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BEAVER CREEK 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

BEAVER CREEK COAL COMPANY,
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. WEST 88-207-R
Order No. 3225158; 4/26/88

Gordon Creek No. 7 Mine
Mine ID 42-01814

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

v.

BEAVER CREEK COAL COMPANY, RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 88-339
A.C. No. 42-01814-03518

Gordon Creek No. 7 Mine

DECISION

Appearances: Thomas F. Linn, Esq., Beaver Creek Coal Company,
Denver, Colorado,
for Contestant/Respondent;
Robert J. Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Respondent/Petitioner.

Before: Judge Morris

These consolidated cases are before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. 801 et seq., ("the Act") to challenge the issuance by the Secretary of Labor of two citations issued to respondent Beaver Creek Coal Company ("BCCC").

After notice to the parties a hearing on the merits was held in Salt Lake City, Utah.

The parties filed post-trial briefs.

Issues

The issues are whether any violations occurred. If so, what penalties are appropriate.

Citation No. 3225145

This citation charges BCCC with violating 30 C.F.R.
75.1704.1

The citation reads as follows:

The alternate escapeway belt entry located in the 3rd south section active was not being maintained in a condition to allow all persons, including disabled persons, to escape quickly to the surface, in the event of an emergency. The following condition did not comply with 75.1704 (1)(a) located approximately 40 feet in by survey station No. 2440, a belt check stopping undercast had been installed across the belt entry with a 35 inch by 35 inch man door in the wall, and there were two cinder blocks step platforms installed on each side of the stopping. These platforms measured 1st: leading into section 30 1/2 inches wide and a 46 inch step down (high). 2nd: 31 1/2 inches wide by 34 1/2 inches high step down.

THE EVIDENCE

During an MSHA inspection LARRY RAMEY, an authorized representative of the Secretary, reviewed the Gorden Creek Mine map. One of the alternate escapeways was identified as a belt line coming out of the 3rd south section (Tr. 16-18).

When walking the belt line with John Perla, the operator's foreman, the inspector encountered an air course undercast located approximately forty feet inby survey station No. 2440. BCCC had installed a belt-check stopping over the undercast for ventilation purposes (Tr. 19). The inspector measured and sketched the installation (Tr. 14-24, 75, Ex. P-2).

The belt-check stopping had been constructed with 8 inch by 16 inch cinder blocks. As a person moves outby he first reaches four steps which give him access to a higher level. He then proceeds an additional 20 feet to the man door. The man door opens in the outby direction. After stepping over the door sill the person immediately encounters six steps which return him to a lower level.

The man door which permits access through the undercast measures 35 inches by 35 inches.

In the inspector's opinion this alternate escapeway was not maintained to insure passage at all times, including passage for disabled persons (Tr. 24).

BCCC's witnesses, JOHN PERLA and LEVON L. TURPIN conducted a travelability test using two persons to carry an occupied stretcher through an identical man door and down the steps. The passage was virtually identical to the one cited by the inspector (Tr. 92, 93, Ex. B-7). The tests and photographs demonstrated the area was passable. The steps could be negotiated and according to BCCC the area in question was travelable thereby meeting the requirements of section 75.1704. In short, there was more than ample room to move a man on a stretcher through the man door (See photo Exhibits B-4, B-5, B-6, B-7 and B-9).

In view of his test results witness Turpin concluded the alternative escapeway was "well travelable" (Tr. 101).

THRESHOLD ISSUE

As a threshold matter BCCC asserts that the Secretary was attempting to enforce the non-mandatory regulations contained in section 75.1704-13.

In support of its view BCCC notes the inspector did not conduct a travelability test, also the operator relies on the wording of Citation No. 3225145, supra., where the citation recites, in part, that "the following condition did not comply with 75.1704-1(a) located, etc. "

BCCC also cites portions of the transcript, including a conversation between witness JOHN PERLA and the inspector. The conversation:

Q. Can you tell us what happened on the 14th of March the circumstances surrounding the issuance of this citation?

A. Mr. Ramey and I went into the mine and I always ask the inspectors where they would like to go. And he wanted to go into the active section, so we went into the third south section, and we walked around in the section for awhile and looked at different things. And then he wanted to walk out the belt line, and so, him and I -- Mr. Ramey and I started out the belt line and we got down to the overcast and we stood there for a minute on the in-by (ph.) side of the overcast -- or, undercast, went through the 35 by 35 inch man-door, went down the other side. And we looked back at the undercast, and he told me he was going to give me a citation because of it [sic] wasn't five by six.

Q. Okay. And tell us what happened next?

A. We were sitting there talking and we looked back at the undercast. And Mr. Ramey told me that he would have to give us a Citation because we didn't have our five by six opening on our escapeway. (Emphasis supplied) (Tr. 69, 78)

Later, in the mine office an additional conversation took place:

Q. Did you talk to Mr. Ramey about the citation?

A. We talked about it at the mine, and when we were looking at the undercast. And then we talked about it when we got outside and down at the office.

Q. What happened at the office?

A. I asked him why it was any different us getting a citation on this one here when these are just like this or something similar with the stoppings off of the undercast was accepted through the life of the mine. Since we opened the mine, we had done this.

Q. Go ahead.

A. He . . .

Q. What was his response?

A. Just that we didn't have our five by six opening and we had to take care of it.
(Emphasis added) (Tr. 82).

Finally, Bccc contends the manner of abatement suggests the inspector was attempting to enforce the dimension standard in 75.1704-1(a). The termination of the citation reads as follows:

The operator has installed a six-foot walkway on each side of the undercast and hand rails on each side of the walkways. The operator has placed a [sic] order with Triune, Inc., located in Colorado, PO No. B10-9778 date 3/15/88 for a 64 x 80 W walk thru man door. The delivery date is 4/14/88.

On the other hand, by way of explanation, Inspector Ramey stated that his reference to 75.1704-1(a) in the body of the citation was only to demonstrate BCCC's nonconformance and lack of District Manager approval. He stated:

This is a guideline that is set out for the district managers to approve escape-ways with less than what they can do. I cited this citation under 75.1704, only referring to 1704-1, in that the operator did not maintain that. The reason that I used 1704 was that I felt like that it was unsafe.

And if you will look, it says at least two separate and distinct travel passage-ways which are maintained to insure passage at all time of any person, including disabled persons, and which are to be designated. And then it goes down and it says including disabled persons to escape quickly to the surface in the event of an emergency.

In the beginning of my citation, I put that it was not being maintained in condition to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

(Tr. 35, 36)

Discussion

On the threshold issue I conclude BCCC was properly cited. The text of the citation initially incorporates the specific language of the regulation. Further, the citation on its face clearly alleges that BCCC violated 30 C.F.R. 75.1704, not subpart 1704-1(a). If the inspector intended to cite BCCC for violating 1704-1(a) he could have recorded this regulation on the face of the citation.

It is true the inspector did not conduct a travelability test. But there is no requirement that such a test be made. A cursory glance should satisfy an inspector that an opening of less than three foot square would not insure passage of miners or disabled miners within the mandate of the regulation.

The abatement of the citation also does not establish the operator was cited under section 75.1704-1(a). The method of abatement is generally a matter left to the operator's discretion.

Was the Escapeway Passable Within the Meaning of the Regulation

This escapeway opening, i.e., the man door, measured 35 inches by 35 inches. In short, the passageway was less than a yardstick in height and width. Query: In passing through such a man door is a miner to proceed headfirst or feetfirst?

Since there is no dispute as to these measurements I conclude as a matter of law that such an opening could not insure passage of miners, including disabled miners.

BCCC's evidence and photographs show that a person on a stretcher could literally be passed through the 35 inch by 35 inch opening. But the ability to pass a stretcher through such an area does not "insure passage" as contemplated by section 75.1704. Passage is not insured because a miner in a smoke filled environment would have to reach the area, go up the cinder block steps, proceed an additional 20 feet and then locate, open and crawl through the man door. He would then immediately descend another flight of stairs of six steps on the other side. The passage of a disabled miner on a stretcher would be even more difficult.

All of the foregoing factors cause me to conclude that the described conditions would hinder rather than insure passage.

For these reasons I reject the contrary opinion of BCCC's witness Turpin.

BCCC, in support of its position, relies on Utah Power & Light Company, 10 FMSHRC 71 (1988), affirmed October 27, 1989.

The facts in Utah Power & Light (UP&L) support the Secretary and not BCCC. Specifically, in WEST 87-211-R, it was held that the escapeway regulation was violated because there were tripping hazards and the escapeway had been reduced to four feet in width. 10 FMSHRC at 83.

In the instant case the steps constituted a tripping hazard. Further, BCCC's escapeway was less than three feet in width, considerably less than the four foot width in UP&L.

For the foregoing reasons, I conclude that respondent violated 30 C.F.R. 75.1704.

Civil Penalty

Section 110(i) of the Act mandates consideration of six criteria in assessing civil penalties.

The parties stipulated the operator was of moderate size. The mine produced 400,000 tons last year.

The operator failed to offer any evidence that a penalty would adversely affect its ability to continue in business.

Exhibit J-1, a computer printout, indicated BCCC within the last two years was assessed 19 violations. This is a favorable prior history.

I consider the operator's negligence to be high. The company should have known this 35 inch by 35 inch door had been installed in an escapeway.

The gravity was likewise high. A miner, or a disabled miner attempting to escape, could have been seriously impeded.

The company demonstrated good faith in rapidly abating this violative condition.

On balance, I deem that a civil penalty of \$200 is appropriate.

Citation No. 3225158

The citation charges BCCC with violating 30 C.F.R. 75.402.4

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The citation reads as follows:

The following underground areas of the 1st south working section had not been rock dusted. The two connecting crosscuts located between 1st right, 2nd right and 3rd right entries had not been rock dusted. No rock dust had been applied to the mine floor, coal ribs nor mine roof. These two crosscuts were more than 40 feet from the working faces the distances involved was approximately 80 feet in length and the height in these crosscuts were approximately 8 feet high. The miner had taken approximately 50 to 55 feet cuts out of the 2nd and 3rd right faces and was in the process of cutting and loading out of the 1st right face.

Inspector LARRY RAMEY has inspected BCCC's mine many times (Tr. 116).

The inspection party went to the 1st south working section and into the 3rd right area. The continuous miner was cutting and loading in the 1st right section. (See Exhibit P-5, a drawing attached to the citation.)

No rock dust had been applied to the two open crosscuts. These crosscuts were from 3rd to 2nd right and 2nd right to 1st right. The crosscuts were on 60 foot centers (Tr. 118, 120, Ex. P-5).

When he arrived in the section the roof-bolting machine was headed into the 3rd right. After the roof bolts were installed the inspector used a dust kit to take samples from the right lower rib, the upper left rib and the mine floor. The sample was taken from the crosscut to the left of 3rd right (Tr. 120-122).

The sampled material was then filtered through a mesh screen into a catching pan. It is then bagged and sent to the lab for analysis. The lab is located in Mt. Hope, West Virginia⁵ (Tr. 123, Exhibit P-6).

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In the inspector's opinion the crosscuts were not safe to manually rock dust but a rock dusting machine could have been used. A rock dusting machine applies rock dust in a more even fashion than by a manual application. (Tr. 127, 128).

In the inspector's opinion the two crosscuts were not inaccessible if the rock dusting was done by machine (Tr. 129).

Rock dusting improves underground visibility (Tr. 130-132).

Turpin stated it was BCCC's practice to roof bolt the crosscuts and then apply rock dust. The inspector gave the company adequate time to hook up the electrical rock duster (Tr. 135, 158).

The inspector tested a coal dust sample and placed it in a baggie. The sample was dry (Tr. 139 - 140).

The crosscuts were on 60 foot centers. It was 120 feet from the center line of 1st right to the center line of 3rd right (Tr. 144, 145, 164).

The 3rd right and 2nd right didn't have any rock dust in them from the outby corner to the inby face (Tr. 145). The entry openings were 20 feet wide (Tr. 147).

The area lacking rock dust measured 184 square feet (Tr. 147, 148). However, Exhibit P-5 does not show this figure. Exhibit P-5 shows the two crosscuts were not rock dusted (Tr. 148).

When the citation was issued the roof bolter had installed one row of permanent support from the lower third right rib to the upper third right rib. The inspector had the roof bolter back the machine out and he then collected a sample of dust (Tr. 152). [Inspector Ramey also stated the bolter was in the process of entering the crosscut to bolt the area when the citation was issued (Tr. 152)].

The inspector had no complaints about the company's mining sequence. The inspector told the company's representatives that it was unsafe to manually rock dust the crosscuts. He also indicated he would give them enough time to either support the area and rock dust it manually or by machine. It is not unlawful to use hand dusting (Tr. 155 - 156).

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Dusting people out, i.e., mechanically liberating dust, creates some health hazards. Except for the two crosscuts and the immediate face areas in the entries, all other portions of the section were rock dusted (Tr. 157).

BCCC's cleanup plan states that "rock dusting shall be done during the bolting cycle by the bolters. As the bolter bolts in the entry, they catch up the rock dust. When they pull out, it is rock dusted." (Tr. 161, 162).

An operator's obligation to apply rock dust arises when the continuous miner breaks through into the next entry. At that point the newly mined area becomes a crosscut (Tr. 165, 167).

In the inspector's view the Beaver Creek clean-up plan should include a statement that all crosscuts should be immediately rock dusted after they are cut through and before roof bolting (Tr. 174). BCCC needs a system where they machine dust those areas (Tr. 175).

There were several ignition sources in the vicinity (Tr. 177).

LEVON L. TURPIN identified Exhibit B-11 as the BCCC cleanup and rock dust plan. Parts 3 and 4 for the plan have been in effect since 1984.

Discussion

The writer is bound by Commission precedent including cases decided by the Interior Board of Mine Operations Appeals. The controlling precedent here is *The Valley Camp Coal Company*, 1 MSHC 1051, 1 IBMA 243. (1972). See also *Hall Coal Co., Inc.*, 1 IBMA 72-16; 1 MSHC 1037 (1972).

In the above cases it was held the Secretary must prove the dust was combustible (1 MSHC at 1051). Further, the Secretary must prove the area to be rock dusted was safe to enter.

Concerning the initial issue: There was no proof as to the combustibility of the dust. No doubt this proof failed since the judge excluded the Secretary's exhibit (see footnote 5, supra.)

Concerning the second issue: the evidence is unclear whether the double-headed roof bolter was entering or with-drawing from the crosscut when the dust sample was taken. But it is quite clear it was not safe for miners to manually rock dust the crosscuts. The inspector contends the rock dusting could have been done by machine. However, the regulation does not mandate machine rock dusting.

For the foregoing reasons I conclude the Secretary's proof failed in two essential aspects. In view of this, Citation No. 3225158 should be vacated.

Briefs

The parties have filed detailed briefs which have been most helpful in defining the issues herein. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

ORDER

Based on the foregoing findings of fact and conclusions of law I enter the following order:

- 1. In WEST 88-207-R: Contestant's contest is sustained.
- 2. In WEST 88-339: Citation No. 3225158 is vacated.

Citation No. 3225145 is affirmed and a penalty of \$200 is assessed.

John J. Morris
Administrative Law Judge

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FOOTNOTE START HERE

- 1. The cited regulation reads as follows:
75.1704 Escapeways
[Statutory Provisions)

Except as provided in 75.1705 and 75.1706, 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, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

- 2. The drawing on the citation and Exhibits B-1, B-2 and B-3 (drawn to scale from the citation detail) shows the steps and their measurements, as well as the man door at the undercast (Tr. 23).

- 3. On October 27, 1989, in Utah Power & Light Company, WEST 87-211-R, discussed infra, the Commission ruled that section

75.1704-1(a) was not enforceable. (Slip opinion at 6).

4. The cited regulation reads as follows:

75.402 Rock dusting.

[Statutory Provision]

All underground areas of a coal mine, except those areas in which the dust is too wet or too high in incombustible content to propagate an explosion, shall be rock dusted to within 40 feet of all working faces unless such areas are inaccessible or unsafe to enter or unless the Secretary or his authorized representative permits an exception upon his finding that such exception will not pose a hazard to the miners. All crosscuts that are less than 40 feet from a working face shall also be rock dusted.

5. The judge excluded Exhibit P-6 because of inconsistencies. The exhibit on its face states it was taken on the 27th but the inspector testified he took the sample on the 26th. Further, the witness indicated he took the sample from 3rd right (Tr. 121-126). The critical weakness in the Secretary's evidence is that the record fails to disclose the precise point where the dust sample was taken. Based on the approximate distances shown in Exh. P-5 the sample could have been taken approximately 50 to 55 feet from the nearest crosscut (The XC between 3rd right and 2nd right). In the alternative, the sample could have been taken as far as 200 feet from where the crosscut broke through into 1st right.