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

ROCHESTER & PITTSBURGH COAL
COMPANY,

CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. PENN 88-164-R
Citation No. 2879230; 3/7/88

Greenwich Collieries No. 2
Mine
Mine ID 36-02404

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

CIVIL PENALTY PROCEEDING

Docket No. PENN 88-288
A. C. No. 36-02404-03723

v.

Greenwich Collieries No. 2 Mine

ROCHESTER & PITTSBURGH COAL
COMPANY,

RESPONDENT

DECISION

Appearances: Joseph A. Yuhas, Esq., Rochester & Pittsburgh Coal
Company, Ebensburg, Pennsylvania, for the Operator;
U. S. Department of Labor, Philadelphia,
Pennsylvania, for the Secretary.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases the Secretary (Petitioner) seeks a civil penalty for alleged violations by the Operator (Respondent) of 30 C.F.R. 75.301, and the Respondent has contested the violation, and alleges that the underlined citation be vacated. Subsequent to notice, these cases were scheduled and heard on March 1, 1989, in Bellefonte, Pennsylvania. At the hearing, Samuel J. Brunatti and James E. Biesinger testified for the Petitioner, and Mike A. Ondecko testified for Respondent. The Petitioner filed Proposed Findings of Fact and Supporting Memorandum on June 21, 1989, and Respondent filed a Post-Hearing Brief on June 20, 1989.

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On June 21, 1989, Petitioner filed a Motion to Amend the Transcript. This Motion was not opposed and it is GRANTED.

Stipulations

The Parties have agreed to the following stipulations:

1. Greenwich Collieries is owned by Pennsylvania Mines Corporation, and managed by Respondent, Rochester and Pittsburgh Coal Company.

2. Greenwich Collieries is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject citation was properly served, by a duly authorized representative of the Secretary of Labor, upon an agent of the Respondent at the dates, times, and places stated herein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

5. The Respondent demonstrated good faith in the abatement of the citation.

6. The assessment of a civil penalty in this proceeding will not affect Respondent's ability to continue in business.

7. The appropriateness of the penalty, if any, to the size of the coal operator's business, should be based on the fact that:

a. The Respondent company's annual production tonnage is 10,554,743.

b. The Greenwich Collieries No. 2 Mine's annual production tonnage is 1,195,419.

8. That Greenwich Collieries No. 2 mine was assessed 1,013 violations over 1,053 inspection days during the 24 months preceding the issuance of the subject violation.

9. The Parties stipulate to the authenticity of their exhibits, but not their relevance, nor to the truth of the matters asserted therein.

10. On March 7, 1988, MSHA Inspector Samuel J. Brunatti took air bottle samples at bleeder evaluation point No. 35, and at a crosscut outby bleeder evaluation point No. 35 at Greenwich Collieries No. 2 Mine.

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11. On March 30, 1988, MSHA Inspector, Nevin J. Davis took air bottle samples at bleeder evaluation point Nos. 4, 16, 17, and 19 at Greenwich Collieries No. 2 Mine.

12. The air samples taken by Inspectors Brunatti and Davis were analyzed at the MSHA Laboratories at Mt. Hope, West Virginia.

13. The Parties stipulate to the following with respect to the analyses of the air samples at the MSHA Laboratories:

a. The analyses were in accordance with proper scientific protocol.

b. The samples were not altered in any way from the times they were taken through the end of their analyses.

c. The results obtained accurately reflect the volume per centum of carbon dioxide in the air at the respective sampling locations on March 7 and 30, 1988.

14. The Parties stipulate to the authenticity and admissibility of the two documents entitled Table-1 Analyses of Air Bottle Samples collected on March 7, 1988, and Table-1 Analyses of Air Bottle Samples collected on March 30, 1988.

Findings of Fact and Discussion

On March 7, 1988, air bottle samples taken by MSHA Inspector Samuel J. Brunatti at bleeder evaluation point No. 35, at a cross-cut at approximately 20 to 30 feet outby bleeder evaluation point No. 35, bleeder evaluation point No. 17, and bleeder evaluation point No. 19, all revealed carbon dioxide levels in excess of the maximum of 0.5 volume percent permitted by 30 C.F.R. 75.301. The critical issue presented before me is whether 75.301, supra, is applicable to the cases at bar.

30 C.F.R. 75.301, is applicable to "all active workings." Petitioner makes reference to 30 C.F.R. 75.2, which, for purposes of part 75 of 30 C.F.R., defines "active workings," as . . . "any place in a coal mine where miners are normally required to work or travel." In this connection, Petitioner, in arguing that the cited areas were active workings, refers to stipulation No. 16, which indicates that the evaluation points in question were examined weekly by a certified person in accordance with 30 C.F.R. 75.305 and 75.316. Petitioner further refers to the opinion of Brunatti and James Biesinger, an MSHA Supervisory Inspector, that in certain circumstances, an operator may need to monitor bleeder evaluation points more frequently than once a

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week, sometimes even continuously. In addition, Petitioner refers to the testimony of its witnesses that, if in the area water accumulates or the roof deteriorates or the wall crushes, conditions termed by Brunatti to be not unusual to Respondent's method of extracting coal by retraction, workers would have to travel to the areas in question to repair these conditions. Also, Brunatti indicated that on quarterly and 103(i) spot inspections, inspectors are accompanied by miners who are Union Representatives, and might also be accompanied by miners who are company representatives. As such, Petitioner contends that miners are required to travel and work in the cited areas and hence these areas should be considered "active workings," and be subject to the terms of 75.301, supra. For the reasons that follow, I do not find merit in Petitioner's arguments.

I find, based on Brunatti's testimony and the ventilation map (Exhibit J-2B), that air coming off the gob goes outby down a bleeder entry to the various bleeder evaluation points. The air in this entry then continues outby the gob until it meets and mixes with the return air that has flowed into this entry. The entries in which the bleeder evaluation points were located are perpendicular to the return entries, and appear to deliver air from the gob to the return air entries. Thus these entries, at least until the bleeder evaluation points, are to be considered bleeder entries within the purview of 30 C.F.R. 75.316-2(e)(1) which defines bleeder entries as ". . . special air courses developed and maintained as part of a mine ventilation system and designed to continuously move air-methane mixtures from the gob, away from active workings, and deliver such mixtures to the mine return air courses." Indeed, Brunatti indicated on cross-examination that the bleeder evaluation point No. 35 was in the bleeder entry. It would appear that this comment would also be appropriate to the other bleeder evaluation points in issue, as they are part of the same ventilation scheme.

Brunatti indicated that the area from which he took the sample from outby bleeder evaluation point No. 35, was not in a bleeder entry. However, he indicated that this site was the mixing point between air coming off the gob and air entering from the return entries. As such, it would appear that this testing point is to be considered part of the bleeder system within the purview of 30 C.F.R. 75.316-2(e)(2) which, in essence, includes in the bleeder system any combination of bleeder entries and bleeder entry connections ". . . to any area from which pillars are wholly or partially extracted" Section 75.316-2(e)(2), supra, continues to provide that the bleeder systems extend ". . . to the intersection of the bleeder split with any other split of air." Accordingly, I conclude that both the bleeder evaluation points and the area tested by Brunatti

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20 to 30 feet outby bleeder evaluation point No. 35, are all part of the bleeder system. Inasmuch as I have found the bleeder evaluation points and the other area tested by Brunatti to be part of the bleeder system, I must conclude that they are not active workings, as section 75.316-2(e)(2) indicates that the bleeder systems ". . . shall not include active workings."

In U.S. Steel Corporation 6 FMSHRC 291 (1984), Judge Koutras was presented with the issue as to whether carbon dioxide readings in excess of .5 percent taken at a bleeder evaluation point, were violative of section 75.301, supra. Judge Koutras, at 307, supra, concluded that Contestant's argument was sound and logical that ". . . when read together with the other standards found in part 75, a bleeder entry is not active workings" Further, Judge Koutras found, in essence, the fact that a certified examiner must travel to the bleeder evaluation points once a week to make an inspection, does not place these points within the purview of section 75.301, supra. I believe that Judge Koutras' decision is well founded and choose to follow it.

Petitioner's witnesses testified that it would not be unusual for conditions to occur in the bleeder entries requiring miners to enter those entries to perform the repair work. In the absence of evidence as to the specific practice of Respondent, in the sections at issue, in requiring miners to work in the areas in question, I find the testimony to be insufficient to establish that miners are "normally" required to work or travel in those areas. (c.f. Secretary v. Jones and Laughlin Steel Corporation 8 FMSHRC 1058, 1063-1064 (1986)).

Therefore, based upon all of the above, I conclude that the location at which the samples in question were taken were not active workings, and as such are not within the purview of section 75.301, supra.(FOOTNOTE 1) Accordingly, it has not been established that section 75.301, supra, has been violated by Respondent herein.

