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JIM RESOURCES V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

JIM WALTER RESOURCES, INC., CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. SE 86-105-R Order No. 2811664; 7/1/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. SE 86-106-R Order No. 2811667; 7/8/86 No. 5 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. SE 87-8 A.C. No. 01-01322-03648
v.	No. 5 Mine
JIM WALTER RESOURCES, INC., RESPONDENT	

DECISION

Appearances: R. Stanley Morrow, Esq. and Harold D. Rice, Esq., Birmingham, Alabama, for Jim Walter Resources, Inc.; William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama for Secretary of Labor.

Before: Judge Weisberger

STATEMENT OF THE CASE

The Secretary's Petition for Civil Penalties for alleged violations, by the Mine Operator (hereinafter called Respondent) of 30 C.F.R. 75.500(d), has been consolidated with the companion Notices of Contest filed by the Respondent. Pursuant to notice, the case was heard on March 3, 1987, in Birmingham, Alabama. Carl Early, William Vann, and William Meadows testified for the Secretary (hereinafter called the Petitioner). Charles Stewart testified for Respondent. At the hearing, Petitioner made a motion that the Notice of Contest, SE 86Ä106, be dismissed on the ground that the Order contested, Number 2811667, was vacated by the Mine Safety and Health Administration. This motion was not objected to by the Respondent.

Petitioner filed its Post Hearing Brief on April 23, 1987, and Respondent filed its Brief on May 4, 1987. Respondent filed its Reply Brief on May 11, 1987. Petitioner did not file any Reply Brief.

ISSUES

1. Whether Respondent violated 30 C.F.R 75.500(d).

2. Whether the crosscuts, in which nonpermissible electrical equipment were located, were "the last crosscut" as that term is used in section 75.500(d), supra.

3. If Respondent violated 30 C.F.R. 75.500(d), was the violation caused by its "unwarrantable failure."

REGULATORY PROVISIONS

30 C.F.R. 75.500(d) as pertinent, provides as follows:

"All other electric face equipment which is taken into or used inby the last crosscut of any coal mine %y(4)27, shall be permissible."

STIPULATIONS

1. The operator is the owner and operator of the subject mine.

2. The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 (Act).

3. The Administrative Law Judge has jurisdiction of this case.

4. The MSHA Inspector, who issued the subject citation, was a duly authorized representative of the Secretary.

5. A true and correct copy of the subject citation was properly served upon the operator.

6. Imposition of a penalty, in this case, will not affect the operator's ability to do business.

7. The operator's size is medium.

8. If it be found that a violation of 30 C.F.R 75.500(d) occurred as alleged, Order 2811664, then the violation is to be considered to be "significant and substantial."

9. The equipment identified in Order Citation Number 2811664 were nonpermissible.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On July 1, 1986, a nonpermissible distribution box, at Respondent's Number 5 Mine, was located in the last crosscut connecting number 2 and number 3 entries in the number 8 section. (See F, Exhibit GÄ2.) Although there were two open crosscuts further inby, they were between entries 1 and 2, and 3 and 4, respectively. (See A and H, Exhibit GÄ2.) There was no crosscut connecting entries 2 and 3 which was further inby the crosscut in which the distribution box was located.

Respondent cites 30 C.F.R. 75.200Ä7(iii), 30 C.F.R. 75.31Ä3(a), and 30 C.F.R. 75.302(a), as the only regulations, aside from the one at issue, that contain the term "last open crosscut." Respondent, in essence, argues that these sections delineate the parameters of that term. In this connection, it is noted that pursuant to 30 C.F.R. 75.301 and 302, air is tested in number 1 and number 4 entries respectively, outby crosscuts A and H, (labeled on Exhibit GÄ2), as these crosscuts are considered to be last open crosscuts within the meaning of section 75.301, supra, and section 75.302, supra, as they separate intake and return air entries.

It appears to be Respondent's position, based upon these sections, that the last crosscuts inby the face, which separate intake and outtake entries, labeled A and H, on Exhibit GÄ2, are the only crosscuts to be considered to be "the last crosscut" for purposes of section 75.500(d), supra.

I have considered Respondent's argument, but find it lacking in merit. I find that the regulatory sections cited by Respondent do not define the phrase "last crosscut." These sections merely indicate a reference to "the last open crosscut" where certain actions are to be performed, or certain devices are to be used. It is unduly restrictive to hold that the identification of "the last open crosscut" for the purposes set forth in the sections cited by Respondent, mandates identification of the same crosscut for the purposes enumerated in section 75.500(d), supra.

Instead, I have been guided by the Congressional intent in promulgating section 318(i), of the 1977 Mine Act, 30 U.S.C. 801 et seq., whose language is repeated in section 75.500(d), supra. Congressional intent is expressly stated in section 318(i), supra, which provides, in essence, that only permissible electrical equipment are to be used in the last open crosscut "to assure that such equipment will not cause a mine explosion or mine fire" Respondent, in essence, argues that because the intent of section 75.500(d), is to minimize the hazard of a methane ignition, nonpermissible equipment is precluded only in

crosscuts A and H, connecting fresh air intake to the return, (see Exhibit GÄ2) as only these crosscuts are exposed to methane laden air. In support of its position, Respondent cites testimony to the effect that most methane is liberated at the face in the cutting operation, and then travels through crosscuts A and H and down return entries 1 and 4 outby the face (see Exhibit GÄ2). Thus Respondent argues that methane laden air does not enter crosscut F in which the nonpermissible equipment was located (see Exhibit GÄ2).

However, according to the uncontradicted testimony of William Vann, a Federal Mine Safety Health Administration Ventilation Specialist, methane gas is common in the crosscut in which the distribution box was located. It was also the uncontradicted testimony of the Federal Mine Inspector, Carl, Early, that 30 percent of the time, that he has tested for methane in that crosscut, there has been more than 1 percent of methane which is in excess of the allowed amount. (Tr. 31, 74.) The testimony of Vann and Early tends to establish that interruption of a mine curtain placed in the number 3 entry outby the crosscut in which the nonpermissible equipment was located, would result in neutral air in that crosscut allowing methane to accumulate. Accordingly, to hold that the crosscut in which the distribution box was located, is other than the last crosscut, would clearly lessen the assurance against a mine explosion or fire, and would accordingly be violative, of the expressed purpose of section 318(i), supra. Furthermore, Early, Vann, and William Meadows, Supervisory Mine Engineer, employed by Mine Safety and Health Administration, all testified, in essence, that to their knowledge the only way that the crosscut in which the distribution box is located is referred to, is as the last crosscut. I therefore find that section 75.500(d), was violated by having a nonpermissible distribution box in the crosscut labeled F, in Exhibit GÄ2, which is the last crosscut between entries 2 and 3 and which is the last crosscut referred to in section 75.500(d), supra.

The parties have stipulated that, on July 1, 1986, there was a nonpermissible scoop charger being used. Its location is depicted on Exhibit GÄ2 as being in a crosscut between entries 3 and 4. Vann testified that the scoop charger was in the "last crosscut" as that crosscut extends from the brattice in crosscut C, between entries 1 and 2, up to the brattice in the crosscut J, between entries 3 and 4, (see the yellow areas in Exhibit GÄ2). However, Early has indicated that the charger was in the the "affected area" of the last crosscut, but that the crosscut in which it was located was not the last open crosscut. (Tr. 53.) Meadows, in essence, indicated that a crosscut is a connection between two entries. (Tr. 129.) Essentially the same definition is found in A Dictionary of Mining, Mineral, and Related Terms (U.S. Department of the Interior, Bureau of Mines (1968)), which defines crosscut as "a small passageway driven at right angles to

the main entry to connect it with a parallel entry or air course." Accordingly, I conclude that the scoop charger was not in the same crosscut where the distribution box was located, which has been found to be the last crosscut. Rather, the scoop charger, as depicted in Exhibit GÄ2, was in a crosscut between entries 3 and 4. Inasmuch as there were two other crosscuts between entries 3 and 4 inby the face, I conclude that scoop charger was not in the "last crosscut."

Having found that section 75.500(d) was violated, I conclude, on the basis of the Parties' stipulation, that such violation was "significant and substantial." Petitioner maintains that the violation of section 75.500(d), resulted from a "unwarrantable failure" on the part of the Respondent. Respondent has stipulated that the equipment in question was nonpermissible, and there does not appear to be any dispute that the Respondent knew of the actual location of the equipment in question. The only question is whether or not the Respondent knew, or should reasonably have known, that the nonpermissible equipment was located in the "last crosscut." Charles C. Stewart, the Deputy Mine Manager at the No. 5 Mine, Respondent's only witness, testified that crosscuts A and H, depicted on Exhibit GÄ2, which are the most inby crosscuts between entries 2 and 3, and 3 and 4 respectively, each have air from the face going through them. In contrast, the crosscut, in which the distribution box was located, has only intake air. Stewart further testified that until July 1, 1986, the date the instant citation was issued, the Respondent had never received any other citation for nonpermissible equipment in crosscut F (Exhibit GÄ2). Stewart testified that he did not know the last crosscut for permissible equipment. However, he stated specifically that the last crosscut between entries 2 and 3 was labeled F (Exhibit GÄ2), which is the crosscut in which the distribution box was located. In addition, I find most persuasive the uncontradicted testimony of Early, Vann, and Meadows that to their knowledge "last crosscut," is the only term to be applied to the crosscut in which the distribution box was located, i.e., the last crosscut between entries 2 and 3 inby the face. I conclude that Respondent should have known that the location of the nonpermissible distribution box was in the "last crosscut." Accordingly, I find that the violation herein was caused by Respondent's "unwarrantable failure."

I conclude, based on the record and the Parties stipulation, that the violation herein was "significant and substantial."

I have considered all the criteria set forth in section 110 of the Act. Specifically, I have taken into the account of the high gravity of the violation, as indicated by the stipulation as

to its being "significant and substantial," and I have also taken into account the high degree of negligence as discussed above in my analysis of the issue of "unwarrantable failure." Petitioner had, in its petition for assessment of civil penalty, requested a penalty of $1000. However, inasmuch as I have found that the use of a scoop battery charger, in the crosscut between the 3rd and 4th entry, did not constitute a violation of section 75.500(d), I find that a penalty of $500 is appropriate.

At the hearing, Petitioner indicated that Citation Number 2811667 was vacated by the Mine Safety and Health Administration effective February 27, 1986. Petitioner made a motion that the Notice of Contest, contesting this order, SE 86Ä106ÄR be dismissed. Respondent indicated that it did not have any objection. Therefore, the Notice of Contest, SE 86Ä106ÄR is DISMISSED.

At the hearing, at the conclusion of the Petitioner's case, Respondent made motion to dismiss. In light of my decision this motion is DENIED.

ORDER

Based on the above findings of fact and conclusions of law, Respondent is ORDERED to pay the sum of $500 within 30 days of the date of this decision as a civil penalty for the violation found wherein.

It is further ORDERED that Respondent's motion to dismiss is DENIED.

It is further ORDERED that the Notice of Contest, SE 86Ä106ÄR, be DISMISSED. It is further ORDERED that the Notice of Contest, SE 86Ä105ÄR be DISMISSED.

Avram Weisberger
Administrative Law Judge