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HELVETIA COAL v. SOL (MSHA)

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

HELVETIA COAL COMPANY,
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. PENN 85-1-R
Order No. 2256778; 8/28/84

Lucerne No. 8 Mine

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

v.

HELVETIA COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. PENN 85-106
A.C. No. 36-04597-03533

Lucerne No. 8 Mine

Appearances: William Darr, Esq., Rochester and Pittsburgh
Coal Company, Indiana, Pennsylvania, for
Helvetia Coal Company;
John S. Chinian, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Secretary of Labor.

DECISION

Before: Judge Melick

These consolidated cases are before me pursuant to section
105(d) of the Federal Mine Safety and Health Act of 1977, 30
U.S.C. 801 et seq., "the Act" to contest a withdrawal order
issued to the Helvetia Coal Company (Helvetia) under section
104(d)(1) of the Act and for review of civil

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penalties proposed by the Secretary of Labor for the violation charged therein.(FOOTNOTE.1)

The withdrawal order at issue (Number 2256778) reads as follows:

Proper pre-shift examinations were not made in the high spot (roof fall) area in the North Mains belt-track entry located approximately 1000 ft. outby the 4 South track switch. Examinations were made, however, roof rails close together were installed restricting the person from making the examination in the high spot. A hose was provided from the roof rails to the roof of the high spot, however, supervisory personnel making the examination were using a CSE methameter Model 107 Approval No. 8C-37 with no adapters to use the provided hose to make the examination in the high cavity area.

Helvetia does not dispute that it was required to conduct methane tests in the cited caved area in accordance with the mandatory standard at 30 C.F.R. 75.303 but maintains

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that it was in fact properly conducting such tests at all times. The Secretary is concerned however that the tests as performed by Helvetia were not adequate to detect the presence of methane in the cited cavity and were therefore in violation of the standard.

The evidence shows that the cavity or high spot had existed for some time and extended to a maximum of 10 feet above the 6 foot high travelway. It was supported by I-beam rails and cribbing. Inspector Michael Bondra of the Federal Mine Safety and Health Administration (MSHA), a ventilation specialist, observed during the course of his inspection on October 28, 1984, that a hose or tube extended from the high spot of the cavity to the travelway. The tube had formerly been used in conjunction with a pump type methane monitor to test for methane in the high spot but had not been used for several years after Helvetia converted to the "CSE 102" methane monitor without a pump.

Inspector Bondra climbed into the high area of the cavity and performed smoke tube tests at various locations in the cavity area. According to Bondra the air did not clear out of the top 3 or 4 feet of the cavity. Since the mine operator was performing methane tests with the CSE 102 detector from the travelway at the inby side of the cavity Bondra concluded that the testing method was not adequate to detect the presence of methane in the high spot where there was no air movement. According to Bondra the test was not sufficient because the lighter-than-air methane would collect at the high point of the cavity and not be removed by ventilation. If the methane was not being ventilated it would not be detected with the hand-held methane monitor at the inby side of the cavity.

Both Richard Flack, the Senior Safety Inspector for Helvetia, and Robert Smith, Superintendent and Mine Foreman at the Lucerne No. 8 Mine, testified that before changing over to the CSE 102 methane monitor they personally made numerous smoke tube tests in all areas of the cited cavity and found in all cases that all points of the cavity including the high spots were being ventilated. Accordingly they determined that if methane were present in those high spots it would be detected by use of the hand-held methane monitor at the inby end of the cavity where the air flow exited the cavity. Indeed it was their conclusion that because of the problems they had had with the use of the extended tube (becoming broken and clogged with condensation

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and rock dust) this method of detection was a significant improvement.

The Secretary nevertheless maintains based on the expert testimony of mining engineer and ventilation specialist Joseph Hadden that the operator should have known that a smoke tube test is valid only for one point in time and that various changes in mine conditions can alter ventilation patterns. According to Hadden the tests for methane must be taken between 12 inches to 18 inches from the top of the high spot because methane is lighter-than-air and would be expected to accumulate near that location. Hadden pointed out that the cribs and cross-bars supporting the caved area would tend to obstruct air flow into the cavity and that methane accumulations could be pulled from the cavity into the active workings by the vacuum created by vehicles passing below.

I find the expert testimony of the MSHA witnesses to be most persuasive. Within this framework I conclude that the method of methane testing cited in this case was indeed deficient and a violation of the cited standard. I do not however find that the violation was the result of "unwarrantable failure". A violation is "unwarrantable" if the operator fails to abate a condition that he knew or should have known existed, or failed to abate because of indifference or lack of due diligence or reasonable care. Section 104(d)(1). See Ziegler Coal Corporation, 7 IBMA 280 (1977). In this regard I accept the undisputed testimony of the operator's witnesses that they performed many smoke tube tests over a long period of time in the cited cavity and found the ventilation to have been sufficient on all occasions to move air out of the high spot. Based on these tests and the demonstrated inadequacy of the formerly used pump type monitor I find that the operator acted in good faith in converting to the cited testing method. Under the circumstances it cannot fairly be said that the mine operator knew or should have known that the new testing method was inadequate. Accordingly I do not find that the violation was due to the "unwarrantable failure" of the operator to comply with the standard. The section 104(d)(1) order at bar is accordingly modified to a citation pursuant to section 104(a) of the Act.

For the reasons discussed above I also find that the operator was not negligent in regard to this violation. In light of the admittedly low hazard associated with the violation, the stipulated history of violations, the large size of the mine operator and the admitted good faith abatement of

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the violation, I find that a civil penalty of \$100 is appropriate.

ORDER

The Helvetia Coal Company is hereby ordered to pay a civil penalty of \$100 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FOOTNOTES START HERE:-

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1 Section 104(d)(1) reads as follows: "If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."