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SOL (MSHA) V. YOUGHIOGHENY & OHIO COAL
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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 83-36
A.C. No. 33-00968-03513

v.

Nelms No. 2 Mine

YOUGHIOGHENY & OHIO COAL
COMPANY,
RESPONDENT

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor,
U.S. Department of Labor, Cleveland, Ohio, for
Petitioner Robert C. Kota, Esq., St. Clairsville,
Ohio, for Respondent

Before: Judge Broderick

STATEMENT OF THE CASE

A Federal mine inspector issued an order of withdrawal under section 107(a) of the Mine Act for an imminent danger which alleged a violation of 30 C.F.R. 75.308, because he found an accumulation of methane in a working place in the subject mine. Respondent does not challenge the finding of methane accumulation or the propriety of the imminent danger withdrawal order, but contends that no violation of the mandatory standard was shown. Petitioner's brief argues that the imminent danger order was properly issued, but this is conceded, and, in any case, is not an issue in a penalty proceeding.

Pursuant to notice, a hearing was held on June 27, 1983, in Wheeling, West Virginia. Federal Mine Inspector Charles J. Hall testified for Petitioner. John Repella and Nelson Cramblett 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

1. Respondent is the operator of an underground coal mine in Harrison County, Ohio, known as the Helms No. 2 Mine.

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2. Coal was produced by the subject mine and its operation affected interstate commerce.

3. Respondent is a moderate sized operator, employed 339 miners, and produced 820,000 tons of coal annually at the subject mine.

4. Respondent's history of prior violations shows only one previous violation of the safety standard in 30 C.F.R. 75.308, and that violation was in 1973. The history is not such that a penalty otherwise appropriate should be increased because of it.

5. The subject mine is classified as a gassy mine and is on a 5-day inspection cycle under 103(i) of the Act because it liberates more than one million cubic feet of methane during a 24-hour period.

6. On July 19, 1982, Federal Mine Inspector Charles J. Hall conducted a roof control inspection of the subject mine, including the 4 North off the Main East Section where coal was being produced.

7. Inspector Hall issued a withdrawal order for an imminent danger when he found a concentration of methane in excess of 5 percent within 12 inches of the roof at the last row of roof supports in the E entry. The order alleged a violation of 30 C.F.R. 75.308.

8. A sample of the atmosphere was taken at the time the order was issued and when tested at the MSHA laboratory in Mt. Hope, West Virginia, showed 6.34 percent methane.

9. The inspector took a ventilation reading at the last open crosscut which showed 10,208 cubic feet per minute which in the inspector's judgment was marginal under the circumstances. (30 C.F.R. 75.301 requires a minimum of 9,000 cubic feet a minute at the last open crosscut).

10. There had been a roof fall in the E entry on the previous shift. The fall knocked out a jack and tore the curtain which was up in the fall area. Miners were installing breaker posts behind the fall when the order was issued.

11. The section foreman decided to abandon the E entry and cut coal in the crosscut. Tubing from the air dyne fan was extended into the crosscut. The continuous miner was cutting coal approximately 40 feet from where the methane concentration was found.

12. The section foreman checked the area of the fall at the beginning of the shift and again about 20 minutes before the inspector arrived and found approximately .2 percent methane.

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13. Following the issuance of the order, the power was shut off, and the men were withdrawn except those engaged in abating the condition. The curtains were tightened and curtain was extended into the E entry to the fall area. The condition was abated in about 1 hour when the methane concentration was reduced to less than .1 percent.

14. Eleven miners were working in the section at the time the order was issued including 2 in the E entry installing posts, and 2 in the crosscut off the E entry cutting coal. A shuttle car was running in and out from the continuous miner.

15. The methane monitor on the continuous miner was operating properly at the time the order was issued. No permissibility violations were cited in the section. The section was adequately rock-dusted. The section was somewhat damp.

16. The methane concentration in the E entry was due in part to the fan pulling the air to the face being mined (the crosscut) and short circuiting the air to the E entry.

REGULATION

30 C.F.R. 75.308 provides as follows:

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(d) 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.

ISSUE

Whether a finding of a concentration of methane in the explosive range under the circumstances of this case constitutes a violation of 30 C.F.R. 75.308?

CONCLUSIONS OF LAW

1. Respondent was subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the subject mine, and the undersigned administrative law judge has jurisdiction of the parties and subject matter of this proceeding.

2. Although excessive accumulation of methane in a working place is not per se a violation of the mandatory safety standard in 30 C.F.R. 75.308, the failure of an operator to take reasonable and necessary steps to control and dissipate methane concentrations before they reach the explosive range is a violation of the standard.

DISCUSSION

In a case under the 1969 Coal Act, the Board of Mine Operations Appeals held that a finding of methane in excess of six percent 6 feet from the working face did not in itself establish a violation of section 303(h)(2) of the Coal Act (this statutory provision is identical to 30 C.F.R. 75.308). Eastern Associated Coal Corporation, 1 IBMA 233 (1972). The holding was reaffirmed in Mid-Continent Coal and Coke Company, 1 IBMA 250 (1972) where the Board said: "Neither the Act nor the Regulations provides that a mere presence of methane gas in excess of 1.0 volume per centum is per se a violation." 1 IBMA at 253. In 1977, the Board held that a 5 percent methane accumulation in the face did not establish a violation of 30 C.F.R. 75.301 (requiring ventilation of active workings with air of sufficient volume and velocity to dilute, render harmless and carry away explosive gasses). "The Board is of the opinion that it would be patently inconsistent administration to hold that an excessive methane accumulation constitutes a violation under 30 C.F.R. 75.301 when the provisions of 30 C.F.R. 75.308 provide for specific actions to be taken when such an excessive accumulation is discovered." Mid-Continent Coal and Coke Company, 8 IBMA 204, 212 (1977).

It is a well known fact that the 1977 Mine Act was passed in part because of the Scotia mine disaster in March, 1976. The Senate Committee Report on S. 717 (which became the Mine Act) reads in part:

"At Scotia, in March, 1976, twenty three miners and three Federal inspectors died in two explosions of accumulated methane gas when the mine safety enforcement effort was unable to detect and address chronic conditions of inadequate ventilation in the mine.

* * * * *

The Scotia disasters demonstrated once again that until the Congress finally provides truly effective

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mine health and safety laws and insists on responsive administration and enforcement of those laws, this problem will continue to occur."

S. Rep. 95-181, 95th Cong., 1st Sess. 4-5 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of The Federal Mine Safety and Health Act of 1977, at 592-3 (1978) ["Legis. Hist."].

The Committee Report further made it clear that the civil penalty provisions of the Act were intended to induce compliance with the Act and its standards, and the Scotia disaster was specifically related by the Committee to the failure of the civil penalty procedures under the 1969 Coal Act. See Legis. Hist. 597, 629.

Whatever the authority of the Board decisions under the Coal Act, it is clear that when it passed the 1977 Mine Act, Congress intended that methane buildups in underground mines be prevented by the imposition of civil penalties in appropriate circumstances. It is clearly not enough that a mine operator take steps to eliminate explosive concentrations of methane after they are found by an inspector and a withdrawal order is issued.

In the case of *C F & I Steel Corporation v. Secretary*, 3 FMSHRC 2819 (1981), Judge Boltz found that because the operator at once made necessary ventilation changes when served with an order alleging that 1.0 percent methane was contained in the air at the working face, no violation of 30 C.F.R. 75.308 was established. However, in a later case, *Consolidation Coal Company v. Secretary*, 4 FMSHRC 1960 (1982), Judge Kennedy observed (dicta) "I believe a more precise reading of the law would show that while a 1% concentration is not a violation [of 75.308] an operator's failure to control and dissipate the concentration before it reaches 1.5% warrants a finding of violation." 4 FMSHRC at 1962, fn 4.

3. The following factors singly or in combination require a mine operator to take extra precautions to avoid permitting a methane buildup to reach the explosive range: (a) the mine liberates excessive methane and is classified as a gassy mine; (b) a recent roof fall; (c) an abandoned area or gob area near the working places.

4. In this case, the operator was aware of the three factors listed above. It knew or should have known that extending the fan tubing into the crosscut would short circuit the air going to the abandoned entry. Under the circumstances, it was required by 30 C.F.R. 75.308 to take necessary and reasonable steps - including directing a greater quantity of air to the last open crosscut, and tightening and extending the curtains - to assure that there would not be a methane buildup in entry E.

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5. Because the Respondent failed to take such steps, it was in violation of the mandatory standard in 30 C.F.R. 75.308.

6. The violation was extremely serious. The methane concentration was in a working place. It could have resulted in an explosion and multiple fatalities.

7. The Respondent should have been aware of the violation. See conclusions of law 3, 4, and 5 above. The violation resulted from Respondent's negligence.

8. Respondent's history of prior violations is not such that a penalty otherwise appropriate should be increased because of the history.

9. There is no evidence that the imposition of a penalty will have any effect on the operator's ability to continue in business.

10. The Respondent promptly and in good faith abated the violation after it was cited.

11. Considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$2,500.

ORDER

Based on the above findings of fact and conclusions of law, Respondent is ORDERED to pay within 30 days of the date of this decision the sum of \$2,500 for the violation found herein to have occurred.

James A. Broderick
Administrative Law Judge