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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 85-34
A.C. No. 05-00469-03550

v.

Dutch Creek No. 2 Mine

MIDCONTINENT RESOURCES, INC.,
RESPONDENT

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb,
Glenwood Springs, Colorado, for Respondent.

Before: Judge Carlson

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the Act), arose out of an inspection at an underground coal mine operated by respondent MidContinent Resources, Inc. (MidContinent) near Redstone, Colorado. On August 23, 1984, Larry Ganser, a coal mine inspector employed by the Secretary of Labor, issued two citations to MidContinent in which he alleged violations of mine safety standards promulgated by the Secretary under the Act. In the present proceeding the Secretary seeks to collect substantial civil penalties as the result of the alleged violations. At the evidentiary hearing held in Denver, Colorado, both parties presented evidence. The parties waived the filing of briefs or other post-hearing submissions.

REVIEW AND DISCUSSION OF THE EVIDENCE

Citation No. 2213222

On the morning of August 23, 1984, Larry Ganser, a federal coal mine inspector, inspected the 204 headgate section of MidContinent's Dutch Creek No. 2 Mine. While there, he observed a continuous mining machine inby the last open crosscut. The machine was withdrawn from the face and was not engaged in mining. A 550-volt trailing cable furnished power to the machine. When the inspector looked at the cable he noted that its outer jacket had been cut away where it entered the "stuffing box" and was connected to the machine. According to the inspector, the absence of the outer jacket diminished the circumference of the cable to the extent that air could freely enter and exit the box in which energized wires in the cable were connected to the machine.

This condition, the inspector believed, violated the mandatory safety standard published at 29 C.F.R. 75.503. That standard, at the time of the alleged violation, provided as follows:

The operator of each coal mine shall maintain in permissible condition all electric face equipment required by 75.500, 75.501, 75.504 to be permissible which is taken into or used in by the last open crosscut of any such mine.

The machine was not in "permissible" condition, the inspector maintained, because the opening around the cable allowed the free exchange of atmosphere between the inside and outside of the box. A "permissible box," he testified, must be able to contain any explosion of a gassy atmosphere within the confines of the box.

Through its answer, MidContinent confessed the existence of the violation. It contested, however, the Secretary's characterization of the violation as "significant and substantial," and disputed the reasonableness of the proposed penalty of \$900.00.

In penalty assessments, Section 110(i) of the Act requires the Commission to consider the 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 remain in business, and the gravity of the violation itself.

The parties stipulated that MidContinent's mines in the Redstone, Colorado area produced a total of 743,844 tons of coal in the year in question, of which 463,504 tons came from Dutch Creek No. 2. They further stipulated that Dutch Creek No. 2 employed approximately 135 miners, with all mines employing about 350. From these facts I must conclude that the size of the mining enterprise was large.

The parties further stipulated that MidContinent abated the violation in good faith, and that payment of the proposed penalty would not impair its ability to continue in business.

The evidence shows that MidContinent knew or should have known that the violative condition existed. The cut-away portion of the cable was clearly visible to anyone who approached the box and looked. Moreover, MidContinent's face boss at the area in question acknowledged that the cable was an inch larger than was customary. Therefore, someone had to "trim it down" to get it into the box (Tr. 137). In other words, the defective condition was not the result of an unnoticed accident or of a gradual deterioration which could perhaps have been overlooked.

The record contains exhaustive evidence of MidÄContinent's history of prior violations under the Act. Through its safety director, MidÄContinent introduced a series of computerized lists of citations grouped in various ways (respondent's exhibits 5 through 18Äa). The accuracy of these records was not challenged. No useful purpose would be served in summarizing the many pages of these records here. It is enough to say that during the two years prior to the instant citation, MidÄContinent received numerous citations. On the other hand, one must recognize that the Dutch Creek No. 2 operation is classified as a gassy mine; it therefore undergoes nearly constant federal inspection. This fact, coupled with the mine's large size, tends to mitigate the impact of the mere numbers of violations.

We now consider the gravity of the violation. MidÄContinent acknowledges that Dutch Creek No. 2 is properly classified as a "gassy mine" under the numerous regulations that deal with that concept. Nor is it disputed that the opening around the trimmed trailing cable where it entered the box on the mining machine caused the box to lose its "explosion-proof" character and thus rob the machine of its "permissible" approval. Inspector Ganser testified that should an explosion occur because of the unprotected electrical connection, three miners would have been endangered at the time of inspection: the miner operator, his helper, and a shuttle car operator. Five or six miners would have been in the vicinity had mining actually been in progress, he testified.

The inspector tested for methane presence at the face. He found a concentration of four-tenths of one percent. Under the standards, mining may take place at levels under one percent. The inspector testified without contradiction that the mine atmosphere becomes explosive when the methane concentration reaches five percent.

He acknowledged that the continuous mining machine was equipped with a methane monitor designed to alarm when the concentration reached one percent. The device also automatically deactivates the machine when the methane level reaches two percent. The inspector maintained that the shutdown mechanism would not affect the hazard created by the lack of an explosion-proof box, however, because he did not believe that it would de-energize the cable itself. John Jerome, the face boss, testified to the contrary, however. He asserted that the shutdown device de-energized the machine totally, all the way back to the power center. I find that Jerome was familiar with the machine and credit his testimony on this issue. Donald E. Ford, the mine's safety director, testified that gas studies in the double entry in question here showed relatively low rates of methane liberation for a gassy mine. Readings, he declared, had generally varied from three-tenths to five-tenths of one percent. Occasionally, readings were as high as eight-tenths of one percent. Immediately after natural shifts in the mine strata, described as "bumps" and "bounces," levels as high as one or two percent were recorded.

Mid-Continent suggests that the presence of the alarm made the possibility of a methane-fueled explosion and fire unlikely, and that the \$900.00 penalty proposal is excessive.

The Secretary's position is that violations such as the present one, which increase the risk of an unconfined electrical spark in a gassy mine, are always serious. Whatever the immediate level of methane, the known possibility of methane releases, together with the inevitable presence of some amounts of coal dust (excessive or not), makes for a potentially lethal situation. This is so, the Secretary contends, even with the presence of methane alarms or automatic shutdown devices.

The inspector's assessment of the danger took into account that his reading of air flow near the face was only about half of what was required by the mine's ventilation plan when mining was in progress. Although mining had ceased by the time he arrived, he inferred that the insufficient flows existed when mining was in progress. He reasoned that the diminished flows allowed greater concentrations of methane and coal dust near the face, since the gas and dust generated there would not be diluted by the required large volumes of moving air.

The ventilation issue was directly raised by the inspector in the second citation tried in this case, number 2213223. As will be seen in the discussion of that citation, I found that no violation of the mine's ventilation plan was proved. It follows that a lack of proper ventilation should not be considered as an aggravating factor in determining the gravity of the present violation.

Moreover, I must conclude that the presence of a methane alarm and shutdown device did tend to reduce the possibility of an explosion. The safety director's recitation of the history of low levels of methane release for the face in question is less impressive. It is scarcely prudent to assume that greater amounts of methane will not be released with the next mining advance. Moreover, that witness admitted that bumps and bounces sometimes occur in the mine, causing release of methane to a two-percent level. The witness did not claim, of course, that he was able to forecast the times when these phenomena may occur.

Overall, I must also conclude that the evidence establishes the gravity of the violation to be moderate-to-high. No condition which deprives a piece of electric face equipment of its permissibility in a gassy mine can be taken lightly. The standards insist upon multiple precautions in underground coal mines - particularly gassy mines - because of the potentially disastrous consequences of fire or explosion. One simply cannot reason, for example, that if methane control and coal dust suppression measures are well maintained, that one can be casual about safeguards against ignition sources. The standards and common sense demand that all mandatory precautions against explosions and fire be scrupulously observed.

Having weighed all the statutory penalty elements discussed above, I conclude that \$600.00 is the appropriate civil penalty.

The Secretary's citation characterized the violation as "significant and substantial" under section 104(d) of the Act. In Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981), the Commission defined such a violation as one where "%y(3)27 there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Doubtless, had an explosion or fire occurred, the likely injuries to miners would have been severe. That an explosion would occur was not probable, certainly, but was reasonably possible. The violation furnished a ready ignition source. Had this been combined with an untimely failure of face ventilation or some other failure in coal dust or methane control, the basic ingredients for a disaster would have been at hand. In this regard, the facts discussed in connection with the other citation in this case are instructive. Those facts were insufficient to establish the violation charged because the unplanned disruption in ventilation which occurred was not proved to have happened during mining. (As mentioned earlier, mining generates coal dust and may liberate methane.) They were sufficient to illustrate, however, that accidental disruption of ventilation can take place in the mine in question. That the accident took place when no mining was in progress was mere fortuity. The Secretary correctly classified the present violation as "significant and substantial."

Citation No. 2213223

This citation was written by Inspector Ganser in the 204 headgate section on the same morning as the permissible face equipment citation.(FOOTNOTE 1) It is undisputed that the inspector took a measurement of air flow at the face which showed 11,190 cubic feet per minute. It is also undisputed that MidÄContinent's approved ventilation plan called for minimum quantity of 20,000 cubic feet per minute of air in development sections during the cutting, mining or loading of coal (respondent's exhibit 1, section 6.2). The inspector believed that his reading showed that MidÄContinent was violating this provision. He therefore cited the operator for violation of the mandatory standard published at 30 C.F.R. 75.316, which provides:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed

and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every six months.

The inspector admitted that at the time he made his inspection and took his reading, coal was being neither cut, mined, nor loaded. The real issue to be decided, then, is whether the evidence justifies a reasonable inference that the air flow was below 20,000 cubic feet per minute earlier on the morning of the inspection when mining was admittedly in progress. For the reasons which follow I conclude that the established facts do not adequately support such an inference.

The inspector testified that he arrived at the area in question at about 10:05 a.m. or 10:10 a.m. and wrote the ventilation citation at about 10:45 a.m. (Tr. 45, 73, 95). He acknowledged that the next step in the mining cycle would have been roof bolting. For roof bolting, the record shows, the ventilation plan requires but 3,000 cubic feet per minute of air (Tr. 96-99, respondent's exhibit 1, section 6.8).

The inspector assumed, without being certain, that the morning shift had reported to work at 8:00 a.m. He professed a certainty that the mining had ceased only a short time after he had arrived. He found coal dust in the air, he said, and the area was still wet from the spray emanating from the continuous mining machine during cutting. Beyond that, and most important, he maintained that the air flow volume present at inspection could not have decreased from the 20,000 cfm level to 10,190 cfm in the short time since mining had ceased. He did not claim firsthand knowledge of the cause of the decrease in air, but reasoned that since it took from 10:45 a.m. to 12:15 p.m. to bring the volume back up to the 20,000 level, the problem was a major one. He admitted having been told by a management official that the problem was caused by a check curtain having been knocked down elsewhere in the air course. The inspector rejected that explanation, however, because in his opinion a section of curtain could have been replaced in 15 minutes; it would not have taken an hour and a half.

Mid-Continent's principal witness disagreed with most of the inspector's premises. Mr. Jerome, the face boss, testified that the shift had started at 7:00 a.m., not 8:00 a.m. He agreed that the face had been advanced about 15 feet that morning, but he insisted he had done the required pre-shift readings and found the air-flow to have been 23,000 cfm. He estimated that mining had ceased at least 15 minutes before the inspector arrived. (More time - at least a half an hour - elapsed before the inspector took his air flow reading.)

According to Jerome, he sent a crew of three men to check out the stoppings along the entryway. At about 1500 feet out by the inspection area they found that an airlock curtain had been knocked down by a trailer carrying longwall shields to a separate area of the mine. Jerome ordered a second curtain hung there to repair the leak. Restoration of the airlock returned full ventilation to the face, the witness testified.

I find MidContinent's explanation of the reduced air at the face plausible. A large diversion of air from the prescribed air course would likely cause a fairly rapid decline in air flow at the face. Clearly, displacement of the airlock would tend to create a large diversion. The evidence does not disclose the time at which the trailer knocked down the curtain. Under proper circumstances, one may indeed infer a present condition existed at a time past. In this case, however, the inspector's conclusions are simply too speculative to constitute a convincing set of proofs. The burden of proof on the issue of violation rests upon the Secretary. He did not sustain that burden because he did not effectively negate the possibility that the air at the face remained at the prescribed volume until after mining had ceased.

One more matter deserves comment. The inspector and the face boss differed rather heatedly over whether the crew at the face had set a timber and extended the line curtain to it after the face was advanced. Mr. Jerome insisted that this was done, and that it is significant because he took a satisfactory air reading at the place where the curtain was "winged out" to better sweep the face with air. It was undisputed that the timber could not have been set until mining and loading had ceased because the timber would have interfered with the use of the face equipment (Tr. 133-135). Inspector Ganser, however, was certain that the line curtain was not extended when he took his own readings (Tr. 199). He was certain, he said, because the change in the configuration of the curtain would have yielded different measurements than those he got when he calculated the area at the mouth of the line curtain - an integral step in determining the air flow.

I find no reason to question the fundamental truthfulness of either witness, despite the irreconcilable difference in their testimony. I must therefore attribute that difference to a failure in accurate recall on the part of one witness or the other. I have not attempted to resolve the matter because if Jerome were declared wrong and the inspector correct, the result would not be changed. If, indeed, a reading showing a 20,000 cfm flow was taken by MidContinent after the mining ceased, it would be compelling evidence that there was no violation. If, on the other hand, such a measurement was not taken, or if it was taken and found to be less than 20,000 cfm, such facts would not add substantial weight to the Secretary's case. They do not bear directly on the essential question: the level of air flow during cutting, mining or loading.

The citation will be vacated.

CONCLUSIONS OF LAW

Based upon the entire record herein, and in accordance with the factual determinations contained in the narrative portion of this decision, the following conclusions of law are made:

(1) The Commission has jurisdiction to decide this matter.

(2) The respondent, MidÄContinent, admits violation of the mandatory safety standard published at 30 C.F.R. 75.503, as alleged in citation number 2213222.

(3) The violation was "significant and substantial" within the meaning of section 104(d) of the Act.

(4) The appropriate civil penalty for the violation is \$600.00.

(5) MidÄContinent did not violate the mandatory safety standard published at 30 C.F.R. 75.316, as alleged in citation number 2213223.

ORDER

Accordingly, citation number 2213222 is ORDERED affirmed; a civil penalty of \$600.00 is ORDERED assessed therefor, to be paid within 30 days of the date of this decision; and citation number 2213223 is ORDERED vacated.

John A. Carlson
Administrative Law Judge

1 Midway through the hearing MidÄContinent was allowed to amend its answer to show that it contested the alleged violation. Its intention to oppose the violation was plain, and the Secretary did not appear prejudiced by the amendment.