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SOL (MSHA) V. TEXASGULF INC.
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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 85-148-M
A.C. No. 48-00639-05515

v.

Docket No. WEST 86-83-M
A.C. No. 48-00639-05517

TEXASGULF, INC.,
RESPONDENT

Wyoming Soda Ash

DECISION

Appearances: Tobias F. Fritz, Esq., Office of the Solicitor,
U.S. Department of Labor, Kansas City, Missouri,
for Petitioner;
Thomas E. Downey, Jr., Esq., Downey & Murray,
Englewood, Colorado, for Respondent.

Before: Judge Lasher

This matter arises pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a) (herein the Act). Petitioner seeks assessment of penalties for three violations which are cited in the three Citations involved in these two dockets which were consolidated for hearing and decision by Notice dated June 19, 1986. All three Citations, issued under Section 104(a) of the Act, charged Respondent with infractions of 30 C.F.R. 57.21078, entitled "Permissible Equipment" which provides:

"Only permissible equipment maintained in permissible condition shall be used beyond the last open crosscut or in places where dangerous quantities of flammable gases are present or may enter the air current."

The Citations were issued by MSHA Inspector Martin B. Kovick on three different inspection dates.

The descriptions of the violations shown on the three Citations are as follows:

1. Citation No. 2983339 issued April 10, 1985.

"In No. 5 miner panel there is a gap of .005 in the main control panel. The miner is in the last open crosscut. A methane check showed 0.0% with a CSE this condition could possibly create a hazard to employees in this panel."

2. Citation No. 2083401 issued April 24, 1985.

"In miner No. 4 panel there is a gap of .006 in the connection box located under the seat of miner No. 4. The miner is beyond the last open crosscut in room No. 8025. A CSE reading shows 0.0%. This condition could possibly cause a hazard to employees in this panel."

3. Citation No. 2083419 issued October 15, 1985.

"In miner No. 9 there is a gap of .011 in the right head light on miner No. 9. The miner is in the last open crosscut on the shortwall section. A CSE shows 0.0% methane in this area. This condition could possibly cause a hazard to employees in this panel."

On a five-part "Gravity" scale ("No Likelihood", "Unlikely", "Reasonably Likely", "Highly Likely", and "Occurred") provided on the face of the citation form, all three Citations were marked "Reasonably Likely".

The Citations issued under Section 104(a) of the Act, also charged that the violations were "significant and substantial" (herein "S & S").

In *Secretary v. Consolidation Coal Company*, 6 FMSHRC 189 (1984), this Commission held that S & S findings may be made in connection with a citation issued under Section 104(a) of the Act. Considering this ruling in conjunction with *U.S. Steel Mining Company*, 6 FMSHRC 1834 (1984), where the mine operator was allowed to contest S & S findings entered on Section 104(d)(1) citations in a penalty case, it is initially concluded that S & S findings are properly reviewable in this penalty proceeding.

The matter came on for hearing in Rock Springs, Wyoming on August 20, 1986. Both parties were well represented.

The Respondent concedes the occurrence of the three violations but urges that such were not S & S, thus raising the major issue posed and only issue aside from the amount of appropriate penalties. The Secretary seeks a penalty of \$157 for each violation.

Having carefully considered the transcript of testimony and the briefs submitted by both parties, the position of Respondent is found supported in the record and meritorious.

FINDINGS

At the outset of the hearing the parties entered the following stipulations on the record:

- (a) Respondent is a large mine operator;

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(b) Payment of reasonable penalties in this matter will not jeopardize Respondent's ability to continue in business;

(c) Respondent, after receiving notice of the three subject violations, proceeded in good faith to promptly abate the same;

(d) Respondent had but one violation in over 200 inspections days prior to the issuance of each of the three subject violations and I conclude therefrom that Respondent has an extremely commendable compliance history.

During the hearing it was further agreed that the permissibility requirements of 30 C.F.R. 18.31 applied to each of the three machines found in violation and that the maximum plane flange gap permissible under 30 C.F.R. 18.31 is .004 inch (T. 77-78).

It is further found that Respondent operates a trona mine in Sweetwater County, Wyoming, and that such mine has, at all relevant times, been classified as "gassy" by the State of Wyoming (T. 4, 161), and is a "gassy" mine for purposes of this proceeding (T. 10, 161-164, 229).

The subject mine is one of five trona mines (T. 37, 117) located inside an area called the Trona Patch in Wyoming. Mining "beds" therein are numbered "1" through "30"; Respondent mines in Bed 20. (T. 157-160). Somewhere between 10% and 30% of the subject mine's reserves have been developed (T. 309-310). Mining is conducted approximately 1400 feet below the surface five days a week by three shifts daily (2 production and 1 maintenance) (T. 267).

Despite its designation by the State of Wyoming as "gassy", the subject mine is "considerably less" gassy than the other four mines in the Trona Patch (T. 41), and does not require frequent inspections under federal law, (T. 39-41). Under Section 103(i) of the Act extra inspections at fifteen day intervals are required if a mine produces 200,000 cubic feet of gas per day. 30 U.S.C. 813(i). The output from this mine has been measured at only 50,000 to 90,000 cubic feet of methane gas per day well below the lowest trigger of Section 103(i). (T. 40, 161).

To be in permissible condition gaps in boxes housing electrical equipment, such as those involved in the three matters under discussion, shall not exceed certain tolerances. For the three pieces of equipment involved herein, as previously noted, gaps in excess of .004 inches were prohibited (T. 45, 77-78, 106-107; 30 C.F.R. 18.31).

On April 10, 1985, Citation No. 2083339 was issued citing continuous miner No. 5, which was then located in the last open crosscut of the mine. Inspector Kovick detected a gap of .005

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inches in the main control panel of this Miner. On April 24, 1985, Inspector Kovick issued Citation No. 2083401 citing a .006 inch gap in the connection box located under the seat of Miner No. 4. On October 15, 1985, Inspector Kovick issued Citation No. 2083419 after he found a gap of .011 inches in the right headlight on continuous Miner No. 9. The record is clear that the three pieces of electrical equipment involved were in impermissible condition when cited and Respondent concedes the occurrence of the violations.

The contemplated hazards to which the three violations contributed are methane ignitions and methane explosions (T. 50A51, 54-55, 85). A methane ignition is of a lesser degree than an explosion (T. 54).

The three machines (miners) involved were beyond the last open crosscut when cited (T. 47, 50) and from two to six employees would ordinarily have been exposed to the hazard (T. 94, 230A231).

At the times the three Citations were issued, both the ventilation system and methane monitoring equipment were properly functioning and adequate (T. 47A48, 57-58, 74, 80), and the methane reading taken by hand-held instrument was zero, that is 0.0% (T. 48, 84).

The methane monitors on the miners in question automatically turn off the equipment when they detect that the methane level has reached 1.5% (T. 51A52, 73-74, 196-197, 255) and such were in proper working order on the three citation issuance dates in question (T. 256, 257A261). However, a lag time of five to six seconds runs between the time the methane monitor first sniffs the methane gas and the miner shuts down (T. 262).

Methane monitors, which are checked only weekly for proper calibration, need frequent calibration, and are regularly found to be out of calibration (approximately one out of four each week), one cause of which is vibration (T. 52, 122A123, 248, 256, 262A264).

It is possible to have a methane ignition even where there is adequate ventilation where there occurs a "sudden rush" or "outburst" of liberated methane which can overpower the ventilation system (T. 51A52, 120, 134). Such possibility, however, is remote (T. 156, 199, 221, 226, 322). Ventilation systems are also subject to breakdown (T. 53, 121A122, 234) and other problems (T. 51A52, 214-220).

On the three dates pertinent herein, some 30 to 50 pieces of permissible equipment were in the mine (T. 176A177). None of the three pieces of machinery (electrical boxes) involved here were shown to be arcing or sparking (or malfunctioning) at the time the Citations were issued and there existed only the possibility of their arcing or sparking (T. 50A52, 56, 57, 81, 112-115, 128, 205, 274, 275A277, 284-286).

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No method or technology exists for predicting or determining where concentrations of methane may exist or be encountered in Bed 20 where the subject mine is located (T. 54, 58, 159, 298-302, 303, 315, 327).

While there is a possibility of encountering an accumulation of methane (T. 51-54, 58, 70, 75, 89, 93, 327-328) such is highly unlikely (T. 62, 328).

The methane level where explosions can occur ranges from 5% to 15%; the methane level where ignitions can occur is 1% to 2% (T. 68-69, 168). The methane levels found by the Inspector on the three occasions in question were not sufficient to permit ignitions (T. 69, 79, 84).

Over the eight years that Inspector Kovick had inspected the mine, he had never detected explosive levels of methane in the mine, had never found methane in excess of 1%, (T. 39, 62), and had never detected ignitable or explosive levels of methane (T. 62, 75, 86). Inspector Kovick conceded that methane must be at an explosive or ignitable level before it is reasonably likely to cause injury (T. 75, 80, 84-85). Over the mine's 10-year (approximate) history, methane emission levels have remained fairly constant (T. 165), i.e., negligible to non-existent (T. 166). The mine has no history of fires or explosions (T. 197, 227).

The possibility that methane would reach either ignition or explosion levels was remote (T. 89-90, 156, 161-165, 166, 169-174, 194-195, 197, 202, 205-206, 230, 242, 251).

Both the magnitude and the probability of an ignition of methane in a trona mine are less than a methane ignition in a coal mine due to the fact there would be no involvement of flammable coal dust in a trona mine. Where only methane is ignited, injuries and fatalities will result only to those in the area where the methane exists or within the area affected by the concussion or pressure from such ignition (T. 120, 163-165).

DISCUSSION

While characterizing violations in the abbreviated "serious and substantial" mode is convenient for general reference it is misleading as to the actual substantive meaning articulated by Congress and resort to the entire phrase from which such was taken is more, but not entirely, helpful. Thus, so stated, the main question here is whether the subject section 104(a) Citations cited violations which were "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard" as that phrase (1) is used in Sections 104(d)(1) and 104(e)(1) the Act and (2) has been fleshed out by the Federal Mine Safety and Health Review Commission.

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More fully, Section 104(d)(1) of the Act, in which the full S & S clause originates provides:

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