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SOL (MSHA) V. CYPRUS EMPIRE
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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	CIVIL PENALTY PROCEEDING Docket No. WEST 88-206 A.C. No. 05-01370-03573
v.	Eagle No. 5 Mine
CYPRUS EMPIRE CORPORATION, RESPONDENT	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Michael S. Beaver, Esq., Holland & Hart, Englewood, Colorado, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent with violating a safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., (the "Act").

After notice to the parties a hearing on the merits was held in Steamboat Springs, Colorado on July 26, 1989.

The parties waived receipt of the transcript and waived the filing of post-trial briefs. They also submitted the issues on oral argument and requested an expedited decision.

Summary of the Case

Citation No. 2504948 charges respondent with violating 30 C.F.R. 75.316, which provides as follows:

75.316 Ventilation system and methane and dust control plan [Statutory Provisions]

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be

> adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

Citation No. 2504948 states as follows:

> The ventilation system and methane and dust control plan was not being complied with in that the setup entry at 16 East - longwall did not have enough air movement to turn the anemometer to take a reading. A smoke tube was used and the smoke just went up to the roof and spread in all directions. Visability (sic) was restricted because of the diesel equipment that was being used in the intake entry. The plan requires 200 FPM at Shield #10.

Stipulation

At the hearing the parties stipulated as follows:

1. The Commission and the Administrative Law Judge have jurisdiction to hear and determine this matter.

2. Citation No. 2854948 was properly issued and served on respondent.

3. Respondent's history is shown by the computer printout which can be received in evidence (Exhibit P-1).

4. The penalty as proposed is appropriate and such a penalty will not hinder the ability of the operator to continue in business.

5. The parties agree on the authenticity of exhibits submitted by both parties.

6. The photographs received in evidence in the case are for illustrative purposes.

Issues

The principal issues are whether the presence of 10 percent of the shields needed to mine coal and one-half of a pan-line cause a setup entry to be a "working face" within the meaning of 30 C.F.R. 75.316.

Summary of the Testimony

ERNEST L. MONTOYA of Craig, Colorado has been a coal mine inspector for 11 years. He is experienced in mining, safety and ventilation.

Eagle No. 5 is an underground coal mine 8 miles south of Craig, Colorado. Inspector Montoya has inspected this particular mine from 1 to 3 years.

On December 10, 1987, Inspector Montoya arrived at the company site and contacted company representatives. He was accompanied by Robert Stolter of the safety department when he went underground.

When the inspector arrived in the 16 East Longwall section of the mine, he observed that the entry was foggy. He could also see a welding flash and an accumulation of welding smoke. These conditions caused him to believe that the ventilation was not good. At the time there were 6 to 8 miners in the entry.

Inspector Montoya drew Exhibit P-2. The exhibit shows the intake entry (at the left), the "setup entry" (at the top) and the return entry (on the right side of the exhibit).

After he observed the conditions in the entry the inspector used an anemometer to determine the flow of the air. But the blades would not turn. By using a smoke tube he then put a puff of smoke into the air. He observed the air go into the tailgate and spread in all directions. Due to these conditions he concluded that there was insufficient air in the entry. However, there were times when there was air movement in this entry. Such movement occurred when the diesel equipment went into the entry. However, at that time the air velocity was between 30 to 80 CFM. (The witness marked an x on the left side of Exhibit P-2 showing where the diesel equipment would enter the area; he further marked an xx on the right side of Exhibit P-2 indicating where the equipment would exit the area.)

Inspector Montoya stayed on the site until about 5 or 6 p.m.; he terminated the citation when the second shift came to work.

On Exhibit 2 witness Montoya marked the air direction with double arrows in red. He also marked the direction of the return air.

There were no curtains directing the air into the setup entry. Two curtains kept the air from entering the bleeder entry; the net result was to direct the air into the setup entry.

Mr. Montoya and two management representatives reviewed the company's ventilation plan. The ventilation plan (Exhibit P-3) applies to the 16 east section. The ventilation plan provides in part that "the minimum quantity reaching the intake end of the longwall face shall be 40,000 CFM" (Paragraph 1 of Exhibit P-3). Further, paragraph 3 of the ventilation plan provides that the minimal velocity of air maintained across the longwall face shall be 200 feet/min. at shield No. 10 (on the intake side) and 100 feet/min. at shield No. 115 (on the return side).

It was the inspector's view that the setup entry did not have 200 feet per minute of air, which is a requirement of the ventilation plan.

The crux of the Secretary's case: the ventilation plan refers to the longwall face; the setup entry cited by the inspector is the same as the longwall face (Exhibit P-6).

The inspector took 25 to 30 readings in the area but he did not record them each time.

Mr. Cobb, the company's fire boss was present and he also took readings. Cobb stated to the inspector that he could not observe any readings because there was no air and they discussed the lack of air movement.

In the inspector's opinion, Citation No. 2504948 was an S&S violation.

The hazard from the described condition is that a miner will breath air containing carbon monoxide from the diesel equipment and he would also breath welding fumes. These contaminants can cause cancer in the long term.

There were miners working in the setup entry when Mr. Montoya took his readings and there were workers continually moving in and out of the entry.

An anemometer measures cubic feet of air per minute. Witness Montoya discussed how the flow of air is calculated. Measurements that were taken when the anemometer would turn would indicate an average flow of 3200 CFM.

It was the inspector's opinion that when the very first piece of equipment goes into the setup entry the area becomes a longwall face.

Along the longwall is equipment called the pan-line. It contains the electrical wiring, the chain conveyor and related equipment. The pan-line when in operation also conveys coal from the face and it is located ahead of the shields. The pan-line itself was 250 to 300 feet in length (about half of the length when the pan-line is in operation).

The setup entry is the same as the setup room and it measures 22 to 25 feet wide. This is wider than a normal entry. The setup entry is used to set up equipment but actual mining does not take place in the entry.

At the time this citation was issued active mining was taking place in the 17 east intake entry. (It is apparent that the active mining was taking place at some place other than where this citation was issued.)

The company was also developing the No. 6 mine located underneath Eagle No. 5 mine. There was at least one worker present in the setup entry at all times while the inspector was in the area.

Shields used in mining can be raised up to 12 feet high and they are 4 1/2 to 5 feet wide. When all shields are in place the mining then proceeds. The normal longwall face consists of 130 to 140 shields. The top of the shield defines the roof. The floor is coal; the backwall is the shield and at the front of the shield is the coal face.

At the time of the inspection there were 8 to 14 shields in the setup entry. These was about 10 percent of the shields that would be needed before any mining could commence.

The shields are moved into the setup entry one at a time. It would take about 28 additional days to move all of the shields into position. The operator had just started the process of moving the shields.

When it is set up, the pan-line is some 600 feet long; at the time of the inspection about 300 feet of the pan-line was in place. It would have taken the operator an additional 3 weeks to set up the balance of the pan-line. The shield was not in place and the mining equipment was not energized. No mining could take place in this area until the drums are installed and energized and the shields are in place.

Workers were using diesel equipment to set up the mining equipment. The presence of such diesel equipment in the setup entry affects and partly blocks the entry. The cooling fans on the diesel equipment will affect the air in the entry.

Company representative Stolter did not complain when Inspector Montoya took readings next to a piece of diesel equipment. Cobb's reading shows there was no carbon monoxide present but at that time the foggy area had cleared up. From everything that could be seen the inspector concluded that the carbon monoxide was within the limits of the applicable regulation. No respirable dust measurements were taken.

Inspector Montoya reiterates his opinion: in this section of the mine there was a lack of air or, as he described, "no air."

Measurements by Cyprus were consistent with the inspector's readings and a couple of times Cobb took readings that were 1,000 to 1,200 CFM in excess of the inspector's readings.

Towards the end of the shift Cobb had readings of 1,000 to 1,500 more CFM than Inspector Montoya would measure.

Montoya was with company representative Pike when Pike took a measurement in excess of 50,000 CFM on the intake end of the longwall face. The inspector agreed at the hearing that there was plenty of air on the intake roadway where Pike had taken his measurements.

If there is no ventilation plan in effect, MSHA regulations provide for a minimum airflow but the company was not cited for such a violation.

The minimum MSHA requirements apply if there is no ventilation plan and miners are present in the area.

An MMU (mechanized mining unit) is identified by an MSHA I.D. number.

The ventilation plan (Exhibit P-3) follows this particular longwall section. (The idea is the MMU number stays the same regardless of the location of the equipment.)

MSHA requires that ventilation be directed at active mining areas. The purpose of the ventilation plan is to provide sufficient air for miners.

A "working section" to Inspector Montoya means the presence of miners working on equipment in a setup entry.

The setup entry itself is cut with a continuous miner. When it is being cut, a continuous miner ventilation plan would apply. Once the company starts to move mining equipment into the entry, then the longwall ventilation requirements apply. The continuous miner plan requires a lower air movement.

The longwall and the shear both carry the same MMU number. If the section does not have an MMU number designation the ventilation plan would apply.

The inspector obtained no anemometer readings at all. However, there were times when he had 2,000 to 3,000 CFM. These readings would last for 5 minutes then go to zero.

Respondent's Evidence

ROSS STOLTER is a safety director for respondent. His responsibilities include inspections, test devices, and workman's compensation. He also oversees the safety department.

On the date of this inspection he accompanied Inspector Montoya and was present when the air measurements were taken. They initially went to the take-down room where most of the shields (115 to 120) were located.

When they arrived at the setup room there were two mechanics and a maintenance foreman present. The purpose of the setup entry is to set up the mining equipment. The entry is 26 feet wide and it can be as wide as 28 feet. A regular entry is 18 feet wide but it will not exceed 20 feet.

The common air comes into this area on the left-hand side of Exhibit P-2 and the air is then split into three entries.

There were a few shields in the setup room. The back of the shields make up the back wall. It is not over 15 feet from the longwall face to the back of the shields. (The witness illustrated his testimony on a blackboard).

The shields themselves were not in place at the time of this inspection. The company could not mine coal until the shields were situated. The company was at least 14 days from mining any coal. All equipment must be totally installed before coal mining can begin.

Diesel equipment moves the shields into the setup area. In addition, the pan-line is moved into the area in 15 foot sections.

Inspector Montoya took readings near the scoop. The scoop fan blew air against the normal flow of air into the entry. In effect the scoop was creating resistance to the normal airflow. This phenomena only occurs during setup and take-down procedures.

The inspector concentrated his measurements near the headgate area. The witness did not recall how many times the inspector took air measurements. Low air movements were recorded near the scoop.

Company representative Pike also took measurements at the intake and the longwall face. These measurements indicated an airflow of 55,400 CFM.

At the time of the inspection, Shield No. 10 and Shield No. 115 had not been moved into the setup entry.

The entry behind the setup entry is the one that Mr. Montoya referred to as a bleeder entry.

During the set up it is not possible to seal off the bleeder entry because that entry must be used by the equipment and because the setup entry was blocked by the shields. The shields increase the velocity of the air.

The ventilation plan was submitted to MSHA and it was intended that it would be applicable when there was active cutting of the coal.

During the inspection the witness took carbon monoxide measurements which measured less than 10 PPM. The threshold limit is 50 PPM. Mr. Montoya took no dust samples.

Mr. Stolter and Mr. Pike also took measurements. There were fluctuations in the airflow depending on the diesel equipment that was checked.

After Mr. Montoya took measurements showing insufficient air, he asked for the ventilation plan and threatened the company with a (d) order. He also stated he wanted 30,000 to 35,000 CFM before he would abate the citation. He also wanted the company to change the ventilation. Stolter did not have the authority for such a change so he contacted Jim Pike, the company's foreman.

When there was no diesel equipment in the setup entry the airflow was 31,000 CFM but that was insufficient because it was not constant. Inspector Montoya believed it to be insufficient.

Mr. Montoya does not understand the delicate nature of the ventilation of the mine; further, Mr. Stolter did not have the authority to change the ventilation. Such change could affect and heat the gob.

At the time the company was under an MSHA (k) order due to a previous fire. The (k) order had critical restrictions and because of this the company could not randomly move the ventilation.

Regarding the MMU number: After the longwall was finished the company would send a letter to MSHA deactivating the MMU. It would then be reactivated when the company cut coal again. When this citation was issued the MMU unit was not active and MSHA had been so advised.

At the time of the inspection there were some shields in place and there was a pan-line about half way down the entry.

Mr. Stolter did not know how many times Inspector Montoya had taken air samples and he didn't recall the number of measurements that he had taken himself. It was somewhere between ten and twenty measurements. Montoya took measurements on both sides of the shields.

Also measurements were taken throughout the area but most of them at the tailgate side in the entry.

Mr. Stolter used an anemometer and the smoke tube; CFM can be determined with an anemometer.

Mr. Stolter did not take any readings near zero and he was present when Mr. Cobb, the fire boss, was in the area. He agreed that there was little air movement when Mr. Montoya took his readings.

Between 6:30 p.m. and 7:30 p.m. there was more active air movement.

In order to attain an airflow of 200 feet per minute at a given point you would need 49,400 CFM. The witness did not know what it would take to establish a 200 feet/min. airflow with 3 shields in the setup entry but it would be something less than 49,400 CFM. The ventilation plan also serves to control methane.

State law requires that the company maintain a certain amount of air.

A working section is defined in the regulations as being where coal is extracted and loaded out.

The ventilation plan goes into effect when the shear goes into operation. Less than 10 percent of the shields were in place and most of Mr. Montoya's measurements were taken in the middle of the face.

During the continuous miner operation the company transports materials such as roof bolts into the section.

CLIFFORD J. PIKE, General Mine Foreman, is a person experienced in mining and he is responsible for the enforcement of the company's ventilation plan.

On December 10, 1987, he made the plan available to Mr. Montoya and Mr. Stolter. He measured the air in the intake entry at 53,000 CFM. He was also present during the rest of the inspection. He let Mr. Cobb do most of the air readings. While measurements were being taken he was concerned with directing into the area the amount of air that Inspector Montoya wanted. He felt the company had a sponton(FOOTNOTE 1) problem.

It is the witness' policy that he tries to make MSHA happy whether they are right or wrong. But to him there was nothing in this section that indicated a lack of air movement. However, the company did not delay and tried to get Mr. Montoya what he requested. However, the witness had to make sure that ventilation changes did not cause detrimental things to happen elsewhere in the mine. In addition to putting more air into the setup entry, he put up a directional air current that did not cause any emissions problem in the area.

By way of illustration Mr. Pike indicated that if one were to place an anemometer at a window, he would get a certain CFM airflow. On the other hand, if you take the same anemometer and place it in the corner of a room, you would get a lower airflow. In his opinion, the flow of air is similar to the flow of water. The CFM remains the same. In short, the measurements should be on the intake side and the return side.

The witness agrees he took a few readings in the setup entry and found very little movement on the anemometer. However, velocity does not have to be constant. Mr. Pike took measurements at the mouth of the section and the measurements measured 78,000 CFM. At the end of the section the second reading indicated a flow in excess of 50,000 CFM but these measurements were not taken in the setup entry.

In the witness' opinion the amount of airflow required by the ventilation plan would not apply to the setup entry. Other portions of the law would apply such as the required concentration of oxygen or a perceptible movement of air.

Concerning scoops that might be in the area: airflow is required by the ventilation plan at half of the nameplate of the braking power. Some machines go to 7,000 to 9,000 CFM. The witness did not see any dust in the air but there was smoke. That is common to diesel and welding activity.

When the witness examined for air he didn't see any dust in the area but there was smoke. This is common to diesel and welding activity.

Evaluation of the Evidence

A credibility issue arises in this case as to the airflow in the setup entry. Inspector Montoya indicated that the airflow was so minimal that the anemometer would not turn. He then used a smoke tube. These two factors establish a lack of air movement in the setup entry. The operator's witnesses essentially concede the above condition in the setup entry.

On the other hand, measurements taken by company representatives on the intake side and return entry side indicate a sufficient airflow. The inspector does not dispute that there was sufficient air at these places.

However, the pivotal issue in this case is whether the operator violated the ventilation plan. The ventilation plan mandates the quantity and velocity of air reaching each working face.

The ventilation plan, as evidenced by Exhibit P-3, requires a minimum quantity of air reaching the intake end of the longwall face to be 40,000 CFM. Further, the minimum velocity of air maintained across the longwall face shall be 200 feet/min. at Shield No. 10 (intake side) and 100 feet/min. at Shield No. 115 (return side). The pivotal issue in turn requires a definition of what constitutes a working face.

MSHA believes that the term "working face" is to be read broadly, that any time there is some work which is the beginning of activity which will result in the extraction of coal, then the ventilation plan is in effect.

I disagree. The evidence here is uncontroverted that the pan-line and shields were not in place and they are necessary predicates to establish a working face. Obviously no coal was being produced.

Respondent argues that this case is controlled by the Secretary's own definitions as contained in 30 CFR 75.12(g)(3) and 75.2(g)(1).

30 CFR 75.2(g)(1) provides as follows:

> "Working face" means any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed and during the mining cycle.

30 CFR 75.12(g)(3) provides as follows:

> "Working section" means all areas of the coal mine from the loading point of the section to and including the working faces."

The facts involved in this case fail to fall within either of MSHA's definitions. A working face, in part, is where "work of extracting coal from its natural deposit in the earth is performed".

It is apparent on the uncontroverted evidence that no such work as comtemplated by the regulation was performed. No coal was extracted from its natural deposit in the earth. The only work being performed was the work preparatory to the actual extraction of coal. Nor was there a mining cycle. To like effect

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see the decision of Commission Judge Roy Maurer in BethEnergy Mines, Inc., 10 FMSHRC 224 (1988). (Pending on review.)

The Secretary also relies on the velocity of air required by the ventilation plan at shield No. 10 and No. 115. However, it is uncontroverted that these shields were not in the entry when the citation was issued.

In sum, the setup entry was not a working face and 30 C.F.R. 75.316 is not applicable

It follows that the Secretary has not established a violation of the ventilation plan. It accordingly follows that Citation No. 2504948 should be vacated.

At the conclusion of the hearing, in her closing argument, the Secretary stated that if the ventilation plan is not applicable then 30 CFR 75.301 applies and the court should rely on that section to establish a violation.

The Secretary did not move to amend her complaint. Further, the Secretary's "suggestion" was not timely made.

ORDER

For the foregoing reasons the following order is appropriate:

Citation No. 2504948 and all proposed penalties therefor are vacated.

John J. Morris
Administrative Law Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE
1. Spontaneous combustion.