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SOL (MSHA) V. CARPENTERTOWN COAL & COKE
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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. PENN 82-312 A.C. No. 36-04595-03501
v.	Mahoning Creek No. 2 Mine
CARPENTERTOWN COAL & COKE CO., RESPONDENT	

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner Robert W. Thomson, Esq., Reed, Smith, Shaw & McClay, Pittsburgh, Pennsylvania, for Respondent

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

Petitioner brought this proceeding, seeking civil penalties for two alleged violations of the mandatory safety standard contained in 30 C.F.R. 75.316 allegedly occurring on March 24, 1982. At the commencement of the hearing, the Secretary moved that the petition be dismissed with respect to one of the citations because investigation subsequent to its issuance disclosed that it had been issued in error and that the Respondent was not in violation of the standard as charged in the citation. Respondent did not oppose the motion. The remaining citation charges that Respondent violated its approved ventilation plan because an evaluation point (also called a monitoring point) was in an area that could not be reached because of loose rock and water accumulations in the travelway.

In January, 1982, Respondent requested approval of an amendment to its ventilation plan which would include the relocation of the No. 9 evaluation point because of dangerous roof conditions. The request was denied by the MSHA district office on the ground that the revised location of the evaluation point would not assure adequate ventilation in the idled worked-out areas. In April, 1982, (after the issuance of the citation) the relocation was approved contingent on the establishment of five ventilating boreholes, to be drilled from the surface to the old No. 9 evaluation point.

Respondent contends that the evidence does not establish the alleged violation of 30 C.F.R. 75.316; and that the denial by MSHA of the request for relocation of the evaluation point was arbitrary, capricious and unlawful.

Pursuant to notice, the case was called for hearing on April 14, 1983, in Pittsburgh, Pennsylvania. Lester C. Walker, Federal coal mine inspector and Alex O'Rourke, MSHA supervisory mining engineer, testified on behalf of Petitioner; Carl Nagodi, Respondent's resident engineer, and Donald Lilley, Respondent's Director of Health and Safety, testified for Respondent. Closing arguments were made by counsel for both parties, and each was given the opportunity to file posthearing briefs. A brief was filed on Respondent's behalf.

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

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the owner and operator of the Mahoning Creek No. 2 Mine, an underground coal mine in Armstrong County, Pennsylvania. The subject mine produces goods which enter interstate commerce.

2. Respondent is a medium sized operator. There is no evidence that a penalty imposed herein will affect its ability to continue in business, and I therefore find that it will not.

3. Respondent demonstated good faith in abating the alleged violation.

4. Respondent's history of prior violations is good.

5. The ventilation plan for the subject mine approved by MSHA on October 26, 1981, and in effect on March 24, 1982, required regular weekly air readings to be taken at designated evaluation points shown on the mine map which was part of the plan. One of the designated evaluation points, number 9, in the 1 left off the Northwest Mains section, was not travelable on March 24, 1982, because of loose rock and water accumulations.

6. On March 24, 1982, Inspector Walker issued a citation charging a violation of 30 C.F.R. 75.316-2(f)(1) because the No. 9 evaluation point in the ventilation plan was no longer travelable. The citation was modified on July 14, 1982, to allege a violation of 30 C.F.R. 75.316 and to state that the weekly examination was not being performed due to loose rock and accumulations of water.

7. The area of the number 9 evaluation point had been "dangered off" by a State of Pennsylvania mine inspector prior to March 24, 1982, because of the roof condition. The roof could have been repaired and the area made safe by timbering and cribbing it. This, however, would have involved a considerable amount of work.

8. Inspector Walker had visited the same area of the mine in early January and noted the deteriorating roof conditions at that time.

9. On January 18, 1982, Respondent requested that monitoring points No. 9 and No. 12 be relocated because of dangerous roof conditions and flooding. This was done at least in part as a result of the suggestion of Inspector Walker.

10. MSHA denied approval of the request by letter dated February 2, 1982, on the ground that the revised locations of the evaluation stations "would not assure the idled worked-out areas . . . would be adequately ventilated."

11. A supplemental request pertaining evaluation point No. 12 was submitted to MSHA on March 3, 1982.

12. On March 18, 1982, MSHA approved the relocation of evaluation point No. 12 subject to certain conditions. It repeated that permission was not granted to relocate the No. 9 evaluation point.

13. The proposed relocation of evaluation point No. 9 was approved April 22, 1982, subject to establishing boreholes at locations acceptable to the MSHA District Manager, and subject to certain other conditions.

14. The citation referred to in Finding of Fact No. 6 was terminated on April 22, 1982, because "a new map was submitted and approved by the District Manager showing the relocation of the No. 9 evaluation point in the 1 left off Northwest mains section."

15. There is no history of methane liberation in the subject mine.

16. The purpose of the evaluation points in the ventilation plan is to assure ventilation in abandoned or worked-out areas of the mine. The original request was denied because in MSHA's judgment, to move the point 1,300 feet outby as requested would mean "1300 feet less of the mine that we could assure ventilation in."

17. The revised request for relocation of evaluation point No. 9 was granted because it included a proposal to drill boreholes from the surface to the original evaluation point 9 which would assure ventilation from the borehole to the relocated point 9. The revised request was based on numerous meetings between Respondent and MSHA, and the possibility of drilling boreholes had been discussed at these meetings.

18. It was and is the position of Respondent that all the air that would have been measured at the original point 9 was being measured at the relocated point 9, and that the boreholes had no effect on the movement of air between the two points.

ISSUES

1. Was Respondent in violation of 30 C.F.R. 75.316 on March 24, 1982, as charged in the citation as modified?

2. Can Respondent in a penalty proceeding raise the issue whether MSHA's refusal to modify an approved ventilation plan was arbitrary, capricious and illegal?

3. If so, was the refusal by MSHA to modify the approved ventilation plan as requested by Respondent prior to the issuance of the citation herein arbitrary, capricious and illegal?

4. If a violation of a mandatory standard is found to have occurred, what is the appropriate penalty therefor?

CONCLUSIONS OF LAW

1. Carpentertown Coal and Coke Company was subject to the provisions of the Federal Mine Safety and Health Act in the operation of its Mahoning Creek 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 motion of the Secretary, the petition will be dismissed with respect to the violation charged in Citation No. 1144824. The Secretary stated that the facts did not show a violation as alleged, and that the citation was issued in error.

3. Respondent's brief discusses the citation (1144826 issued April 14, 1982) alleging a violation of 30 C.F.R. 75.200 and the withdrawal order issued April 20, 1982, for failure to abate the violation alleged. The citation was subsequently vacated and the order declared void. Neither the citation nor the withdrawal order are before me in this proceeding, and I do not pass upon their propriety. Respondent states, however, that it agreed to drill boreholes only in order to obtain MSHA's permission to relocate the evaluation point and get the withdrawal order lifted.

4. The evidence shows prima facie, that Respondent on March 24, 1982, was in violation of its approved ventilation plan and therefore was in violation of 30 C.F.R. 75.316.

DISCUSSION

Respondent argues that 75.316 only requires the adoption of a plan approved by the Secretary and that it include certain information. It is much too late to argue that the provisions of an approved ventilation plan are not themselves enforceable as mandatory safety standards under the Mine Safety Act. See Zeigler Coal Company, 4 IBMA 30 (1975), aff'd sub nom 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); Secretary v. Freeman United Coal Mining Company, 5 FMSHRC 590

(1983) (ALJ). There is no question here but that the approved plan

required that air readings be taken at evaluation point No. 9 which on March 24, 1982, could not be reached because of adverse roof conditions and water accumulations. Therefore, prima facie, the ventilation plan was not being complied with, which ipso facto is a violation of a mandatory health or safety standard. However, prior to the issuance of the citation, Respondent had requested a variance in the plan to relocate evaluation point No. 9, which request had been denied. The basic issue in this case is whether the requested variance and its denial can be asserted in defense of what otherwise would be a violation of the plan.

5. A mine operator may not unilaterally change an approved ventilation plan without MSHA approval even if it is shown that the change enhances rather than diminishes safety. Secretary v. J. & R. Coal Company, 3 FMSHRC 591 (1981) (ALJ). The Secretary is charged by law with protecting safety in the nation's mines in the public interest. Under section 303(o) of the Act (repeated in 30 C.F.R. 75.316), a mine operator must adopt "a ventilation system and methane and dust control plan" which the Secretary must approve before it is effective. The Act contemplates that the Secretary and mine operators will cooperate in developing and revising such plans in accordance with changing conditions in the mines.

6. I conclude that a mine operator may, in a proceeding to assess a penalty for violation of an approved plan, challenge the reasonableness of MSHA's refusal to modify the plan which had been requested by the operator. In Zeigler v. Kleppe, supra, the Court of Appeals stated at page 407 that a mine operator might contest an action seeking to compel adoption of a plan with terms not designed for the specific circumstances of the mine involved and, at page 410, that the imposition of "outrageously ultra vires plan provisions" nominally adopted by a mine operator would not be enforced by a court. By analogy, I conclude that an operator who has unsuccessfully sought a variance may, in a penalty proceeding for violation of a provision of the plan, defeat the action if he can show either that compliance with the terms of the plan was impossible or that MSHA's denial of the variance was arbitrary, capricious or unreasonable.

7. Compliance with the ventilation plan requirement that air be monitored at evaluation point No. 9 was not impossible as of March 24, 1982. Both the Inspector and Respondent's Safety Director agreed that the roof leading to the "old" evaluation point 9 could have been supported with cribs and posts. It would have been a major and difficult task but was not impossible. Furthermore, as is previously stated herein, MSHA approved the relocation of the evaluation point when boreholes were included in the request. According to O'Rourke, MSHA would also have approved a modification of the plan involving sealing off the abandoned area. Compliance was therefore not impossible.

8. The initial refusal of MSHA to approve the relocation of evaluation point 9 and its insistence on the establishment of boreholes to the surface before approving the requested relocation were not arbitrary, capricious or unreasonable.

DISCUSSION

MSHA initially rejected Respondent's request to relocate the evaluation point 9, because moving the point outby meant that to the extent it was moved, that much less of the abandoned area could be assured to have ventilation. (Tr. 40). MSHA had, prior to March 24, 1982, suggested the drilling of boreholes to assure ventilation in the affected area, but Respondent did not include a proposal to drill such boreholes until April 22, 1982. It is the position of Respondent that the air measured at the proposed relocated evaluation point 9 would also measure the air at the old evaluation point 9 and that the boreholes did not give any additional information as to ventilation. MSHA's position was stated by Alex O'Rourke, a supervisory mining engineer, whose primary duty is to evaluate plans or programs including revisions thereof, submitted by mine operators to the MSHA District Manager. Respondent's position was stated by Donald Lilley, its Director of Health and Safety, formerly a training instructor with MSHA, who had no professional training in mining engineering. The evidence shows a bona-fide technical dispute concerning a very limited issue. Even if I accepted the conclusions of Mr. Lilley (and Respondent), I would not conclude that MSHA's position was unreasonable, arbitrary or capricious. The law requires MSHA's approval for a variance. MSHA may not impose unreasonable conditions or arbitrarily deny a request, but obviously may impose reasonable conditions and need not grant every good-faith request to modify a plan proposed by a mine operator. There is no evidence in this record to support Respondent's hyperbolic statement that "this is a case where bureaucratic bungling and red tape with not a little governmental arrogance caused a problem that need never have arisen." The evidence does show a disagreement as to whether the modification originally sought by Respondent would enable MSHA to assure itself that the abandoned area in question would be ventilated. It is MSHA's responsibility to approve plans only when it has that assurance. The conditions it imposed in this case were neither unreasonable nor arbitrary.

9. Since I concluded that MSHA did not unlawfully reject Respondent's request for modification of the approved ventilation plan, I need not address the contention raised by Respondent that the Mine Act's failure to provide a means for direct review of the MSHA action denying the requested variance is unconstitutional.

10. The violation charged in the citation and found herein to have occurred was not serious.

11. There is no evidence that the violation was the result of Respondent's negligence.

12. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation found is $20.

ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citation No. 1144824 is VACATED and the penalty proceeding with respect to the violation charged in the citation is DISMISSED.

2. Respondent shall within 30 days of the date of this decision pay the sum of $20 for the violation of 30 C.F.R. 75.316 charged in Citation No. 1144823 and found herein to have occurred.

James A. Broderick
Administrative Law Judge