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SOL (MSHA) V. SHAMROCK COAL
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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. KENT 90-137 A. C. No. 15-02502-03565
v.	Docket No. KENT 90-142 A. C. No. 15-02502-03566
SHAMROCK COAL COMPANY, INC., RESPONDENT	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 consolidated Civil Penalty Proceedings are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary (Petitioner), alleging violations of various mandatory safety standards set forth in Volume 30 of the Code of Federal Regulations. The Operator (Respondent) filed Answers in these proceedings, and pursuant to notice, the cases were heard in Richmond, Kentucky, on August 16, 1990. (Docket No. KENT 90-136, which had previously consolidated with the cases involved in this proceeding, was severed based upon an oral Motion made by Petitioner and not opposed by Respondent.) At the hearing, James A. Delp testified for Petitioner and Gordon Couch testified for Respondent.

Stipulations

The following stipulations were agreed to by both Parties:

1. That the proposed penalty would not affect the Operator's ability to continue in business and would be appropriate to the size of the business.

2. That, where appropriate to the nature of the citation, the Operator demonstrated good faith in attempting to achieve rapid compliance after being notified of the alleged violations.

3. The Operator's history of prior violations is shown in Government's Exhibit 1 (Gx 1).

Docket No. KENT 90-137

Citation No. 3206452

On January 10, 1990, James Delp, an inspector employed by the Mine Safety and Health Administration, issued Citation No. 3206452 alleging a violation of 30 C.F.R. 75.403, in that sampling, taken at the various locations of the No. 1 Return Entry of the 006 Section of Respondent's Shamrock No. 18 Mine, revealed that rock dust samples had incombustible contents less than 80 percent. Respondent did not adduce any evidence to rebut or impeach the figures set forth in the Dust Sampling Lab Report, which revealed that in 31 of the the 38 samples taken in the No. 1 Return Entry, the incombustible content of the rock dust was less than 80 percent. 30 C.F.R. 75.403, in essence, mandates that the rock dust in the area in question have an incombustible content of not less than 80 percent. Accordingly, I find that the Respondent herein did violate Section 75.403, supra.

According to the uncontradicted testimony of Delp, the purpose of rock coal dust is to hold down combustible materials, such as coal dust, which he indicated to be highly flammable and explosive. He indicated that if the rock dust does not have the appropriate level of incombustible material, there could be an ignition. According to Delp, if there would be a methane ignition at the face with enough pressure to raise the coal dust and place it in suspension, there would be an explosion. However, he indicated, on cross-examination, that the area in question does not produce a great amount of methane. He also indicated that there were various items of equipment at the face, such as a continuous miner, two shuttle cars, a roof bolting machine, and a scoop, all of which are potential sources of an electrical spark. The record does not contain evidence of any deficiency of any of the equipment present at the face, which would have rendered it reasonably likely for a spark to have occurred. Also Delp indicated that the mine in question does not liberate a great amount of methane. Thus, although the violation herein could have contributed to the hazard of the propagation of an explosion, I find that the evidence fails to establish that there was any reasonable likelihood of a ignition. Accordingly, I find that the violation herein was not significant and substantial. (See, Mathies Coal Co., (FMSHRC 1, 3-4 (1984)).

Inasmuch as the lack of the appropriate incombustible content of the rock dust can lead to the propagation of an explosion, I find that the violation herein was of a moderately high level of gravity. Petitioner has not adduced any evidence to base a decision that Respondent either knew or reasonably should have known that the rock dust in question did not have the appropriate level of incombustible material. Accordingly, I find that the Respondent did not act with more than low negligence in connection with the violation herein. Taking into account the remaining statutory factors of 110(i) of the Act, as stipulated to by the Parties, I conclude that a penalty herein of $300 is appropriate.

Citation No. 3206454

On January 10, 1990, Delp found that the deluge water spray system for the 009 Section head drive was inoperative, as the water line was not connected. Respondent did not contradict or otherwise impeach this testimony. I therefore find that Respondent herein violated 30 C.F.R. 75.1101-1(a) as alleged.

Delp indicated that if the deluge water system, designed to dump large qualities of water on the head drive, is not operative due to the fact that it was not connected to the water source, there is a hazard of a fire at the belt not being suppressed resulting in smoke and noxious gasses. He indicated that there were various materials which could potentially burn, such as several gallons of oil in metal containers, and various timbers and wooden cribs. However, he did not indicate the distance of these materials to the head drive, and it is noted that the oil was contained in metal containers. Also, although he indicated that the area is known as one that accumulates float coal dust, and that the belt was in operation and carrying coal, he was unable to say whether he observed coal dust on the belt, and did not specifically indicate that there was any coal dust around the head drive. Further, although he noted that there was a potential of fire due to friction of rollers and various components, as well as sparks from various electrical equipment at the head drive, there was no evidence adduced as to a specific condition of the various equipment which would make the hazard of an ignition reasonably likely to have occurred. I thus conclude that it has not been established that the violation herein was significant and substantial. (See, Mathies, supra).

Inasmuch as the violation herein could have resulted in the propagation of a fire, producing intense smoke and noxious gasses, and the same could have been carried by the belt to other areas, I conclude that the violation herein was of a moderate high level of gravity.

Delp was asked as to whether it was obvious that the water supply had not been hooked up to the system. He indicated that it was obvious to him. Further, he said that Respondent's foreman, Heatch Begley Jr., who was with him at the time did not explain why the water was not hooked up, and in general did not make any comment. I find that Petitioner has not adduced sufficient facts as to the degree of Respondent's negligence. There is no evidence as to how long the condition had existed prior to Delp's inspection. Further, although Delp indicated that the condition was obvious to him, there were no specific facts adduced as to either a description of the site where the water had been disconnected or its specific location. Nor was any evidence presented as to a specific description of its visibility. Hence, I conclude that it has not been established that the Respondent herein operated with more than a low degree of negligence in connection with the violation herein. I conclude that a penalty of $100 is appropriate.

Citation No. 3206457

On January 23, 1990, Delp indicated that while in the intake entry, he observed a hole approximately 3 by 3 feet in an overcast that ran through and perpendicular to the intake entry. The overcast had been constructed of concrete blocks. The hole that Delp observed still contained parts of concrete blocks, but had been covered by a plastic lined brattice (brattice cloth). Delp issued Citation No. 3206457 essentially alleging that Respondent had not followed its ventilation plan, ". . . which requires overcast to be constructed of 4" x 8" x 16" concrete block and pilaster . . . . " (sic).

According to Delp the overcast was constructed, essentially, to prevent the air in the belt from mixing with intake air. He indicated that the belt line in the overcast goes to the face and contains various gasses and dust. He indicated that in the event of a fire, the brattice cloth could have melted, allowing the contaminants in the belt line to enter the intake entry, which serves as the escapeway. Essentially it was Delp's testimony that as the intake air passes under the overcast, it would create suction which would result in the intake air being the path of least resistance. Accordingly, air from the belt drive containing various gasses would enter the intake air.

I do not place much weight on this theory as Delp did not explain how such suction is created. Further, he indicated that as a general proposition air takes a path from high pressure to low pressure. In this connection he noted that the intake entry is under more pressure than the air in the belt line in the overcast. Accordingly it does not appear likely that air from the overcast would enter the intake return.

Further, the sole basis for the violation cited in the Citation is the assertion that the use of brattice cloth to cover a hole in an overcast violates the ventilation plan. As pertinent, Respondent's violation plan, with regard to materials and methods used to construct overcasts, provides as follows: "4" x 8" x 16" concrete block and pilaster, a noncombustible material may be used in some conditions." (Emphasis added). (Government Exhibit 5, page 3). "Combustible" is defined in Webster's Third New International Dictionary (1986 ed.) ("Webster's") as follows: "1: capable of undergoing combustion or burning - used esp. of materials that catch fire and burn when subjected to fire;" "Combustion" is defined in "Webster's" as "1: a process or instance of burning: . . . . " "Burning" is defined in "Webster's" as "1 a: a consuming or being consumed by a fire or heat."

Thus, Petitioner, in order to prevail, must establish that the brattice cloth in question was not incapable of burning. For the reasons that follow, I find that Petitioner has failed to meet this burden. Delp, who has been with MSHA only since January 1989, but has 15 years experience as a miner, including approximately 12 years as a section foreman, testified on direct examination that "I believe it will burn" (Tr. 70). However, on cross-examination he was asked whether the material in question was not combustible and he answered as follows: "I don't know if it was combustible, but I do know that it would melt" (Tr. 102). In addition, he agreed it was ". . . approved flame-resistant material" (Tr. 102). Gordon Couch, who has been Respondent's safety director for 15 years, and previously involved as a mine inspector for the Department of Interior for 8 years, and served as coal mine inspection supervisor for 2 years, testified with regard to the nature of the material in question as follows: ". . . it is not combustible. It is deemed flame-resistant by the tests conducted by the Bureau of Mines" (Tr. 112). Further, Couch indicated that it is routine to remove blocks and temporarily cover the resulting openings with the material identified by Delp's testimony. Couch's testimony, in these regards, was not impeached or rebutted by Petitioner. Accordingly, I find that the record fails to establish that the brattice cloth in question is not "non-combustible." Thus, it has not been proven that the usage of the brattice cloth herein violated the ventilation plan. However, Citation No. 3206457 is to be dismissed.

Docket No. KENT 90-142

Citation No. 3206323

Delp indicated that on January 23, 1990, Respondent's foreman, a Mr. Asher, opened the water valve on Respondent's sprinkler system. Delp indicated that this is the manner that he usually tests the sprinkler system, at Respondent's mine. He indicated that the belt did not stop and neither a visual nor an auditory alarm was emitted. He issued a Citation alleging a violation of 30 C.F.R. 75.1101-10, which provides, as pertinent, that each water sprinkler system shall be equipped with a device to stop the belt in the event of a rise in temperature, and the device ". . . shall be capable of giving both an audible and visual warning when a fire occurs."

Respondent did not rebut the testimony of Delp that when the system was tested it did not stop the belt drive, nor did it emit an audible or visual warning. Nor did Respondent adduce testimony from any witness which tend to establish that the method of testing used by Delp was not the proper or usual one. Accordingly, I find Respondent herein did violate Section 75.1101-10, supra, as alleged.

Delp indicated that the hazards of a fire are the same as those he described in his testimony with regard to Citation No. 3206454, which involved the deluge system. Also, on the same date, concerning the same belt, he issued Citation No. 3206321 alleging that there were no fire hose outlets for a distance of approximately 900 feet along the belt. In addition, he issued Citation No. 3206322 alleging that there was coal dust a quarter inch to 20 inches in depth, along the side and under the belt conveyor for a distance of approximately 900 feet. However, Delp did not describe the presence of any specific condition which would make the event of ignition reasonably likely to occur. Accordingly, I find that it has not been established that the violation herein was significant and substantial.

The violation herein could lead to the propagation of a fire, which could travel along a belt. Further, persons would not be warned of the fire by either an auditory or visual alarm. I conclude that the violation was of a moderately high level of gravity. There has been no evidence adduced as to the length of time the violation existed prior to Delp's inspection. Nor has there been any evidence adduced to predicate a conclusion that Respondent knew or should reasonably have been expected to know that the violation had occurred. Accordingly, I conclude that Respondent herein operated with only a low degree of negligence. I find that the penalty herein of $75 is appropriate.

Citation No. 3206325

On February 1, 1990, Delp issued Citation No. 3206325. According to Delp, Respondent violated the approved Ventilation Plan, ("the Plan") by: (1) removing two concrete stoppings that had been in the No. 5 intake entry, and replacing them with "loosely hanging" line brattice cloth (Tr. 141), and (2) installing a brattice cloth over an opening in an overcast.1 The Plan, with regard to permanent stoppings, provides that they are "constructed of 4" x 8" x 16" concrete block and pilaster." (sic) (Government 5, Attachment B). The Plan further provides that "Temporary stoppings are constructed of mining timbers, 1" x 2" x 2" boards, and approved brattice material." (Government 5, Attachment C).

Respondent did not rebut or impeach Delp's testimony that brattice cloth, that did not have any boards, were installed at locations that previously contained permanent stoppings. Brattice material is clearly not permitted by the Plan to be used as a permanent stopping, as by its terms, only concrete blocks and "pilaster" (sic) are allowed. In essence, according to Couch, the line brattices were installed for use only as temporary stoppings. There is no evidence Respondent applied for approval to change its Plan and replace permanent stoppings with temporary ones. Further, according to the Plan, temporary stoppings are to be constructed of boards and approved brattice material.2 In contrast, although the brattices herein were approved flame-resistant, they were hung without boards. Thus, I find that Respondent did violate its Ventilation Plan.

The Citation issued by Delp indicates the violation to be significant and substantial. No evidence was adduced specifically with regard to the likelihood of a hazard contributed to by the violation, resulting in an injury. (See, Mathies, supra). In general, Delp indicated that the hazards with regard to the violation herein are the same as was discussed by him in connection with Citation No.3206457. In this previous testimony Delp set forth the hazards of belt and intake air mixing. However,

these hazards were created because the brattice cloth did not provide a perfect seal where it replaced permanent stoppings. In contrast, the record is lacking sufficient evidence as to the hazards contributed to by the violation herein, i.e., the utilization, per se of a material that is not permitted by the Plan for use as a stopping. Accordingly, I conclude that it has not been established that the violation herein was significant and substantial.

According to Couch, the permanent stoppings were removed to allow equipment to be taken in and out the entry in question to rebuild supports necessitated by a bad roof condition. Further, he indicated that permanent stoppings, called for by the Plan, were not rebuilt, as an overcast was placed where the temporary stopping was located. Couch also indicated that curtains, of the same material as the brattices in issue, are used at the face to deflect air. I find that Respondent in utilizing the cloth in question, acted pursuant to a good faith belief that the material was allowed by the Plan. I conclude that Respondent was negligent to a low degree. I find that the gravity of the violation to be moderate. I find that a penalty of $75 is appropriate for this violation.

Citation No. 3206326

Delp issued Citation No. 3206326 alleging a violation of 30 C.F.R. 75.507-1(a) in that a power center was located in the No. 2 Entry approximately 60 feet outby Survey Spad No. 148. Delp in his testimony indicated that the power center was not permissible and was in a return entry ventilated by return air. Section 75.507-1(a) prohibits nonpermissible equipment in return air.

Essentially, according to Delp, return air from the 008 Section, where coal was being mined, coursed through Return Entry No. 2 where the power center was located. According to Delp, the air in Entry No. 2 is considered return air as it comes off the 008 Section where coal was being mined. Respondent did not rebut or otherwise impeach the credibly of this testimony. Further, Delp's definition of return air is consistent with that contained in A Dictionary of Mining, Mineral, and Related Terms (Department of Interior, 1968) ("DMMRT"), which defines "return air" as ". . . 2.b. Air which has circulated the workings and is flowing towards the main mine fan." Accordingly, I find that Respondent herein did violate Section 75.507-1(a), supra, as alleged.

According to Delp, there would be a "probable" ignition source if dust or gas is carried from the working section and gets into the the nonpermissible power center which has various electrical components operating at 12,470 volts (Tr. 183). He indicated that the cable supplying electricity to the power

center does experience shorting, and he knows of situations where high voltage cables have blown up causing sparks and heat. However, no evidence was adduced with regard to the condition of the specific cable that was connected to the power center.

Delp stated that with an accumulation of methane and float dust from the face, there would be "more potential" for ignition and explosion (Tr. 184). He indicated that testing by him within 60 feet of the cited area, revealed methane at concentrations of .01 percent or 3180 cubic feet per 24 hour period in the No. 2 Entry, and 2400 cubic feet per 24 hour period in the No. 1 Entry. However, he indicated on cross-examination that "what counts" is the percentage of methane and the percentages present were not combustible (Tr. 194). I find this evidence fails to establish that the violation was significant and substantial.

According to Delp, the location of the power center was obvious. Respondent did not rebut or impeach this conclusion. I find the negligence herein be moderate. I conclude the gravity was moderate. I find that a penalty of $100 is proper for the violation found herein.

ORDER

It is ORDERED that Citation No. 3206457 be DISMISSED. It is further ORDERED that Citation Nos. 3206452, 3206454, 3206323, 3206325, and 3206326 be AMENDED to reflect the fact that the violations therein are not significant and substantial. It is further ORDERED that Respondent pay $650, within 30 days of this Decision, as a Civil Penalty for the violations found herein.

Avram Weisberger
Administrative Law Judge

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FOOTNOTES START HERE

1. For the reason set forth in the disposition of Citation No. 3206457, infra, I find that it has not been established that the installation of a line brattice to cover an opening in an overcast violates the Ventilation Plan.

2. I interpret Government Exhibit 5, Attachment C, as indicating that the Plan requires brattices to be used in conjunction with boards.