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

VESTA MINING COMPANY,
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. PENN 83-122-R
Order No. 2103186
Docket No. PENN 83-123-R
Citation No. 2103187
Docket No. PENN 83-125-R
Order No. 2103197

Vesta Mine

DECISION

Appearances: Michael T. Heenan, Esq., Smith, Heenan, Althen
& Zanolli, Washington, DC, for Contestant,

David E. Street, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, PA.,
for Respondent

Before: Judge Fauver

Vesta Mining contests two orders and one citation issued by the Secretary of Labor (MSHA) on March 2, 1983. Jurisdiction in this proceeding is stipulated, and applies under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq.

The three cases were consolidated and heard in Pittsburgh.

Having considered the testimony, and the record as a whole, I find that a preponderance of the probative, reliable, and substantial evidence establishes the following:

FINDINGS OF FACT

Order No. 2103197

1. Federal Mine Inspector Joseph F. Reid issued this withdrawal order under section 104(d)(2) of the Act on March 2, 1983. The order charges a violation of 30 CFR 75.303(a), based upon the following condition or practice:

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No times, dates and initials of examinations made by certified persons in the No. 10 entry working place of the 9 Butt left 44 Face Section (MMU 037) were being recorded within the last two (2) weeks, as the last date observed on the line canvas in this place was February 15, 1983. According to the section foreman on this shift (Stan Crowson), the examinations have been made for preshift and onshift in this working place, but the time, date and initials were not placed in the area by him and apparently not by the other certified persons on the afternoon and midnight shifts and therefore a proper examination was not being made.

2. The 9 Butt area, where the order was issued, had originally been developed for longwall mining.

3. Because of a rock fault in the area, longwall mining turned out not to be feasible and the company decided to mine the area by the room and pillar method. In accordance with standard practice under MSHA regulations, the company submitted to MSHA a venilation plan which included projections of this mining plan.

4. Included with the company's mining projections were bleeder entries and bleeder projections. The purpose of a bleeder is to provide ventilation to gob areas which result from pillar mining. Bleeder entries are intentionally left on both sides of the area to be pillared so that as mining progresses airways will remain to sweep methane from the gob.

5. Once established, the bleeder entries are required by the regulations to be examined weekly unless the company has a monitoring station where bleeder performance can be evaluated without an examiner specifically traveling the bleeder. Thus, MSHA in approving the ventilation plan, advised the company:

"Since you did not establish a method to evaluate the back end of 9 Butt 44 gob, it is assumed you are traveling and examining the bleeder entries weekly."

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6. In addition to the bleeders, which were designed and projected to provide air to the gob, the company's ventilation plan projected how ventilation was going to be established on the working section in 9 Butt. The plan was to use curtains to keep fresh air on the section and gob air off the section. Bleeders were also projected to be separated from the section by curtains. Face ventilation, on the other hand, was to be maintained by means of a section fan and tubing leading directly into each working face. This plan was being followed at the time of the inspection in these cases.

7. Exhibit C-2 shows the condition of the section on March 2, 1983. It also shows, along with Exhibit C-1, how the intrusion of the rock fault, which had made longwall mining infeasible, interrupted the room and pillar mining.

8. In mid-February 1983, the place where the company had been mining its bleeder projections pinched out at the rock fault and all mining was terminated in this area by February 15, 1983. Ventilation check curtains were installed in the entries involved, Nos. 9 and 10, and the entire top entry (No. 10) was incorporated into the company's permanent bleeder system.

9. On the day of the inspection, March 2, 1983, Section Foreman Stan Crowsen was in charge of the working section. Crowsen had over 12 years mining experience, and had served as a section foreman (assistant mine foreman) at the Vesta mine for over 7 years.

10. Inspector Reid traveled with Crowsen to the 9 Butt area. On the way in, Crowsen checked all of the stoppings between the track and intake air entries.

11. When they arrived on the section, Crowsen asked the inspector whether he wanted to talk with the miners. The inspector chose instead to accompany Crowsen on his examination of the working faces, located in No. 4 and No. 5 entries.

12. In making his examination of the working faces in the No. 4 and No. 5 entries, Crowsen placed the time, date, and his initials on the ventilation tubing in each face. As he did so, Crowsen noted that the faces had initials showing that the section had been pre-shifted by the previous section foreman. The inspector made a methane check in the No. 5 entry and followed Crowsen as he on-shifted the working faces.

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13. The inspector did not dispute the adequacy of Crowsen's inspection or the marking of the date and initials at the faces where mining was being conducted on the section.

14. Crowsen next went to the area "just behind" the fan (see Exhibit C-2) and made a methane check. Crowsen then examined the ventilation check curtain parallel to the fan in crosscut No. 22, and determined that it had been properly installed.

15. After completing these checks, Crowsen examined the Section Load Center which provides power to electrical equipment on the section. Then Crowsen went up to the Battery Charging Station, where he observed an accumulation of water coming from the other side of a stopping which separated the Section Charging Station from the No. 10 bleeder entry.

16. To locate the apparent source of the water, Crowsen walked east to the dead-end of the No. 9 entry, and went around and behind the curtains which separated the working section from the No. 10 return. He then proceeded west up the No. 10 return, which directs bleeder air to the gob areas, until he arrived at the stopping behind the Battery Charging Station.

17. After checking on the water accumulation, Crowsen retraced his steps back down No. 10, around the deflection check curtains in No. 10 and No. 9, and then went to check a mechanical problem with the belt feeder.

18. At this point, Crowsen was informed that the inspector, who was back at the dead-end and extreme east end of the No. 10 entry, was preparing to cite a roof control violation (for an area between Nos. 3 and 4 entries). Crowsen and a mechanic went to the inspector to determine what the problem was about the roof.

19. In their discussion about the roof, the inspector questioned Crowsen with respect to whether the dead-end area of No. 10 entry had been examined regularly and Crowsen indicated that it had been.

20. The inspector then issued the subject order, charging that pre-shift times, dates and initials should have been placed in the east end of No. 10.

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21. No mining was being conducted in the No. 10 entry, on March 2, 1983, and that entry was separated from the working section. The inspector observed no mining equipment in the area; there was no evidence of equipment having been there since mining had ceased in mid-February, which was the point at which date, time and initials had last been marked.

22. The No. 10 entry, directing return air to bleeders, was inspected each week by Crowsen or other certified examiners. In making the regular weekly inspections of the No. 10 return, Crowsen and other examiners put their initials at different locations along the entry, and not necessarily in a given spot.

23. Inspector Reid did not examine the No. 10 entry for dates, times and initials of weekly examinations. Rather, he confined his inspection in No. 10 to determining only whether Crowsen had written the date "March 2, 1983" on line brattices separating No. 9 and No. 10.

24. Crowsen considered No. 10 a return entry subject to regular weekly inspections but not pre-shift or on-shift inspections, because no miners were normally required to work or travel there.

25. After mining ceased in mid-February, the No. 10 entry was not in a condition suitable for mining. Apart from the rock intrusion, posts had been set up which would have blocked access necessary for mining operations and the Battery Charging Station had been established only one crosscut away, thus impeding access to the No. 9 and No. 10 dead-end headings. In addition, the No. 10 entry was being relied upon to provide a segregated return to direct bleeder air to the gob behind the section.

26. After the cessation of mining in mid-February, 1983, two weeks before the issuance of the order involved here, the No. 10 return, including the dead-end heading where the subject order was issued, was not an area where any miners other than certified examiners entered or were assigned to enter.

27. On March 2, 1983, the No. 10 return, including the dead-end where the order was issued, was not part of the 9 Butt area working section.

Order No. 2103186

28. During the inspection on February 24, 1983, Inspector Reid entered a crosscut between Nos. 3 and 4 entries, adjacent to the belt feeder. There he saw sandstone roof about 8 to 9 feet high, and observed three pieces of loose and hanging sandstone between roof bolts. These pieces were large enough to kill or seriously injure a miner if one fell on him.

29. Based upon his observations of the roof, Inspector Reid informed a company representative, Calvin Smitley, that he was issuing a section 107(a) ("imminent danger") order because of the roof condition. The 107(a) order states:

There was loose and hanging pieces of sandstone observed in the middle of the No. 8 room crosscut between Nos. 3 and 4 entries of the 1 Panel East Mains section (MMU 036). This Order is being issued to assure the safety of any persons in this area until the time that it is determined to be safe.

30. Smitley found a piece of drill steel and began prying down the three pieces of roof. The pieces came down. They were about 3 inches thick and, in total, were about 6 square feet.

Citation No. 2103187

31. In the same crosscut where he issued the 107(a) order, Inspector Reid observed what appeared to him to be excessive spaces between roof bolts. The roof ranged from about 8 to 9 feet in height in the crosscut.

32. Inspector Reid used a 6-foot rule to measure the distance between the roof bolts he questioned. Near the No. 3 entry, he saw a large crack about 10 feet long. The roof there was about 8 feet high, and he was able to measure several roof bolt distances by holding both ends of the rule against the roof. I find these measurements to be accurate, and they showed distances of 55 inches, 54 1/2 inches, and 49 inches between roof bolts. He attempted to measure distances in areas where the roof was too high to hold both ends of the rule against the roof. I find that his "measurements" in those areas (ranging from 49 1/2 to 66 inches) were merely estimates and were subject to too much of a margin of error to be reliable figures.

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33. Based upon his measurements and attempts to measure the distances between roof bolts, Inspector Reid issued a section 104(a) citation (No. 2103187), which states:

The approved roof control plan was not being complied [with] in the No. 8 room crosscut between Nos. 3 and 4 entries of the 1 Panel--East Mains section (MMU 036) as there were 10 areas between the conventional roof bolts in the center of the crosscut where the spacing between the bolts exceeded the required 48 inches. Six of the areas ranged from 53 to 59 inches and four of the areas ranged from 60 to 66 inches and there were loose and hanging pieces of sandstone, averaging 3 inches thick, and there was a 10 foot long crack in the sandstone in this crosscut where the height ranged from 8 to 9 feet. This crosscut is a regular tramway for shuttle cars taking coal to the belt feeder.

Note--The Galis roof bolter at 1200 was in the process of starting to bolt the affected areas after the loose and hanging sandstone was taken down and two (2) rows of roof jacks were installed. This citation will not be terminated until the plan is reviewed with the persons on all three shifts that normally work in this section, by management personnel.

The 104(a) citation was issued on February 24, 1983. On February 25, 1983 it was modified as follows:

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Citation No. 2103187 issued on February 24, 1983 is hereby modified to include the following statement: The excessive roof bolt spacing observed in the No. 8 room crosscut between Nos. 3 and 4 entries of the 1 Panel-- East Mains section was one of the factors that contributed to the issuance of Imminent Danger Order No. 2103186 dated February 24, 1983.

DISCUSSION WITH FURTHER FINDINGS

Order No. 2103197

This MSHA order charges a violation of 30 CFR 75.303(a) for failure to place time, date, and initials of a preshift examination at the east dead-end of No. 10 entry.

Section 75.303(a) requires preshift examinations and the placing of time, date, and initials at the places preshifted within three hours before a shift begins and "before any miner in such shift enters the active workings of a coal mine." The term "active workings" is defined as:

any place in a coal mine where miners are normally required to work or travel. [30 U.S.C. 318(g)(4); 30 CFR 75.2(g)(4).]

The intake air was split just after it reached the working section in question. Part of it ventilated the working section and part of it became return air to ventilate the gob areas. No. 10 entry, at the point where Inspector Reid charged a preshift violation, was a bleeder entry outside the working section. Mining had ceased there on February 14 or 15, 1983, over two weeks before the date of the citation. The regulations provide that bleeders "shall not include active workings" (30 CFR 75.316-2(c)(2)). They are required to be examined weekly, but not preshifted.

Since no miners, other than certified examiners, were required to enter the No. 10 entry, there was no requirement for a preshift examination under 30 CFR 75.303(a). Therefore, the Secretary failed to prove a violation as alleged in Order No. 2103197.

Order No. 2103186

Inspector Reid observed the roof in question, and saw several pieces of loose hanging sandstone between roof bolts. Calvin Smitley, the management representative, pried down 3 pieces of roof with a drill steel. He testified that the pieces were not loose and that it took extreme effort to pry them down. It was his opinion that the roof was safe, and that it was actually a danger to try to pry down a solid roof. However, he did not use a roof bar designed to pry down roof. A drill steel is not wedged and tapered, and is not an appropriate device for prying down pieces of a roof. I credit the inspector's testimony that there were loose, hanging pieces and that these were of sufficient size to cause death or serious injury if a piece fell on a miner.

In crediting Inspector Reid's testimony that the roof condition was an imminent danger, I have also considered his supervisor's testimony that Inspector Reid had correctly issued an imminent danger order at another mine, when he observed loose roof that fell very shortly after he caused the mine to be evacuated. The order in that case, as in this one, was issued despite the operator's strong opinion that the roof was safe. I find that Smitley's use of drill steel rather than a proper prying bar lessens the credibility and weight of his testimony as to the actual condition of the roof. I credit Inspector Reid's testimony as to the number, size, and danger of the pieces pried down by Smitley.

Roof falls are one of the chief causes of fatalities in underground coal mining. The inspector's issuance of an imminent danger order was justified by the facts of this case.

Citation No. 2103187

As stated in the findings, the inspector measured some of the roof bolt distances by holding both ends of the 6-foot rule against the roof. As to those, I find that the measurements were accurate, and that a preponderance of the reliable, probative, and substantial evidence establishes that the top three figures in the inspector's drawing in his notes (Exhibit 6), showing distances of 55, 54 1/2 and 49 inches, were reasonably measured and are accurate. However, the rest of the figures were not measured by placing both ends of the rule against the roof. The inspector simply placed one end of the rule against the roof and held the other end of the rule some distance down from the roof and sighted the point of the rule (i.e. the inch mark) which he estimated would be the right place if that end were placed

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against the roof. Thus, instead of measuring points A and B (the distance between two roof bolts), he was estimating the distance between point A (on the roof) and Point C, some distance in space beneath the roof. I find that this approach was uncertain and not reliable.

In summary, I find that the top three figures (55, 54 1/2 and 49 inches) in the inspector's drawing were adequately measured and proven by the Secretary. Since the roof-control plan provides a margin of error of 5 inches, the figures 55 and 54 1/2 inches prove violations of the 48-inch standard in the roof control plan, and the figure 49 inches does not. The rest of the figures in the inspector's drawing are rejected as being unreliable estimates and not actual measurements.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in these proceedings.
2. The Secretary did not meet his burden of proving a violation as alleged in Order No. 2103197.
3. The Secretary met his burden of proving a violation as alleged in Order No. 2103186.
4. The Secretary met his burden of proving two violative roof bolt distances in Citation No. 2103187 (i.e. 55 and 54 1/2 inches), but did not prove a violation as to the other alleged excessive distances.

ORDER

WHEREFORE IT IS ORDERED that:

1. The Secretary's Order No. 2103197 is VACATED.
2. The Secretary's Order No. 2103186 is AFFIRMED.
3. The Secretary's Citation No. 2103187 is MODIFIED by deleting the following language:

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10 areas between the conventional roof bolts in the center of the crosscut where the spacing between the bolts exceeded the required 48 inches. Six of the areas ranged from 53 to 59 inches and four of the areas ranged from 60 to 66 inches.

and substituting therefor the following language:

two areas between the conventional roof bolts exceeded the required 48 inches in that one spacing was 55 inches and the other spacing was 54 1/2 inches.

Citation No. 2103187, as so MODIFIED, is AFFIRMED.

William Fauver
Administrative Law Judge