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SOL (MSHA) V. BETH ENERGY MINES
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION, (MSHA),
PETITIONER

v.

BETH ENERGY MINES, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 87-145
A.C. No. 36-00840-03606

Docket No. PENN 87-155
A.C. No. 36-00840-03607

Docket No. PENN 87-188
A.C. No. 36-00840-03612

Docket No. PENN 87-224
A.C. No. 36-00840-03617

Cambria Slope No. 33 Mine

DECISION

Appearances: William T. Salzer, Esq., and Evert VanWijk, Esq.
(on the brief), Office of the Solicitor, U.S. Department
of Labor, Philadelphia,
Pennsylvania for the Secretary of Labor;
R. Henry Moore, Esq., Buchanan Ingersoll Professional
Corporation, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Melick

These cases are before me upon the petitions for civil penalties filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the "Act" charging Beth Energy Mines, Inc., (Beth Energy) with five violations of regulatory standards. The general issues before me are whether Beth Energy violated the cited regulatory standards, and, if so, whether those violations are of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e. whether the violations are "significant and substantial". If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

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Docket Nos. PENN 87A145 and PENN 87A224

At hearing the parties moved to settle Order No. 2691012 proposing a reduction in penalty from \$850 to \$650. Based upon the documentation and representations presented post-hearing I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

Citation No. 2691218 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.1704 and charges as follows:

The intake escapeway for 14 left G. West Mains and G. West Mains left sections was not maintained to insure passage at all times of any person, including disabled persons in that the first overcast in by S.S. 4979 in No. 5 entry of G. West Mains had steps to cross over it and the distance between the steps ranged from 16 inches to 8 inches through which a person could fall also the steps over the 2 overcast where the escapeway crosses from the left side of G. West to the right had spaces between the steps from 4 inches to 11 inches through which a person could fall. These overcast [sic] were from 66 inches to 72 inches high and had 6 or 7 steps each. Also from S.S. 1126 in No. 8 entry through a xcut to No. 9 entry and out by on No. 9 entry to S.S. 1240+50 feet. The travelway had piles of rock at least one-foot high across the escapeway.

Citation No. 2698137 similarly alleges a "significant and substantial" violation of the same regulatory standard and charges as follows:

The alternate escapeway for the E East left, E East right, 4LT E East and 5LT E East which is the left side return of E East is not being maintained to insure passage at all times of any person, including disabled persons. At 3 locations steps were built over overcast and gaped [sic] between the steps up to 9 inches were present that a person or a part of a person could fall through causing injuries in the event of an emergency. The 3 locations are (1) in by overcast in the 2nd set in the return both sets of steps the top set was 9 inches from the top of the overcast (2) in by overcast in the 3rd set in the return both sides steps were gaped [sic] from 4 to inches (3) in by overcast in the 4th set on the return in by side steps had gaps from 4 to 6 inches.

The Secretary maintains that the cited conditions constituted a violation of that part of the standard at 30 C.F.R. 75.1704 which reads as follows

At least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways ... shall be provided from each working section ... and shall be maintained in safe condition.

It is apparent that the language of this standard is expressed in general terms so that it may be adaptable to myriad situations affecting the safety of escapeways. See Kerr-McGee Corp. 3 FMSHRC 2496 (1981). Accordingly questions of liability for alleged violations of this standard must be resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of this standard, would have recognized the hazardous conditions that the standard seeks to prevent. Ozark-Mahoning Co., 8 FMSHRC 190 (1986); Great Western Electric Co., 5 FMSHRC 840 (1983); U.S. Steel Corp., 5 FMSHRC 3 (1983); Alabama By-Products Corp., 4 FMSHRC 2128 (1982). Specifically the maintenance of escapeways in safe condition must be measured against the test of what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard. The Commission has stated that the reasonably prudent person test contemplates an objective, and not subjective, analysis of all surrounding circumstances, factors and considerations bearing on the inquiry at issue. Great Western, supra., 5 FMSHRC at 842-843.

Citation No. 2691218 charges two categories of violation, namely, excess gaps between the steps over the overcasts in the intake escapeway and piles of rocks across the escapeway. The evidence on these issues is essentially undisputed. The first overcast was approximately 66 inches high. The gaps in the steps on one side of this overcast were uniformly 8 inches, except between the top step and the top of the overcast where the horizontal distance between the step and the top of the overcast was 16 inches. This step was level with the top of the overcast. The gaps on the other side of the overcast were nearly of uniform width of between 4 to 6 inches. The second overcast was approximately 72 inches high and the gaps were from 4 to 11 inches. The cited pile of rocks was about one foot high and two to three feet wide and continued across the entry.

The steps cited in Citation No. 2698137 had been in existence for several months to a year. At the second set of overcasts in E East the top step on each side was 9 inches from the overcast. At the third set of overcasts in the alternate escapeway there were gaps of 4 to 6 inches. These sets of overcasts were all approximately 4 1/2 feet high.

The horizontal gaps in the steps in both G West and E East were almost uniformly 4 to 6 inches with the exception of the gap between the top step and the top of the overcast. In three instances this gap exceeded 6 inches but the top step and the top of the overcast were in the same horizontal plane with no vertical rise between the steps. One set of steps had uniform gaps of 8 inches. All of the cited steps were constructed of wood and were six feet wide with treads of uniform width. The backs of the steps were open. The steps in E East had handrails.

MSHA Inspector Gene Ray, who issued these citation, opined that the existence of gaps of varied widths in the steps created a hazard because miners "could very easily not see the hole between the steps and fall into it and get injured." He further described the hazard as follows:

If people had to evacuate these ... sections in an emergency situation, and they would be in a hurry ... they would fall between--that they would slip into one of these gaps, that they could become injured ... they could receive a sprain or a broken leg. Also, in that they would be injured, it would slow them down in the process of evacuating the mine in case of an emergency.

Ray also observed that miners "could trip and injure themselves" over the rock piles while traveling the escapeway in an emergency situation.

Within this framework I conclude that a reasonably prudent person familiar with the factual circumstances surrounding the cited conditions would have recognized that the irregular gaps up to 16 inches wide in the steps over the overcast and the described pile of rocks created hazardous conditions in the escapeways such as to constitute violations of the cited standard.

I also find that the violations were "significant and substantial". The described violations contributed to the discreet safety hazard of tripping or slipping and/or falling through the uneven gaps in the steps and of tripping over the piles of rocks. It is reasonably likely to expect such a hazard to result in injuries such as sprains or fractures and that such injuries would be of a reasonably serious nature. See Mathies Coal Co. 6 FMSHRC 1 (1984). The hazards would also be greatly exarcebated by an evacuation through the cited areas during an emergency.

I find however that the operator is chargeable with but little negligence with respect to the violations charged in Citation No. 2691218. The evidence shows that although some of

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the gaps in the steps had existed for up to ten years and in areas subject to MSHA inspections, no citations or other notice had been given that they constituted violations. Similarly with the respect to the rock piles, Beth Energy is chargeable with but little negligence. There is no evidence to show that Beth Energy officials had prior knowledge of the rocks in an area that is not subject to frequent inspections. However since the violations charged in Citation No. 2698137 were found on June 15, 1987, five months after notice of similar violations in Citation No. 2691218, it is clear that the operator should have corrected the cited conditions. Its failure to have done so constitutes negligence.

Docket No. PENN 87A155

On February 11, 1987, MSHA Inspector William L. Davis issued Citation No. 2691158 pursuant to Section 104(a) of the Act. the citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.202 and charges as follows:

The roof was found to be inadequately supported in that the 6" x 8" x 5p crossbars (2) of them were broke [sic] and several showed signs of excessive weight on them, therefore this entry is not safe for travel by a certified person for weekly examinations. Located in the No. 8 entry between the second and third crosscut in by survey station No. 7226 of the No. 10 entry of the F West Mains.

The citation was issued following an inspection of the F West Mains area by Inspector Davis and Foreman Roger McIntosh on February 11, 1988. The F West area was an inactive area where mining had not occurred for several years. The only persons who regularly entered the subject area were mine examiners who perform weekly examinations of the bleeder evaluation points and the return air courses. Such examinations were being made in the Nos. 8, 9, or 10 entries, depending on the condition of the particular entry, and these entries were in common.

The evidence shows that Davis had never previously inspected this area and neither he nor McIntosh knew the precise route followed by the mine examiner who traveled these entries. While Davis first testified that they were able to follow the precise route of the mine examiner by tracking footsteps in the coal dust, he later admitted that the footprints could have been made years earlier when the section was active.

Davis testified that he and McIntosh passed through the F West entries until they arrived at spad No. 7145 in the No. 8 entry. Just beyond that point, he noticed that 2 crossbars used

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for roof support were broken. Davis and McIntosh then turned left in a crosscut and proceeded to the No. 9 entry. They looked down the No. 9 entry and observed that the bottom was heaved and there was roof pressure in the No. 9 entry beyond where they were standing. Davis thought it was not feasible to travel in the No. 9 entry so they traveled to the No. 10 entry and apparently proceeded down the No. 10 entry.

According to Davis, the citation was abated by marking a route of travel in the No. 8 entry between a row of timbers and the right hand rib. In issuing the citation, the inspector assumed that the mine examiner was traveling under the bad roof in the No. 8 entry but had no idea which entry the mine examiner actually traveled.

Ralph Keefe, a union mine examiner, testified that he made the weekly examination the week before the subject citation and had regularly made such examinations. His normal route of travel was to proceed down the No. 8 entry to spad 7145. Keefe would then turn left (as Inspector Davis did) and travel over one crosscut to the No. 9 entry. He would turn right down the No. 9 entry and travel two crosscuts. According to Keefe he would then turn right and travel in a crosscut back to the No. 8 entry thus avoiding all of the dangerous areas in the entries (See Exhibit RÄ2). He would then turn left through a crosscut to the No. 10 entry and travel three crosscuts in the No. 10 entry because of the fall in the No. 9 entry.

The route avoided bad roof in the No. 8 entry beyond spad 7145, it avoided bad roof beyond the crosscut where the examiner turned from the No. 9 to the No. 10 entry and it avoided the bad roof behind the area where the examiner entered the No. 10 entry. Keefe specifically testified that he did not travel under the cited bad roof in the No. 8 entry when making his weekly examination of the F West returns. He had been making examinations in this area for a year and a half before the citation and was aware of this area of bad roof. According to Keefe the route had also been marked so that the cited area in the No. 8 entry could be avoided.

I find the testimony of Keefe to be entitled to significant weight as he clearly was the person most knowledgeable about the cited area, having been the mine examiner for the previous year and a half, and was the only witness having first hand knowledge of the actual route traveled during the mine examinations. On the other hand Inspector Davis was clearly not familiar with the cited area and was inspecting it for the first time. Moreover Davis did not question the mine examiner to determine the route he traveled or avail himself of the opportunity to accompany the examiner along his regular route. Davis also acknowledged that

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it was difficult, it not impossible, because of the condition of the mine floor, to otherwise determine which path was followed by the mine examiner. Under the circumstances he could only speculate as to the route traveled. Davis also contradicted himself in a critical respect by first stating that bad roof prevented all passage in the No. 10 entry but later admitting that there was no area of bad roof along the route Keefe followed in the No. 10 entry.

Under the circumstances I do not find that the Secretary has sustained her burden of proving that a violation has occurred herein. Accordingly Citation No. 2691158 is vacated.

Docket No. PENN 87A188

Citation No. 2691708 alleges a violation of the regulatory standard at 30 C.F.R. 75.1707 and charges as follows:

The isolated intake air escapeway, designated as such by the operator (no. 2 entry) and the "D" East Mains trolley haulage (no. 3 entry) were not separated. This area was developed after March 30, 1970 and this isolated escapeway is used by the 6 left active working section. The first crosscut between no. 2 and no. 3 entries inby survey station no. 5074 was open and air was passing from no. 3 entry into no. 2 entry. The air is in common at the first crosscut inby survey station no. 5074 and also for two crosscuts outby this area where the intake air and escapeway goes into the 6 left working section; however, the air traveling in towards the 6 left section was splitting at the mouth of this section with a small amount of air going inby in the no. 2 entry. The air passing inby in no. 2 entry is preventing the track/trolley air from entering 6 left section at this time.

The cited standard provides as relevant hereto that "the escapeway required by this section to be ventilated with intake air shall be separated from the belt in trolley haulage entries of the mine for the entire length of such entries to the beginning of the working section ..." The term "working section" is defined in the regulations as all areas of a coal mine from the loading point of the section to and including the working face. See 30 C.F.R. 75.2(g)(3). In this case it is not disputed that the belt tail would be considered the loading point.

The Secretary argues that although the intake escapeway "curls" around in a "horseshoe" away from the working face, from the loading point to the faces would nevertheless be inby

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and everything from the loading point in the other direction and, implicitly, doubling back, would be outby. MSHA Inspector Ronald Miller's testimony in this regard is not disputed. Accordingly, from the reference point at the belt tail of the 6 left section "any point traveling out the belt entry would be therefore outby". Under the circumstances it is clear that under the cited standard the operator was required to maintain a separation between the intake air and the trolley haulage entry in the cited areas.

Beth Energy maintains that it did provide such separation without permanent stoppings by use of a pressure differential. However the persuasive evidence in this case through the testimony of MSHA's expert witnesses is that pressure separation alone is not sufficient under the cited standard unless a specific exception is granted under the regulation or under the procedure for the approval of ventilation plans. According to Inspector Miller the "separation" that is required by industry standards is a physical barrier or stopping.

According to MSHA ventilation specialist Samuel Burnetti, in mines where pressure separation is permitted a physical barrier such as a regulator must also be used in conjunction therewith to provide adequate control. Even Beth Energy Mine foreman Nick Carpinello acknowledged that he would not permit an air pressure differential between an intake escapeway and the track trolley for any of the crosscuts where the two directly parallel each other and that such separation would be in violation of the cited standard. Carpinello also acknowledged that if the air flow in the escapeway should reverse then the air from the track trolley would indeed enter the escapeway. This testimony corroborates that of the MSHA experts supporting the rationale of the regulation to avoid a potential hazard.

Under the circumstances I find that MSHA's construction of the standard to be consistent with accepted industry practice and the "reasonable person" test discussed supra. Under the circumstances the failure of Beth Energy to have erected permanent stoppings as cited constituted a violation of 30 C.F.R. 75.1707

I do not find however that the Secretary has met her burden of proving the necessary probabilities of an occurrence to establish the violation as "significant and substantial". See Mathies Coal Co., supra. The testimony of Burnetti and Miller concerning the potential for an air reversal that could cause track air to flow onto the intake escapeway was speculative and based on presumptions of fact not established in the record. For the same reasons I do not find that the Secretary has proven that the violation was of high gravity.

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I also find that Beth Energy is chargeable but with little negligence in regard to this violation. This finding is based in part on the confusion caused by the unusual "horse-shoe" design of the escapeway. It is also based on the evidence that Beth Energy had previously utilized pressure separation without being cited and that a prior violation had been vacated by MSHA officials on the basis that a separation was in fact being maintained by positive air flow.

In determining appropriate civil penalties in these cases I have also considered that the mine operator is of moderate size and does not have a significant history of violations. I also have taken it into consideration that the violative conditions were abated in a good faith and timely manner.

Accordingly I find that the following civil penalties are appropriate: Docket No. PENN 87Ä145 - Order No. 2691012 (settled) \$650; Citation No. 2691218 \$75. Docket PENN 87Ä155 - Citation No. 2691158 (vacated). Docket No. PENN 87Ä188 - Citation No. 2691708 \$100. Docket No. PENN 87Ä224 - Citation No. 2698137 - \$250.

ORDER

Citation No. 2691158 is vacated. Order No. 2691012 and Citation Nos. 2691218, 2691708 and 2698137 are affirmed and Beth Energy Mines, Inc., is directed to pay civil penalties totalling \$1,075 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
(703) 756Ä6261