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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. PENN 85-273
A.C. No. 36-00926-03594

v.

Homer City Mine

HELEN MINING COMPANY,
RESPONDENT

DECISION

Appearances: James E. Culp, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Penn-
sylvania, for Petitioner;
Ronald B. Johnson, Esq., Recht & Johnson,
Wheeling, West Virginia, for Respondent.

Before: Judge Maurer

Statement of the Case

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801, et seq., the "Act," in which the Secretary charges the Helen Mining Company with two violations of the mandatory standard at 30 C.F.R. 75.308. The general issues before me are whether the company has violated the regulatory standard as alleged in the petition and, if so, the appropriate civil penalty to be assessed for the violation(s). Although counsel for the respondent, by his Answer, seemed to be seeking a ruling on whether these orders were valid or not, I note that neither has been contested. Moreover, in a civil penalty case, the validity of the order is not considered to be an issue. Pontiki Coal Corp., 1 FMSHRC 1476 (1979).

The hearing was held as rescheduled on February 6, 1986, at Pittsburgh, Pennsylvania. Documentary evidence and oral testimony was received from both parties. Additionally, the parties have both filed post-hearing proposed findings and conclusions, and the arguments presented therein have been considered by me in the course of this decision.

The Mandatory Standard

Section 75.308 of the mandatory standard, 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.

The Cited Conditions or Practices

Section 104(d)(2) Order No. 2407973 cites a violation of 30 C.F.R. 75.308 for the following alleged condition or practice:

Suitable precautions were not taken by the section foreman Steve Kasperik in muddy run right side 069Ä0 section. An accumulation of methane in excess of 1% was discovered in the crosscut five to four entry. Air being used to ventilate this face traveled downwind to the crosscut six to five entry where the 1206 Jeffrey miner was energized and being used to load coal. Methane reading at the face of this crosscut 6 to 5 did not exceed .4% of methane.

Section 104(d)(2) Order No. 2407974 likewise cites a violation of 30 C.F.R. 75.308 and states:

The ventilating air at the face of crosscut five to 4 entry contained in excess of 1.5% methane. The section foreman was Steve Kasperik. Multiple

methane examinations were made at the face with three separate and approved methane detectors indicating methane in excess of 1.5%. The power was not deenergized to the muddy run sections right and left side 001 and 069. Information supplied by the persons of the muddy run right side crew indicate the foreman was aware the condition existed and did not deenergize the sections power. Methane examinations had been made by at least two men of the crew and also the foreman. A Fletcher twin boom bolter was present at the face. Power was deenergized only to the bolter.

Stipulations

At the hearing, the parties agreed to the following stipulations, which were accepted (Tr. 56):

1. The Homer City Mine is owned by the respondent, Helen Mining Company.
2. The Homer City Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The undersigned administrative law judge has jurisdiction over these proceedings.
4. The subject orders, terminations, modifications, and notices were properly served by duly authorized representatives of the Secretary of Labor, on an agent of the respondent at the dates, times, and places stated therein, and may be admitted into evidence for purposes of establishing their issuance and not for the truthfulness or relevance of any statement therein.
5. The alleged violations were abated in a timely fashion.
6. Respondent's annual production is two million, nine hundred and seventy-four thousand, nine hundred and four (2,974,904) production tons annually. The subject mine has one million, forty-six thousand, three hundred and twenty-eight (1,046,328) annual production tons.
7. Respondent had twenty-four assessed violations in the two-month period prior to the issuance of the orders herein in which it operated the Homer City Mine.

Discussion and Analysis

Ronald Rhoades is a miner employed by the Helen Mining Company. He testified that on February 25, 1985, he was assigned to work as a roof bolter in number five entry of the Muddy Run Right Side at the Homer City Mine. Ed Hankinson, who also testified in this proceeding, was assigned to be his helper on that shift. Upon their arrival at the roof-bolting machine, located at "A" on GXÄ6, Rhoades took a methane check with a CSA digital type detector, and got a reading of between 1.7 and 1.9 percent methane. He immediately cut the power off at the roof-bolting machine, sent someone back to turn the power off at the power center, sent for the foreman, and began to make corrections in the line brattice to get rid of the methane. Mr. Hankinson, in the meantime, was taking other readings, both with the same detector Rhoades had used as well as the detector off a continuous miner located in the crosscut, six to five. He also obtained methane-level readings of 1.7 to 1.9 percent with both detectors.

The foreman for the entire Muddy Run area on that shift, both the Left and Right Sides, was Mr. Steve Kasperik, who likewise testified in this proceeding. He arrived in the area approximately twenty minutes to a half hour later. Upon his arrival he took a methane reading. What that reading was is in serious contention in this case. The Secretary contends that it disclosed a methane level of nearly 2 percent. The respondent's position is that it was 1.3%. The importance of the issue being that a reading of 1.5 percent or greater brings the last sentence of section 75.308 into effect.

The resolution of this factual issue turns on the credibility of the miner witnesses and that of the foreman, Mr. Kasperik, as well as the totality of the circumstances surrounding the incident on the date in question. Rhoades and Hankinson testified that they had obtained several readings of 1.7 to 1.9 percent methane levels in number five entry and had so informed Kasperik. Rhoades also testified that Kasperik himself took a methane reading in number five entry and stated that "you guys got upwards of 2 percent" or words to that effect. Significantly, Mr. Kasperik does not deny making this statement, even though he later maintained that the reading was 1.3%. Further, a comparison of the subsequent actions of Rhoades and Kasperik lends credence to Rhoades. Rhoades expeditiously "went public." He contacted MSHA the following day in an effort to have what he considered to be a serious mine safety concern addressed by someone in officialdom. Kasperik, on the other hand, did not record a methane reading in the pre-shift and on-shift examination book, but rather entered the word "none" under

~861

hazardous conditions. He admits this was a mistake, but he "forgot" to put it in the book. He made the appropriate entry the next day.

Additionally, according to the testimony of Inspectors Collingsworth and Burkey, Mr. Kasperik was very reticent during the meeting held on February 26, 1985, concerning the incident of the previous day. They both testified that they repeatedly questioned him about what his initial methane-level reading had been before he finally stated it had been 1.3 percent. Also, they both testified that he had no explanation for his failure to make the required entry in the mine records.

For all of the above reasons, I find as a fact that there was a methane level of 1.7 to 1.9 percent present in number five entry as testified to by Rhoades and Hankinson and that Kasperik as a representative and agent of the respondent was aware of it at the time that it existed.

Mr. Kasperik took personal charge of supervising the dissipation of the methane accumulation. He determined that the methane was coming from a "bleeder" in the upper left corner of the cross-cut in a difficult spot to ventilate. He ordered the canvas tightened up and rearranged in working place number five on RXÄ1 to better ventilate that corner. He took several methane-level readings downstream of the "bleeder," extending over to and beyond working place number six on RXÄ1 in the adjacent entry. The methane-level readings he obtained in these areas were generally .3%. It should be noted here that the operator of the continuous mining machine in entry number six also took methane-level readings downstream of working place number five, including working place number six. His readings did not exceed .4% in any of those locations. In general, Mr. Kasperik was following a written company policy (RXÄ2) for action to be taken when a methane level is detected in the range of 1 to 1.5 percent.

That written company policy (RXÄ2) also contains instructions concerning what to do if a 1.5% methane level is detected. As I have found as a fact that the methane level was in excess of 1.5% that is the portion of Respondent's Exhibit No. 2 that is more relevant to this case. That portion of the policy mandates, inter alia, that machinery in that working place be de-energized, that power to the section be de-energized and that all men not involved in eliminating gas should be withdrawn from the face area. Under the state of facts as I have found them to be, Mr. Kasperik's actions were inconsistent with company policy as well as with the requirements of the mandatory standard.

~862

It is undisputed and I find as a fact that no power to Muddy Run Right or Left Side was ever de-energized except that to the roof-bolting machine in number five entry during the entire incident at issue.

I further find as a fact that while the methane level was in excess of 1.5% in number five entry, Kasperik ordered the continuous miner operator and his helper as well as a shuttle car operator to perform clean-up operations in number six entry of Muddy Run Right Side. Rhoades testified that he immediately objected. He stated at Tr. 15:

I questioned him at that time, whether what he was doing, what he suggested they do was right. He said, yes, he said, the problem we have here affects this area, this place, this working place right here. I said, well we got, you know, we got better than a percent and a half, two percent of gas almost. He said, the problem that you have here is within, or in this entry and this working place. He says, those guys can go over there, get that place cleaned up and get that miner moved.

It is also undisputed that this mine's ventilation system moves the air from number five entry through number six entry of Muddy Run Right Side. The inspectors who testified at the hearing consistently stated that the only way to get rid of the methane accumulation in number five entry was to improve ventilation, which was being-done under the direction of foreman Kasperik. However, they testified that you have to take precautions when you move an accumulation in excess of 1.5 percent methane so as not to pass that body of gas over any potential ignition sources, and any operation of energized mining equipment may obviously create potential ignition sources.

Further, the regulations require that you withdraw all persons and cut off all power from the endangered area of the mine, until the air "at any working place" contains less than 1 percent methane. It is not contended that this was done and in fact it was not done.

Respondent's first line of defense in this case is that there never was a stable reading in excess of 1.5% that management was aware of at the time it existed. As noted above, I have rejected that argument and found the facts to be otherwise. Next, respondent notes that Kasperik prudently decided not to mine any coal with the continuous mining machine in working place number six as a precaution and the only activity that took place in either number five

~863

or number six entry other than the readings and making corrections to the ventilation system was that the continuous mining machine was used to pick up loose coal laying on the bottom in working place number six. Only enough loose coal to fill one shuttle car half-way was picked up. Further, respondent notes that even this activity was not carried out until it had been ascertained that the methane-levels at working place number five had not moved beyond that point and the methane-level was only .3 to .4% downstream and into working place number six. I find this to be credible evidence, unrebutted by the Secretary. However, it falls short of compliance with 30 C.F.R. 75.308.

The last sentence of that section of the mandatory standard states that "[i]f at any time such air (the air at any working place) contains 1.5 volume per centum or more of methane, all persons, except those referred to in section 104(d) of the Act (i.e., those involved in eliminating the hazard), 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 (i.e., working place number five on RXA1) shall contain less than 1.0 volume per centum of methane." [Emphasis and parentheticals added].

The only issue left at this point in the analysis then is to define the endangered area of the mine. On this point I accept as credible the testimony of Inspectors Burkey and Sparvieri that the endangered area of the mine within the meaning of 75.308 was the Muddy Run Right and Left Sides because even though the gas problem existed in number five entry of Muddy Run Right Side, Muddy Run Left Side is only separated by a ventilation curtain.

Therefore, I conclude that respondent did violate 30 C.F.R. 75.308 by failing to de-energize the endangered area of the mine and withdraw the miners from same when the methane level in number five entry of Muddy Run Right Side was in excess of 1.5 percent. Order No. 2407974 is affirmed.

An appropriate civil penalty must also be assessed if a violation is found and a determination must be made as to whether that violation was "significant and substantial." See generally the Commission decisions in National Gypsum Co., 3 FMSHRC 822 (1981) and Mathies Coal Co., 6 FMSHRC 1 (1984) for the applied definition of "significant and substantial."

I find that the respondent's failure to de-energize the Muddy Run sections and withdraw the miners and indeed

to operate the continuous miner in number six entry of Muddy Run Right Side while the methane level was in excess of 1.5% in the adjacent entry subjected the exposed miners to an increased danger of methane ignition or explosion which could have resulted in fatal or permanently disabling injuries to them. Further, in this regard, I note that this mine is classified as a gassy mine, producing two and a half million cubic feet of methane in a twenty-four hour period. Accordingly, I find that the violation is "significant and substantial." I also find that there is a high degree of gravity associated with the violation, that is, the occurrence of the event against which the cited standard is directed was "reasonably likely."

Under the criteria enumerated in section 110(i) of the Act, I have considered the stipulations of the parties concerning the operator's violation history, size of the operator's business, and the fact that the violation was abated in a timely fashion. Further, I find that the respondent, through and by its management representative, Mr. Kasperik, had actual knowledge of the violation at the time it existed. Therefore, I find that the respondent is chargeable with a high degree of negligence. I have already stated my findings with regard to gravity, supra. Therefore, considering all of the statutory factors, I conclude that a penalty of \$1,500 is appropriate.

My decision with regard to Order No. 2407973 requires a short legal analysis and involves making a conclusion of law. The language of 30 C.F.R. 75.308 requires certain action when the air at any working place contains 1.0% or more of methane. If at any time that air contains 1.5% or more of methane, all that is required for a 1.0% concentration is still required, plus additional action is now required.

The action required to be taken for methane levels in excess of 1.5%, but which was not taken, and for which I have already found a violation of section 75.308 and affirmed Order No. 2407974, would include de-energizing the continuous miner in working place number six, which is the activity complained of in Order No. 2407973. Therefore, I concur with the respondent's argument that the violation written up in Order No. 2407973 is included within and is duplicative of the violation found to exist in Order No. 2407974. Therefore, I find as a matter of law that Order No. 2407973 alleges a lesser included violation of the identical standard and is hereby vacated and dismissed.

~865

ORDER

Order No. 2407974 is AFFIRMED and the respondent is ORDERED to pay a civil penalty in the amount of \$1,500 within 30 days of the date of this decision. Order No. 2407973 is VACATED and DISMISSED.

Roy J. Maurer
Administrative Law Judge