

CCASE:
SOL (MSHA) V. BETH ENERGY MINES
DDATE:
19891017
TTEXT:

~1999

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. PENN 88-304
A. C. No. 36-00958-03739

v.

Livingston Portal Eighty
Four Complex

BETHENERGY MINES INCORPORATED,
RESPONDENT

DECISION

Appearances: Anita Eve, Esq., Office of the Solicitor, U. S.
Department of Labor, Philadelphia, PA, for the
Secretary;
R. Henry Moore, Esq., Buchanan Ingersoll,
Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In this proceeding, the Secretary (Petitioner) seeks a civil penalty for an alleged violation by the Operator (Respondent) of 30 C.F.R. 75.316. A Petition for Assessment of Civil Penalty was filed on September 23, 1988, and Respondent filed its Answer on September 30, 1988. On March 28, 1989, the case was set for hearing on June 21 - 22, 1989. Pursuant to a telephone conference call on April 6, 1989, between the undersigned and attorneys for both Parties, a hearing in this matter was rescheduled for August 1 - 3, 1989.

On April 10, 1989, Petitioner filed a Motion to Reopen Discovery, and on April 12, 1989, Respondent filed its response in opposition. The Motion was granted by Order of April 25, 1989.

Subsequently the case was heard on August 1 - 2, 1989, in Johnstown, Pennsylvania. James High, Alvin Shade, Lorenzo Steele, and Richard Zilka testified for Petitioner. Steve Carson, Bruce Sheets, Thomas Mucho, George Kubar, David Morris, Dale Anders, and Michael Error testified for Respondent.

~2000

The Parties were granted time to file proposed Findings of Fact and Briefs 3 weeks subsequent to the receipt of the Hearing Transcript. The official Transcript was filed on August 17, 1989. Respondent filed its Brief on September 11, 1989. Petitioner was granted an extension until September 20, 1989, to file its Brief, but none was filed.

Stipulations

1. At all times pertinent to these proceedings, Beth Energy Mines, Incorporated was the owner and operator of an underground coal mine known as the Livingston Portal, Eighty-Four Complex located in Washington County, Pennsylvania.

2. Beth Energy's mining operations affect Interstate Commerce.

3. Beth Energy is a large operator and the subject mine is also a large mine.

4. In the 24 months proceeding the issuance of the subject citation there were 1,022 violations cited in the subject mine.

5. The ability of Beth Energy to remain in business will not be affected by the assessment of a penalty in this case.

6. As noted on Government Exhibit Number Two A, the Livingston Portal Eighty-Four Complex had been under a 104(d)(2) change since October 7, 1987, and that at the time of the issuance of the Order in this case on May 3, 1988, there had not been a completed inspection prior thereto.

Findings of Fact and Discussion

I.

On May 3, 1988, the approved ventilation plan at Respondent's Livingston Portal Eighty-Four Complex, as evidenced by Government Exhibit 3 and Exhibit O-3, required that air in the return entry be coursed in the proper direction, and air that had been used to ventilate old workings not be used to ventilate the active workings of the section. At 9:15 a.m. on May 3, 1988, James High, an MSHA Inspector, tested the ventilation of a transformer (load or power center) located between the cross cut and the No. 2 Entry. The transformer was to be ventilated by a tube, 4 to 6 inches in diameter, which was to ventilate the air from the transformer to No. 4 Entry. When High performed a chemical smoke cloud test, he observed that the cloud "blowed back out" (August 1, 1989, Vol. I), Tr. 29), rather than being drawn in toward the tubing. High's testimony has not been contradicted by Respondent's witnesses, and

~2001

was corroborated by Alvin Shade, an MSHA Inspector, who was present with High and agreed that there was return air going to the face. Further, Lorenzo Steele, a coal mine inspector supervisor, was also present and observed a reversal of the air. In addition, Bruce Sheets, a longwall foreman employed by Respondent, who testified on Respondent's behalf, also observed the reversal of air. Thus, I conclude that Respondent herein did violate its ventilation plan, and hence did violate 30 C.F.R. 75.316.

II.

Significant and Substantial

According to High, because of the reversal of the air flow from the transformer and battery changer to the longwall section, should there be a fire at the former location, it would be "reasonably likely" for smoke to go to the longwall section. He indicated that the battery changing station and the transformer are ignition sources. He concurred that he was concerned that if anything happened to the battery charger or transformer, smoke could be generated which would go to the face. However, he agreed that these items were "in good working order" (Vol. I, Tr. 81). Further, the uncontradicted testimony of Thomas Mucho, the manager of Respondent's operations at the subject mine, indicates that carbon monoxide from a fire at the area in question would "probably" pass by sensors at the tail piece of the long-wall. (August 2, 1989, (Vol. II), Tr. 52). (The sensors are designed to produce a warning or alarm.)

Alvin Shade, an inspector who was present with High, essentially corroborated High's testimony, but did not elaborate on the likelihood of a fire occurring. Lorenzo Steele, an MSHA Supervisor who also was present during High's inspection, indicated that methane readings as high as 9/10 of 1 percent were detected outby the regulator in the No. 4 entry, and there was coal dust and respirable dust present. He stated that at any time the methane in the area at issue could increase, as on two prior occasions the subject mine had to be closed down due to a high level of methane. He indicated that he would have issued a withdrawal order based on an imminent danger. I find that at most Steele's testimony establishes that an increase in methane could have occurred, but it does not establish that it was reasonably likely to have done so. Further, based on Mucho's testimony, it appears that methane in the area in question, that is brought to the face by an air reversal, would be exceedingly diluted by the volume of air at the face (Vol. II, Tr. 57). Thus, the likelihood of injuries appears to be mitigated.

~2002

Richard Zilka, a ventilation specialist employed by MSHA, indicated that the battery charger produces noxious gasses and hydrogen which as a consequence of the air reversal, would go to the face. However, there was no evidence presented as to the quantities of these elements, and their specific impact if any on the air at the face.

I find that there is insufficient evidence presented by Petitioner to conclude that the production of smoke or fire was reasonably likely to occur. The record also is lacking with regard to a description of the types of injuries which could reasonably be expected from the violation herein. Thus, I find that it has not been established that the violation herein was significant and substantial (See, Mathies Coal Co., 6 FMSHRC 1 (1984)).

III.

Unwarrantable Failure

Some time prior to the issuance of the order in question, Respondent decided to cut through three entries to connect the 4 left panel with the 3C longwall panel. This connection (cut-through) was made in order to experiment with certain 10 foot pillars, and to shorten the left split return in the 4 left section. By May 2, 1988, in the evening shift, two entries had already been cut through to the 3C longwall panel. At approximately 7 to 8 p.m., on May 2, the last entry was cut through and curtains were installed. At that time air and methane readings were taken in the left and right splits of the 4 left return, and according to Steve Carson, the section foreman there was nothing unusual. Robert Merasoff, who was the longwall foreman, for the 4 p.m. to midnight shift on May 2, in the 5A longwall panel, indicated in a deposition taken on July 12, 1988, (Exhibit O-5), that he was not aware of the cut-through. Merasoff indicated that, in a preshift examination, the air current was moving in its proper course and was of the usual volume. He also indicated that he examined the battery and power center and did not recall any problem. Further, examinations of the tubing with a crumbled piece of chalk, both on preshift and on-shift, indicated that air was traveling in the proper course.

David Morris, the section foreman on the 5A longwall for the midnight shift, May 3, 1988, indicated that he did not test the air going through the tubes. He indicated that he just walked by the battery and power center, and did not recall anything unusual. Bruce Sheets, Respondent longwall foreman for the 5A panel on the morning of May 3, could not recall if he tested the air at the power center and battery prior to the time High issued the order at issue.

~2003

In essence, according to High, the violation herein is to be considered to be as a result of Respondent's unwarrantable failure, inasmuch as after the connection between the 4 left and 3C areas was made, Respondent should have checked the air at all areas to be affected, including the regulator for the 5A longwall panel.(FOOTNOTE 1) In this connection, he indicated that George Kupar, Respondent's inspection coordinator, who accompanied him on the inspection, on May 3, indicated to him essentially that the cut-through had made an imbalance in the air, and had caused air to go from the 3C section across the 4 left area to the 5A longwall panel.(FOOTNOTE 2)

Richard Zilka, a Federal Coal Mine Inspector Ventilation Specialist employed by Petitioner, opined that the ventilation in the 4 left area is "delicate" as it abuts the 5A longwall section. (Vol. I, Tr. 181). Hence, according to Zilka, if the regulator for the right split of the 4 left panel is "satisfied" (Vol. I, Tr. 182) by the amount of air it is adjusted for, then air from the No. 4 Entry can not go that way, and instead will go by the most available way to the fan which is back through the tube in the No. 2 Entry at the battery and power center. He asserted that accordingly, if there is a ventilation change in the 4 left, such as a cut-through, there should be an examination afterwards in the 5A panel to make sure that there are no ventilation changes in that area. He indicated that because the 4 left area and 5A longwall panel are so close, it was "negligence" (Vol. II, Tr. 154) not to note that any increase in the ventilation in the right split of the 4 left area would affect the regulator for the 5A longwall panel.) He opined that the reversal of the air in the tube in question was caused by some ventilation change in the vicinity and possibly, by the cut-through.

In order to find that the violation herein resulted from Respondent's unwarrantable failure, it must be established that there was "aggravated conduct" on the part of Respondent, which is more than ordinary negligence (Emery Mining Corp., 9 FMSHRC 1997 (1987)). After considering the record as a whole, based on the reasons that follow, I conclude that Petitioner has not met this burden.(FOOTNOTE 3)

~2004

A material issue to be decided is whether there was any aggravated conduct on the part of Respondent in not checking the tubing and the 5A longwall regulator after ventilation changes, occasioned by the completion of the connection on the evening of May 2, 1988, and the removal of two stoppings (E and B in Exhibit O-2) on the midnight shift of May 3. Also, according to Thomas Mucho, who was the mine manager at the subject 84 Complex, the violative condition was abated upon the removal of the two old partial block stoppings in the 4 left panel. Hence, it also must be decided whether there was any aggravated conduct on the part of Respondent in not having removed these stoppings previously upon completion of the connection and removal of stoppings labeled E and B on Exhibit O-2.

According to Mucho, who has a Bachelor of Science Degree in Mining Engineering, he has experience as an engineer in mines in the area of ventilation, and oversees the drawing up of the ventilation plans for the subject mine. Mucho indicated that prior to the report to him of the air reversal in the tubing in question, he did not anticipate that the completion of the connection and the removal of the stoppings E and B in the 4 left panel area would have caused any affect at the regulator for the No. 4 entry of the 5A longwall section, and thus did not assign anyone to check the air there. Specifically, he indicated that he did not anticipate that the completion of the connection, and the removal of the old stoppings E and B would have caused any air reversal at the tubes in question. He indicated that his lack of concern was based upon an assumption that, because of the close proximity of the 5A longwall section to the intake shaft as opposed to the distance of the 4 left area to the shaft, there would be more pressure in the 5A longwall section as compared to the 4 left. He was of the opinion that if the pressure would be less at the regulator labeled GG on Exhibit O-2, as a result of the removal of the old partial stoppings, air would be expected to go through that regulator from the 5A longwall panel and not from the 4 left panel. In this connection, Mucho indicated that on May 2, he did not feel any air change on either side of the partial stoppings, and concluded that there was no pressure drop and that these old partial stoppings were not affecting the system. On May 2, he was of the opinion that the ventilation changes in the 4 left area would not have any affect on these stoppings. (FOOTNOTE 4)

~2005

Petitioner did not, upon cross-examination, elicit from Mucho any admission which would tend to indicate that the assumptions he made were not proper or reasonable. Nor did Petitioner adduce any evidence which would tend to indicate that the assumptions Mucho made were not prudent mining practices.

Dale E. Anders, Respondent's chief longwall foreman, indicated that when he was informed of the reversal, on the date in question, he checked the ventilation at the load center and it was "fine," (Vol. II, Tr. 120), and also the air in the opposite end in the No. 4 Entry was "fine." (Vol. II, Tr. 121). He indicated that when he checked 10 minutes later, the air direction had reversed. Petitioner's witnesses essentially agreed that the air direction at the tube did fluctuate. Neither High nor Shell nor Sheets was able to establish how often the air reversed itself. Neither High nor Shell established the duration of the air reversal and when it initially commenced. Accordingly, had the air at the No. 4 Entry of the 5A longwall panel regulator or the tubing in question been checked in the midnight shift of May 3, or the morning shift of that date, there is no certainty that such an examination would have uncovered the reversal, as the air direction fluctuated. Also, the evidence does not establish either the frequency or duration of the fluctuation. Taking into account all the above, I conclude that it has not been established that Respondent exhibited any "aggravated conduct" in connection with the violation herein.

IV.

In essence, Michael Error, Respondent's ventilation foreman who planed the connector (cut-through), indicated, in looking at the results of the air reversal in the tube in question, that he would agree that once the permanent stoppings were removed, the old partial stoppings on May 3, were acting as regulators. Also, in essence, Mucho indicated that once he became aware of the air reversal, he concluded that it was caused by the effect of the old partial stoppings once the two permanent stoppings had been removed. Accordingly, I find that Respondent was negligent to a moderately high degree, as it should have known that the removal of the old stoppings would have had an impact on the ventilation in the 4 left area, and would have caused the reversal in question.

According to High, methane readings in the area in question were between .3 to .9, and Steele observed dust going down No. 4 Entry. An air reversal could have brought these hazards as well as noxious gases produced by the battery to the face. According to Mucho's uncontradicted testimony, any methane so drawn to the face would be diluted by the 40,000 cubic feet per meter air flow

