CCASE:
SOL (MSHA) V. SHAMROCK COAL
DDATE:
19901017
TTEXT:

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. KENT 90-75 A. C. No. 15-11417-03514
v.	No. 2 Prep Plant
SHAMROCK COAL COMPANY, INC., RESPONDENT	Docket No. KENT 90-60 A. C. No. 15-02502-03558 Shamrock No. 18 Series

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
Neville Smith, Esq., Smith & Smith, Manchester, Kentucky, for the Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon Petitions for Civil Penalty filed by the Secretary (Petitioner) for alleged violations by the Operator (Respondent) of various mandatory safety standards set forth in Volume 30 of Code of Federal Regulations. Pursuant to notice, Docket No. KENT 90-60 was heard in Richmond, Kentucky, on June 7, 1990. John H. Linder testified for Petitioner, and Gordon Couch testified for Respondent. In a telephone conference call on August 8, 1990, counsel for both Parties waived their right to submit a Brief and Proposed Findings of Fact.

On September 4, 1990, Petitioner filed a Joint Motion to Approve Settlement concerning the Citations that are the subject matter of Docket No. KENT 90-75.

~1945
Stipulations

At the hearing, the Parties stipulated as follows: "That the proposed penalty will not affect the operations of the business as would be appropriate, the size of the business, and that the Operator has indicated he will comply to nullify the violations." (sic) (Tr 6). It was also stipulated that that the mine in question produced 768,543 tons of coal in the 24 month period preceding the citations at issue, and that Respondent's total operations produced approximately 22 millions tons of coal in that period.

Findings of Fact and Discussion

Docket No. Kent 90-75

Citation Numbers 2999139 and 3005741

Petitioner has filed a Joint Motion to approve a settlement agreement in this case. A reduction in penalty from $121 to $40 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The Motion for Approval of Settlement is GRANTED.

Docket No. KENT 90-60

Citation No. 3205519

On September 20, 1989, MSHA Inspector John H. Linder, while performing an inspection of Respondent's No. 18 Mine, observed four miners cleaning belts and inquired of them whether they had self-contained self-rescue devices. According to Linder, the miners indicated that these items were located at the head-drive. Linder then went to the area of the head-drive along with Respondent's Inspector Hurchal Asher, and was able to locate only one such device. Linder issued a citation, Number 3205519, alleging a violation of 30 C.F.R. 75.1101-23 which requires operators, in essence, to adopt an evacuation plan. The plan provides for maximum distances between underground miners and the location of self-contained self-rescue devices. Linder's testimony established that there were no self-contained self-rescue devices for each of the four miners, who were cleaning belts, within the maximum distance specified by the plan. (Gx 3, Pages 6-8). Respondent did not contest Linder's testimony, and indicated that it did not contest the violation. I thus find that Respondent herein did violate Section 75.1101-23, supra, as alleged.

In the citation, Linder indicated that the violation herein was significant and substantial. As set forth by the Commission in Mathies Coal Company, 6 FMSHRC 1 (January 1984), the Commission set forth the elements of a "significant and substantial" violation as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and, (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. (6 FMSHRC, supra, at 3-4.)

Further, as explained by the Commission in U. S. Steel Mining Company, 6 FMSHRC 1834, 1836 (August 1984), the third element of the above formula set out in Mathies, supra, "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is injury." Linder, in his testimony, did not specifically explain his conclusion in the citation that the violation herein was significant and substantial. Linder indicated that the self-contained self-rescue device supplies oxygen for an hour, and thus would allow a miner using it to breathe, should there be an explosion or liberation of methane gas. He indicated that in contrast, the miners on the date in question had filter type rescuers that did not provide oxygen, and which could not be used for some poisonous gases. He indicated that belt lines, which were present in the area in question, are a source of a fire hazard as their rollers can lock at any time. In this connection, he indicated that coal spilling off a belt can pile up over the rollers causing them to heat, which would then cause a fire. He indicated that there were additional ignition sources such as the existence of electrical power lines along the sides of the belt and electrical switches at different locations. With regard to the liberation of methane, he indicated that in the seam in which the mine in question is located, "usually" methane is potentially present in small amounts (Tr. 21). He also indicated that in the subject mine, he was not aware of any methane releases in the explosive range. I find that although there were possible ignition sources present, there is no evidence as to the specific conditions of the sources, upon which to base a conclusion that any ignition was reasonably likely to occur. Thus, although there was some hazard to the miners in the section in question, as a result of not having been provided with rescuers that could supply oxygen in the event of a fire or an explosion, the evidence fails to

establish that there was any "reasonable likelihood" that the hazard contributed to would result in an injury-producing event. (U. S. Steel Mining Co., supra.) Accordingly, I conclude that it has not been established that the violation herein was significant and substantial. Gordon Couch, Respondent's safety director, indicated that exposure to carbon monoxide at a level of a half percent is immediately fatal. He indicated that the self-rescuer device worn by the miners in question is designed to protect, for up to an hour, exposure to one percent of carbon monoxide. Essentially, according to Couch, if as a consequence of a fire or explosion, there remained sufficient oxygen to support life, then the device worn by the miners would allow them to breathe, and thus be able to travel out of the mine. Essentially, he indicated that the self-contained self-rescue units, which did provide oxygen, were not more effective. He indicated that if a fire or explosion would reduce the oxygen below the level needed to sustain life, then neither the device worn by the miners nor the self-contain self-rescue units would help, as any miner present would not survive such an event. In contrast, he indicated that should a fire or explosion leave sufficient oxygen to sustain life, then either device would be adequate to allow the miners present to escape.

I find that Respondent has not contradicted or rebutted the testimony of Linder that the device worn by the miners can not be used to filter out some poisonous gases. Further, I find persuasive the testimony of Linder that in a "big" fire the self-contained self-rescue device, which allows one wearing it to breathe oxygen, is "real important," and in an explosion one would not have a chance without such a unit (Tr. 23). Accordingly, I reject the testimony of Couch, and conclude that the violation herein was moderately serious. There is no evidence before me to base a conclusion that Respondent herein either knew or should have reasonably known that there were not sufficient rescue devices, at the appropriate sites, as mandated by its fire evacuation plan. Accordingly, I conclude that it has not been established that Respondent herein acted with more than a low degree of negligence with regard to the violation herein. Taking into account the remaining factors of Section 110(i) of the Act, as set forth in the Parties' stipulations, I conclude that a penalty of $100 is appropriate for the violation found herein.

Citation 3206149

On October 3, 1989, Linder cited Respondent for a violation, of 30 C.F.R. 75.1100-2(i)(1), alleging that certain required fire fighting equipment was not provided for the 005 working section, which had exceeded a depth of 2 miles from the surface.

At the hearing, Respondent conceded the violation and that the mine did produce more than 300 tons per shift and that the area in question was at a depth of more than 2 miles. Inasmuch as Respondent does not contest the violation cited by Linder, I find Respondent violated Section 75.1100-2(i)(1), supra, as alleged.

Linder indicated, in the citation, that the violation was significant and substantial. He indicated, in his testimony, that the purpose of the requirement for the provision of certain emergency materials was to enclose an area to keep gas out in the event of an explosion, or to conserve oxygen in the event of a roof fall. In this connection, he described the roof conditions as average. Also, he indicated that the belt conveyor was a source for a fire along with equipment in the area, such as continuous miners, scoops, motors, bolters, and high voltage cables, all of which he termed as potential sources of fire. He indicated that an illness or injury could result in the event of an explosion if the necessary materials were not present. However, he indicated that in the absence of an explosion, the lack of such required materials in and of itself would not reasonably likely cause an illness or injury.

Inasmuch as Linder did not offer any facts to substantiate his conclusion, as set forth in the Citation, that the violation was significant and substantial, and inasmuch as the record fails to establish that the hazards contributed to by the lack of the emergency equipment, were not reasonably likely to occur, I conclude that the violation herein has not been established to be significant and substantial. (Mathies, supra.) Although some of the required materials were available at the section, they were being used at the face. Further, according to Couch, certain materials were not present in the quantities mandated by Section 75.1100(a)(2)(i)(1), supra. Thus, he indicated that there was lacking 1000 feet of lumber and five full tons of rock dust. He indicated that he doubted that the quantity of nails required were present, and whether there were two complete unused rolls of brattice cloth.

Inasmuch as the emergency materials, which were not on the section, were to be used, as testified to by Linder and not contradicted by Respondent, to conserve oxygen in case of a roof fall and to keep gas away in the event of an explosion, I conclude that the violation herein was moderately serious.

According to the testimony of Linder, and not contradicted by Respondent, around May or June 1990, he had spoken to Steven Shell, Respondent's safety inspector, with regard to emergency materials, and the latter told him that ". . . he was going to continue to work on it trying to get the materials." (sic) (Tr. 44). Shell also told Linder that another MSHA Inspector,

Denver Rich, also spoke to him about having emergency materials at the 2 mile depth. Thus, I find that Respondent was aware of the necessity of having emergency material once the work section had reached 2 miles from the surface. Accordingly, I find Respondent was negligent to a moderately high degree in not having the required materials present. I conclude that a penalty of $150 is appropriate for the violation found herein.

Citation 3206154

On October 5, 1989, Linder, while walking in a crosscut, at the No. 9 Section, between Entries 3 and 4, observed dust in the air, and "there wasn't nothing moving." (sic) (Tr. 65). Linder timed the movement of the air, by using a smoke club, at 4604 cubic feet per minute, between Entries 3 and 4 in the crosscut, which was the last crosscut in an inby direction before the working face. According to Linder, a roof bolter was located at the end of Entry No. 1, a continuous miner was located at the end of Entry No. 5, and that these two areas were the working faces or working places. The crosscut in which Linder measured the movement of air, ran between Entries 1 and 6, and was the last crosscut in an inby direction prior to the working faces. At the time of Linder's inspection, intake air entered the crosscut in question from Entries 5 and 6, and then coursed in the direction of Entry No. 1 where it turned outby and became return air. Air also returned outby and down Entries 2 and 3 as curtains were down in those entries. At the time of Linder's inspection, a line curtain was hanging in the crosscut in question between Entries 4 and 5. At the date in question, as explained by Couch, the Entries 5 and 6 were development entries. However, he also indicated that as part of the normal mining cycle, the continuous miner takes 30 foot cuts and moves from Entries 5 to 4 to 3 to 2 to 1, respectively.

Linder issued a citation alleging a violation of 30 C.F.R. 75.301 in that only 4604 cubic feet per minute was reaching the last open crosscut between the No. 3 and 4 Entries. Section 75.301, supra, as pertinent, provides that the minimum quality of air reaching the last open crosscut ". . . in any pair or set of developing entries" shall be 9000 cubic feet per minute.

Essentially, it is Respondent's position that it did not violate Section 75.301, supra, as the movement of air was not tested at the proper place. In this connection, Respondent refers to the testimony of Couch that the air should have been tested in the crosscut between Entries 4 and 5, as these were the development entries. Couch also referred to the fact that the crosscut, between Entries 4 and 5, was closed with a curtain. Essentially, Couch also referred to Section 75.301, which set forth its purpose in requiring a flow of 9000 cubic feet a minute.

The stated purpose of this requirement is to render harmless methane when coal is being cut, mined or loaded. Accordingly, Couch indicated that it would not be desirable to have air flowing at 9000 cubic feet a minute to the left of Entry No. 5, and going in the direction of Entry No. 1, as air leaving the continuous miner in Entry No.5 would contain dust and fumes. For the reasons that follow, I do not agree with Respondent's arguments, and find that the areas, in which Linder tested the volume of air, was in the last open crosscut, and the volume of air tested was below the maximum required by Section 75.301, supra.

In Jim Walter Resources, Inc., 11 FMSHRC 21 (January 1989) the Commission, in analyzing the term "last open crosscut," for purposes of deciding whether a violation of 30 C.F.R. 75.500(d) occurred, took cognizance of the fact that a "crosscut" ". . . is recognized to be a passageway or opening driven between entries for ventilation and haulage purposes." (Jim Walter, supra, at 26). Further, in Jim Walter, supra, at 26, the Commission found that a "last open crosscut" is that open passageway connecting entries closest to the working face. The Commission also noted the following definition of "working face" as set forth in Section 318(g)(1) of the Federal Mine Safety and Health Act of 1977, and 30 C.F.R. 75.2(g)(1) as follows: "any place in a coal mine in which work of extracting coal from its natural deposit in the earth during the mining cycle is performed . . . . " The Commission in Jim Walter, supra, was presented with the issue, for purposes of applying 30 C.F.R. 75.1710-1, of whether certain equipment was "permissible." The Commission referred to Section 318(i)(8) of the Act as defining "permissible electric face equipment" as those electrically operated equipment taken into or used inby the last open crosscut. With regard to the term "last open crosscut" the Commission in Peabody Coal Company, 11 FMSHRC 4, 8 (January 1989), found as follows: "In general, the last open crosscut thus refers to the last (most inby) open passageway between entries in a working section of a coal mine. The last open crosscut "is an area rather than a point of line . . . ' Henry Clay Mining Company, 3 IBMA 360, 361 (1974)." The Commission, in Peabody, supra, at pages 8-9, found that a determination by the Trial Judge of the boundaries of the area of the last open crosscut to be demarcated by, inter alia "air flow across the developing entries of a working section . . . . ," to comport with commonly accepted mining terminology.

Applying the rationale of Peabody, supra, and Jim Walters, supra, to the case at bar, I conclude that, inasmuch as during the course of the normal mining cycle, coal will be extracted from the face of No. 4 and No. 3 Entries, it follows that the last crosscut before the face, between these two entries, is to be considered the last open crosscut (See also, Consolidation Coal Company, 3 FMSHRC 678, 685-686 (1981)) (Judge Cook). As

such, I find that Linder took air measurement readings at the proper location. Respondent has not refuted the testimony of Linder that, in the last open crosscut between the 3rd and 4th Entries on the date in question, there were only 4604 cubic feet per minute of air. Inasmuch as 9000 cubic feet per minute is required by Section 75.301, supra, I conclude that Respondent herein did violate that section.

The Citation issued by Linder denotes the violation as being significant and substantial. Linder did not testify at all with regard to the facts upon which he based this conclusion. Nor did his testimony at all refer to the characterization of the violation as significant and substantial. I thus conclude that it has not been established by Petitioner that the violation herein was significant and substantial. (See Mathies, supra.)

According the the uncontradicted testimony of Linder, when he observed that there was nothing moving in the air in the last open crosscut between the 3rd and 4th Entries, he told this to the foreman Terry Couch. The latter indicated that a curtain had been torn down by a scoop, and that he would replace those curtains that have been denoted on Gx 9 with a red circle as having been torn. The record does not indicate when the tearing of the various curtains had occurred. I conclude that it has not been established that Respondent acted with more than moderate negligence in connection with the violation.

As set forth in Section 75.301, supra, the purpose of sufficient ventilation is to ". . . dilute, render harmless and to carry away, flammable, explosive, noxious, harmful gases, dust, smoke, and explosive fumes." Thus, inasmuch as the measured air of 4604 cubic feet per minute was significantly below the requirement in Section 75.301, supra, of 9000 cubic cubic feet per minute, I conclude that the violation herein was of a moderately high level of gravity. I conclude that Respondent shall pay a penalty of $175 for the violation found herein.

Citation 3206155

On October 12, 1989, Linder issued a citation alleging a violation of 30 C.F.R. 75.1101-10 in that the water sprinkler system at the 005 working section head-drive did not stop the belt conveyor or give an audible or visible alarm when tested. In his testimony he explained that it was not hooked up to the power source, and as such could not either stop the belt in the event of a fire, or provide an audible or visible alarm. Respondent did not contradict Linder's testimony, and indicated that it conceded the violation. Accordingly, based upon this concession as well as the evidence before me, I conclude that Respondent herein did violate Section 75.110-10, supra, as alleged.

In the Citation issued by Linder, it was indicated that the violation was significant and substantial. Linder did not make any reference in his testimony to his conclusion that the violation was significant and substantial. Nor did Linder adduce any facts in his testimony which would tend to support such a conclusion.

Linder indicated that at the time the violation was cited, the belt was in operation, and in the event of a fire, the sprinkler system, being unplugged, would not have been able to stop the belt and prevent the fire from spreading. He agreed that coal dust is a hazard, and that belt rollers tend to stick and heat up, and that if coal dust piles up around the rollers, a fire could result. He indicated that in such an event, fire could spread to the belt drive, and "it could be carried around" (Tr. 103). I find this evidence insufficient to establish that there was a reasonable likelihood of a fire occurring.

I thus conclude that it has not been established by Petitioner that the violation herein was significant and substantial. (See, Mathies, supra; U. S. Steel Mining Co.).

There is no evidence before me to indicate how long, prior to Linder's inspection, the water sprinkler system was unhooked. Nor is there any evidence to establish that Respondent either knew, or should have been aware, of this condition. Hence, I conclude that Respondent's negligence, in connection with this violation, was only low. The sprinkler system extended only 50 feet along the head of the belt. However, in addition, there was a fire sensor line all along the belt which would give a warning siren in the event of a fire. Although this device would not shut off the belt, it could be shut off at the head-drive by a switch, or could be shut off from the outside. I thus find that the gravity of the violation was only moderate. I conclude that a penalty of $100 is appropriate for this violation.

ORDER

It is ORDERED that Respondent shall, within 30 days of this Decision, pay $8831 as a Civil Penalty for the violations found herein.

Avram Weisberger
Administrative Law Judge

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
FOOTNOTES START HERE

1. Included in this figure is a penalty of $318 for the violations alleged in Citation Nos. 3206153 and 3206157 which were not contested by Respondent in its Answer.