety and Health Act in the operation of the Crown No. 2 Mine at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. On July 29, 1981, Respondent violated the mandatory standard in 30 C.F.R. 75.316 because it had little or no ventilation in the working face at Room 24, 4th southwest section of the subject mine, in contravention of the approved roof control plan for the subject mine.

DISCUSSION

There can no longer be any doubt that the provisions of an approved ventilation plan are enforceable under the Mine Act and that a violation of a requirement in such a plan is a violation of the Act. *Zeigler Coal Company v. Kleppe*, 536 F.2d 398 (D.C. Cir. 1976); *Secretary v. Mid-Continent Coal and Coke Company*, 3 FMSHRC 2502 (1981).

Respondent does not seriously dispute the allegation in the citation that exhaust fan tubing or an exhaust line curtain were not maintained within 10 feet of the face. It is clear that the fan and tubing had been removed from the face area before the room was mined out in order to get a jump on production in the new face area. The contention that the continuous miner and the shuttle car acted as substitute line curtain is almost frivolous and I reject it.

3. The violation described in Conclusion No. 2 was serious. It was of such nature as could significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard.

DISCUSSION

The failure to provide air to the working face poses a two fold hazard: the possibility of a methane explosion and the buildup of coal dust. The latter can propagate an explosion and can contribute to lung disease in miners working in the area. Although at the time the citation was issued, the miner operator and helper were in fresh air, as cutting continued they would not be. No provision was made to supply air to the face. Even though methane was not detected on the day the citation was issued, it is a constant threat in a gassy mine. It is of the utmost importance that air be kept on the face area while coal is being mined. Under the test laid down by the Commission in *Secretary v. Cement Division, National Gypsum Company, supra*, there is a reasonable likelihood of a methane or dust explosion if there is no face ventilation. In the event of such an explosion, serious injuries or fatalities would result.

4. The violation described in Conclusion No. 2 was due to the gross negligence or deliberate flouting of the standard by the operator.

DISCUSSION

The operator moved the fan and tubing from the face area before the coal cutting was completed. It is obvious that the operator was aware of the fact that the continuous miner was still cutting coal in Room 24. Production was placed ahead of safety to the miners.

5. An appropriate penalty for the violation of 30 C.F.R. 75.316 is \$500 considering the criteria in section 110(i) of the Act.

6. On July 29, 1981, Respondent violated the mandatory standard in 30 C.F.R. 75.301 in that it failed to provide a minimum of 9,000 cubic feet per minute of air at the last open crosscut between Rooms 21 and 22 in the 4th southwest section of the subject mine.

DISCUSSION

Respondent raised issues concerning the accuracy of the smoke test which the MSHA inspector conducted which resulted in his finding of 7,645.5 cubic feet of air per minute. It argues that the area tested was not perfectly regular, that the procedures followed by the inspector could have been improved upon, and that a stop

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watch rather than a regular watch should have been used. It is significant, however, that Respondent, which had the opportunity to do so, did not itself take a smoke test. The inspector's reading - approximately 85 percent of the minimum air reading - is of course subject to a margin of error in either direction. I conclude that the test was validly taken and the results showed a violation.

7. The violation described in Conclusion No. 6 was moderately serious. It was of such nature as could significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard.

DISCUSSION

The violation found here is not as serious as that found in Conclusion No. 2. However, the same hazards are posed by this violation as by the prior one: the possibility of a methane or dust explosion and the presence of respirable dust in the atmosphere. The reduced air in the last open crosscut contributes significantly and substantially to those hazards. It results in a reasonable likelihood of serious injury.

8. The violation described in Conclusion No. 6 was due to the negligence of the operator.

DISCUSSION

The reduction in air in the last open crosscut was due to loose and torn curtains. These conditions are obvious and should have been known to the operator.

9. An appropriate penalty for the violation of 30 C.F.R. 75.301 is \$150 considering the criteria in section 110(i) of the Act.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that Respondent, within 30 days of the date of this decision pay the sum of \$650 for the two violations found herein to have occurred.

James A. Broderick
Administrative Law Judge