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

THE HELEN MINING COMPANY,
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. PENN 88-1-R
Order No. 2881028; 8/31/87

Homer City Mine

CIVIL PENALTY PROCEEDING

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

v.

Docket No. PENN 88-112
A.C. No. 36-00926-03705

Homer City Mine

THE HELEN MINING COMPANY,
RESPONDENT

DECISION

Appearances: Joseph Crawford, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Secretary of Labor
(Secretary); Ronald B. Johnson, Esq., Volk,
Frankovitch, Anetakis, Recht, Robertson &
Hellestedt, Wheeling, West Virginia, for The Helen
Mining Company (Helen).

Before: Judge Broderick

STATEMENT OF THE CASE

Helen contests a withdrawal order issued under section 104(d)(2) of the Act on August 31, 1987, alleging a violation of 30 C.F.R. 75.503. The Secretary seeks a civil penalty for the violation alleged in the contested order. The two proceedings were ordered consolidated for the purposes of hearing and decision. Pursuant to notice, the consolidated cases were heard in Pittsburgh, Pennsylvania on August 16, 1988. Thomas Whitehair, Ronald Lee Rhodes and William D. Sparvieri testified on behalf of the Secretary. Joseph Lewis Dunn and Wayne Fink testified on behalf of Helen. Both parties were given the opportunity to file posthearing briefs. Counsel for Helen filed a brief; counsel for the Secretary did not. I have considered

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the entire record and the contentions of the parties, and make the following decision.

ISSUES

1. The basic issue in this proceeding is a factual one: was the pump switchbox cited on August 31, 1987 - admittedly nonpermissible - in return or intake air? If it was in return air, a violation is established; if in intake air, a violation is not established.

2. If a violation is established, was it significant and substantial?

3. If a violation is established, what is the appropriate penalty?

FINDINGS OF FACT

At all times pertinent to this proceeding, The Helen Mining Company was the owner and operator of an underground coal mine in Indiana County, Pennsylvania, known as the Homer City Mine. Helen produced over three million tons of coal annually, of which 800,000 tons were produced at the subject mine. The record does not contain any evidence respecting Helen's history of previous violations. Therefore, I assume that it had a favorable history. The subject mine is a gassy mine and liberates more than two million cubic feet of methane in a 24 hour period.

On August 31, 1987, Federal mine inspector Wayne Burkey and inspector trainee Thomas Whitehair conducted a regular ("AAA") inspection at the subject mine. They entered the mine with Dale Montgomery, a company safety representative and Ron Rhodes, a union safety committeeman. At one point during the inspection, the inspection party split up, with Whitehair and Rhodes proceeding to what they believed was a return aircourse off the Burrell Mains track. They observed company fireboss Wayne Fink apparently monitoring a pump for methane. Fink testified that in fact he was taking a methane reading at the intake evaluation point at the water's edge. Whitehair saw that the switchbox was not enclosed and asked Fink if he knew that this was a nonpermissible switchbox in return air. Fink admitted it, and said that was why he was there, monitoring the methane. Inspector-trainee Whitehair went to find Inspector Burkey, and returned with Burkey and Montgomery to the switch. Burkey issued the 104(d)(2) order contested herein, and said he wanted power removed from the pump. Neither Montgomery nor Fink at that time, or afterwards when the order was discussed outside, claimed that the pump was not in return air. None of the members of the inspection party conducted any test to determine the direction of

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the airflow. It was apparently assumed by all that the area was in return air.

The map filed by Helen with MSHA as part of its ventilation plan on January 16, 1987, and approved on January 29, 1987, showed the area in question to be in return air. There is a dispute in the testimony as to the location of pump with reference to this map. Although it is not decisive, I accept the testimony of Joseph Dunn, Helen's General Mine foreman, as to the location of the pump. (Inspector Whitehair located the pump and switchbox at areas marked in red "Y" and "P" on page 3 of Government's Exhibit 1; Mr. Dunn stated that they were located at the point marked in blue "X" on the same document. Both these areas were, according to the map, in return air. Both were, in fact, according to Dunn, in intake air).

On the day following the issuance of the order, Mr. Dunn went to the area involved and performed a smoke tube test which showed that the split was intake and not mixed with return air. Mr. Dunn stated that this area had always been in intake air. He testified that the map submitted with the ventilation update omitted a wall, and mistakenly showed an area to the left of the Burrell Mains area as being in return air (double arrows on the map). In fact, Dunn testified, it was in intake air from the split in the old face area. The air does not pass any working faces or ventilate any gob area; it does not mix with any return air. Dunn stated that this was a mistake on the part of the engineers who prepared the map, and of Dunn who reviewed it. Mr. Dunn's testimony on the basic factual issue was consistent and convincing. Largely on the basis of his testimony, I find as a fact that the cited pump switchbox was on August 31, 1987, located in intake air.

REGULATION

30 C.F.R. 75.507Å1(a) provides in part:

All electrical equipment, other than power-connection points, used in return air outby the last open crosscut in any coal mine shall be permissible . . .

CONCLUSIONS OF LAW

Helen Mining Company is subject to the provisions of the Mine Act in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding. The nonpermissible pump switchbox cited in order 2881028 on August 31, 1987, was located in an intake aircourse. Therefore, a violation of 30 C.F.R. 75.507Å1(a) has not been established.

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ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order No. 2881028 issued on August 31, 1987, under section 104(d)(2) of the Act is VACATED. The contest is GRANTED.

2. The Secretary has failed to establish a violation of the mandatory standard alleged and her petition for civil penalty is DISMISSED.

James A. Broderick
Administrative Law Judge