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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. WEST 85-1-M A.C. No. 05-03299-05504
v.	Moffat Tunnel Mine
YELLOW GOLD OF CRIPPLE CREEK, INC., RESPONDENT	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Charles A. Dager, President, Yellow Gold of Cripple Creek, Inc., pro se.

Before: Judge Carlson

REVIEW OF THE EVIDENCE

General Background

This case, heard under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the Act), arose from a January 24, 1984, inspection of the Yellow Gold of Cripple Creek Mine (Yellow Gold) by federal mine inspector James L. Atwood. Atwood issued a citation under section 30 C.F.R. 57.5-2, alleging, in essence, that Yellow Gold lacked the proper equipment to conduct gas or fume surveys "to determine the adequacy of control measures" as required by that standard. The inspector fixed a termination or abatement date of February 7, 1984. On February 16, 1984, Atwood extended the abatement date to February 20, 1984. On May 8, 1984, the inspector returned to the mine and found that three persons were in the mine without proper gas or fume detection equipment. He therefore issued a "failure to abate" withdrawal order under section 104(b) of the Act.

The Secretary now petitions for a civil penalty of $195.00. Yellow Gold contests the violation and the penalty.

An evidentiary hearing was held in Denver, Colorado in which both parties presented evidence. No post-hearing briefs were filed.

The Secretary predicates his case for violation on the mandatory safety regulation published at 30 C.F.R. 57.5-2 (now 57.5002), which provides:

> Dust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures.

In the context of this case, the cited standard must be read in conjunction with two related standards which specify allowable levels of gases. The first of these, published at 30 C.F.R. 57.5-1 (now 57.5001), provides, among other things, that the threshold limit value for carbon dioxide is 5,000 parts per million. The provision itself is contained in a publication of the American Conference of Governmental Industrial Hygienists (petitioner's exhibit 2) which is adopted by reference in the standard.

The second standard is found at 30 C.F.R. 57.5-15 (now 57.5015) and provides:

> Air in all active workings shall contain at least 19.5 volume percent oxygen.

The undisputed evidence shows that Yellow Gold, a small gold mining company, holds rights to use the Moffat Tunnel near Cripple Creek, Colorado, to gain access to drifts leading off from the tunnel. Other mining companies share rights to the tunnel, which has been in existence for many years. Yellow Gold, at the times pertinent in this proceeding, was engaged in drift-driving and mapping. It had as yet undertaken no production from within the mine. It did, however, sell some rock from old dumps to which it had rights.

The evidence also shows that Yellow Gold used equipment manufactured outside the State of Colorado.

The Secretary's Case

The principal witnesses for the Secretary were James Atwood, the inspector who issued the 104(a) citation to Yellow Gold and the subsequent 104(b) withdrawal order; and Warren Andrews, a mining engineer employed by MSHA. His specialty is mine ventilation.

These witnesses testified that the atmosphere in the Moffat Tunnel was well known for its tendency to show excessive amounts of carbon dioxide. Conversely, it was common to find insufficient oxygen content in the air of the tunnel complex. The mining community in the Cripple Creek area, they averred, was well acquainted with these tendencies. Consequently, according to the government witnesses, frequent testing for oxygen and carbon dioxide levels is necessary.

Inspector Atwood testified that at the request of Charles Dager, president of Yellow Gold, he conducted a courtesy inspection of the company's workings in December of 1983. On this occasion, Atwood testified, he gave Mr. Dager a notice that gas surveys were necessary. He discussed with Dager the types of testing devices available for gas-level measurement. He also delivered to Dager a nonpenalty warning under MSHA's courtesy visit program specifying a violation of 30 C.F.R. 57.5-2. The notice refers to a "history of concentrations of carbon dioxide" and the unavailability of any testing method for gases other than a "flame safety lamp."

The inspector testified that a Draeger detector tube system or constant monitoring system would furnish suitable measurements of both carbon dioxide and oxygen levels. The Kohler flame lamp, which respondent is conceded to have used consistently, is incapable of accurate measurement of oxygen or carbon dioxide levels, according to Atwood. On the contrary, it is useful only for detection of methane concentrations and acute oxygen deficiencies. The flame in the lamp goes out when the oxygen content of the atmosphere reaches 16.25 percent. The flame lamp, he testified, does not measure carbon dioxide at all. The inspector indicated that he explained the lamp's deficiencies to Dager at the time of the courtesy visit (Tr. 77).

When Atwood conducted the regular inspection on January 24, 1984, Yellow Gold still had no testing equipment available except for the flame lamp. This is undisputed. On that occasion, Atwood and another inspector who accompanied him, took readings with a Draeger tester and with "cricket" tubes. The latter, according to Atwood, are one-time-use tubes which are activated by breaking in the atmosphere to be tested. Laboratory analyses then reveal the particular gas concentration tested for with high accuracy. The "cricket" tests showed a maximum of .5 percent carbon dioxide. On the Draeger, tests taken at slightly different locations showed a maximum concentration between .6 and .7 percent. The Draeger showed oxygen at 19.28 percent, a figure below the allowable concentration. Atwood testified that exposure to an oxygen level below the minimum set by the standard could cause conditions ranging from dizziness to loss of consciousness. Carbon dioxide exposure above the allowable limits for that gas would produce similar results.

Inspector Atwood explained that when he issued the 104(a) citation of January 17, 1984, he allowed Yellow Gold until February 7, 1984, for abatement of the violation. On a follow-up visit on February 16, 1984, according to Atwood, no testing devices were available at the mine. Upon Mr. Dager's representation that a Draeger detection device was on order from a supplier in Grand Junction, Colorado and had been shipped, he did not at that time issue a failure to abate order under section 104(b) of the Act. Instead, he extended that abatement time to February 20, 1984.

Atwood testified that he was next able to visit the mine on May 8, 1984. Mr. Dager and two other persons were in the mine.

Again, according to the inspector, no proper testing equipment was available at the mine. He therefore declared Yellow Gold to have failed to comply with the abatement requirements specified in the 104(a) citation and proceeded to close the mine through issuance of a 104(b) withdrawal order. Atwood terminated the order two days later when Dager produced a Draeger tester which had not been at the mine on the day of the closure. Even then, the inspector testified, Mr. Dager did not have the correct tubes to test for carbon dioxide. Atwood himself furnished these so that the withdrawal order could be terminated.

Warren Andrews, the Secretary's expert in underground mine ventilation, gave testimony which essentially paralleled that of Inspector Atwood. He stressed that the United States Bureau of Mines had done an extensive study in the 1920's on the release of carbon dioxide from the rock found in the Cripple Creek area, and had documented 35 fatalities owing to excess concentrations of that gas through the year 1928. (Petitioner's exhibit 6.)

Beyond that, Andrews himself did investigations of the Moffat Tunnel in 1979 and 1981 to determine firsthand the gas levels and the ventilation requirements for safe mining. In December 1981 he recommended the installation of a fan to provide positive ventilation.(FOOTNOTE.1) Andrews made a further investigation in April of 1982 of the area of the tunnel where the crosscuts controlled by Yellow Gold were located. On February 15, 1984, he returned to the tunnel for a further survey of the Yellow Gold workings. As a result of that investigation he made updated recommendations regarding air flows and other technical ventilation concerns. Andrews indicated that in his initial 1979 survey he found the oxygen level at only 13.10 percent and the carbon dioxide at 4.97 percent.

Andrews indicated that the best gas monitoring system for the Moffat Tunnel would be a continuous system. He further indicated, however, that periodic testing could be done with the intervals dictated by the previous reading. If, for example, previous samples of carbon dioxide were as low as one-tenth of a percent, subsequent testing would be sufficient if done at the beginning of each shift. Testing every half-shift would be sufficient following readings of two-tenths to three-tenths. For readings as high as four-tenths, samplings would have to be at least hourly (Tr. 144.)

According to Andrews, in mines where certain gases have never been detected, no periodic testing should be necessary. This was not the case in the mine in question, however, where a long history showed a likelihood of carbon dioxide and oxygen problems. Andrews agreed with Yellow Gold's position that carbon dioxide levels within the mine could vary widely with shifts in barometric pressure. He did not agree, however, that barometric readings alone or in conjunction with flame lamp observations were a reliable substitute for direct readings of gas

levels (Tr. 143-144). With regard to the flame lamp device, Andrews insisted that it was useful in detecting acute oxygen shortages only, and was not reliable at all for excess carbon dioxide concentrations. He did agree that an experienced user could make some judgments based on changes in the height or color of the flame, but maintained that such judgments were too subjective to be reliable except, perhaps, in the case of methane detection. Methane, however, was not a concern in the Moffat area.

Yellow Gold's Case

Mr. Alexander Burr, an MSHA inspector, was called by the Secretary, but virtually all of his evidence tended to be favorable to Yellow Gold. He had inspected Yellow Gold from 1978 through April of 1983. He acknowledged that he had told Mr. Dager that use of a flame safety lamp was sufficient in the mine. He also testified his own occasional gas tests with a Draeger device turned up "nothing sufficient" to cause him to tell Mr. Dager to "have other equipment" (Tr. 23). During his years as inspector in the Moffat Tunnel, he testified, Yellow Gold's management had cooperated well.

Charles Dager, president of Yellow Gold, gave testimony for the company. He maintained that Yellow Gold's policy was always to use two Kohler flame safety lamps underground to provide continuing monitoring of gases. The lamps were lighted whenever the barometric pressure at the surface was below 29.04. According to Dager, a barometer was installed at the mine portal and a miner was always at the portal to notify miners underground of barometric changes. He believes that the safety lamps, together with monitoring of the barometer, provided the miners good protection. Moreover, he stressed that the cited standard specified no particular method frequency for taking surveys; therefore, mine operators were free to develop their own.

In the course of his testimony he acknowledged receipt of Inspector Atwood's notice on December 12, 1983, that the mine needed gas-testing equipment beyond the Kohler lamps. After some uncertainty, he asserted that a Draeger was delivered to him on February 15, 1984, and that a letter to MSHA claiming a January abatement was incorrect. He also agreed that he had not used the Draeger before the time that Inspector Atwood closed the mine. He had, he said, tried to use it once, but discovered he did not have the right tubes (Tr. 210-211). He also testified that he had voluntarily shut down the mine "a few days" after the Draeger arrived because of a lack of financing. He further testified that May 8, 1984, when Inspector Atwood issued the 104(b) withdrawal order was the first day the mine was open after the voluntary closure. Dager himself was in the mine with two other persons, doing mapping. He conceded that at that time the Draeger tester was in his automobile at Victor, Colorado.

DISCUSSION

The evidence discloses that the Moffat Tunnel had a well-established reputation for build-ups of carbon dioxide gas. It is equally certain that the oxygen content of the air in the tunnel (and the drifts angling off from the tunnel) was sometimes too low for safe work. These tendencies were confirmed by the actual sampling done at various times by MSHA officials. Given this knowledge, it follows that there was a need for periodic sampling of the mine atmosphere for presence of these two gases as required by 30 C.F.R. 57.5-2.

Yellow Gold contends that since the standard sets forth no particular methods for gas surveys, mine operators are free to specify their own methods of testing. I cannot agree. The cited standard must be read in conjunction with those other standards which specify the minimum or maximum levels of gases. Moreover, 30 C.F.R. 57.5-2 plainly implies that the device or method used must produce a reasonably accurate and reliable result. In this regard, the shortcomings of the Kohler flame safety lamp are all too apparent. I am persuaded by the testimony of Inspector Atwood and Mr. Andrews that the lamp was truly useful in warning of oxygen deficiencies only when those deficiencies become acute. The undisputed evidence shows that the flame in the lamp goes out only when the oxygen reaches a low of 16.25 percent. The oxygen-level standard, however, prescribes a minimum of 19.50 percent. The lamp is not designed to signal when the oxygen level reaches minimally safe level prescribed by the standard. Moreover, the lamp gives no useful measurement of carbon dioxide content.

On the other hand, the undisputed evidence shows that several more sophisticated devices are marketed which will give reasonably accurate readings of both gases. Yellow Gold was obliged to have and use one of those devices.

In complaining of the lack of specificity of the cited standard, Yellow Gold also draws attention to the requirement that surveys be conducted "as frequently as necessary." Yellow Gold suggests that the phrase is too vague to be enforceable.

It is fundamental that any statute, regulation, or standard must give adequate warning of what is required to the persons whose conduct is to be covered by the enactment. In Connally v. General Construction Co., 269 U.S. 385, 391 (1925), the Supreme Court stated;

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Statutes and standards, however, cannot be considered in a vacuum. Courts have generally required that when a safety regulation is examined for meeting due process certainty requirements, it must be looked at "in light of the conduct to which it is applied." Ray Evers Welding Co. v. OSHRC, 625 F.2d 726, 732 (6th Cir.1980). General terms such as "unsafe" or "dangerous" or "as necessary" appear frequently in federal safety and health standards. This approach has been recognized as necessary where narrower terms would be too restrictive. Standards, that is to say, must often be made "simple and brief in order to be broadly adaptable to myriad circumstances." Kerr McGee Corporation, 3 FMSHRC 2496 (1981). In Alabama By-Products Corporation, 4 FMSHRC 2128 (1982) the issue was whether the Secretary could enforce a standard requiring machinery to be kept in "safe operating condition." In holding that this language was not too vague the Commission declared:

> [I]n deciding whether machinery or equipment is in safe or unsafe operating condition, we conclude that the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

See also Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230 (5th Cir.1974); United States Steel Corporation, 5 FMSHRC 3 (1983), 81-136, January 27, 1983.

When the "reasonably prudent person" test is applied, the standard in question here meets constitutional due process requirements. Also, upon the record before me, I must conclude that a reasonably prudent person familiar with the circumstances shown to have existed in the Moffat Tunnel, including any facts peculiar to the mining industry, would have recognized the need to test the tunnel air at least several times a day with adequate equipment. This is so because the evidence conclusively demonstrates a genuine potential for high carbon dioxide levels and low oxygen levels in the mine.

As to the actual frequency of the testing, the guidelines set out in Mr. Andrew's testimony appear reasonable. The real point here, however, is that Yellow Gold did no testing at all with an adequate testing device. Had the company had any sort of testing schedule with a Draeger or other effective device, that schedule could be considered in light of the "reasonable and prudent" test.

As it is, however, it is plain to me that Yellow Gold violated the cited standard.

We now consider whether Inspector Burr's representations to Mr. Dager concerning the adequacy of the Kohler flame safety lamp for gas testing furnishes Yellow Gold a legal excuse for the violation. I must hold that it does not. It is clear that Burr's assurances to the Yellow Gold official were incorrect and misleading. No issue of estoppel is fairly raised, however, because before the issuance of the citation Yellow Gold had ample and repeated warning from Inspector Atwood that Burr's opinion was wrong and that MSHA would insist upon a better testing implement than the archaic flame safety lamp. Thus, while it is unfortunate that Inspector Burr misadvised the respondent, that fact cannot justify Yellow Gold's non-compliance.

The Secretary proposes a civil penalty of $195.00. Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the mine operator's size, its negligence, its good faith in seeking rapid compliance, its history of prior violations, the effect of a monetary penalty on its ability to continue in business, and the gravity of the violation itself.

The Yellow Gold operation is quite small. The Secretary produced no evidence on the company's history of violations. Yellow Gold's president acknowledged that payment of the proposed penalty would not interfere with its ability to continue in business. I must classify the gravity of the violation as moderate. The evidence shows that excessive concentrations of carbon dioxide or insufficient oxygen could, under the proper circumstances, cause death. No large crews were underground at the relevant times, however, and some protection was provided by the ventilation fan. Yellow Gold's negligence in failing to conduct adequate gas testing was moderate. At an earlier date, when the operator was relying on Inspector Burr's advice on the Kohler flame safety lamp, there would have been no negligence. By the time of the citation, however, Yellow Gold knew, or certainly should have known, that its testing practices and equipment were not in compliance with the law.

The chief penalty element in this case, however, is Yellow Gold's failure to achieve timely abatement. The inspector's original abatement deadline was reasonable. Even so, he extended it further. Yet, when he again visited the mine on May 8, 1984, three people were underground but the Draeger, which had never been used, was elsewhere. I have not overlooked that the mine was voluntarily closed from sometime in February 1984 until sometime in early May. Mr. Dager claims that he received the Draeger tester on February 15, 1984, and that he voluntarily closed the mine "four or five days" later (Tr. 202, 210). The accuracy of these recollections is questionable. Earlier in the hearing the witness had said he closed the mine "in January or February" of 1984. It is

particularly doubtful that he had the Draeger on February 15, since the inspector was at the mine on February 15 and issued the extension for abatement to February 20. Those dates are documented. Moreover, in a letter from Mr. Dager directed to MSHA on December 8, 1984, he declared that abatement had been "accomplished within a week of the original citation, 1-24-84." (Exhibit P-8). Because of this confusion one cannot be certain whether the mine was voluntarily closed before or after the final abatement date of February 20, 1985. (Abatement was not necessary while the mine was closed down.) It is certain, however, that when the mine reopened in May of 1984, no Draeger or other suitable tester was available. Abatement was required by then, and it had not occurred. If Mr. Dager's testimony is to be accepted, Yellow Gold had from February 15, 1984, to May 8, 1984, to discover that the Draeger device had not been delivered with the proper tubes for carbon dioxide testing. Under these circumstances I must hold that abatement was not timely and that Yellow Gold failed to exercise full good faith in its abatement attempts.

Having considered the facts in light of all the statutory criteria for penalty assessment, I conclude that $195.00 is an appropriate civil penalty.

CONCLUSIONS OF LAW

Based upon the entire record in this case, and the findings of fact contained in the narrative portion of this decision, the following conclusions of law are made:

(1) That the Commission has jurisdiction to decide this matter.

(2) That Yellow Gold violated the standard published at 30 C.F.R. 57.5-2 (now 30 C.F.R. 57.5002), as alleged.

(3) That the extended time for abatement set by the Secretary was not unreasonable.

(4) That Yellow Gold failed to fully abate the violation within the extended time for abatement set by the Secretary.

(5) That $195.00 is the appropriate civil penalty for the violation.

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ORDER

Accordingly, the citation is ORDERED affirmed, and Yellow Gold is ORDERED to pay a civil penalty of $195.00 within 30 days of the date of this decision.

John A. Carlson
Administrative Law Judge

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FOOTNOTES START HERE:-

~Footnote_one

1 Andrews did not mention when the fan was installed. Other evidence, however, shows that a fan was installed and in operation at least as early as April 1983 (Tr. 23-26).