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EAGLE NEST v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

EAGLE NEST, INCORPORATED, CONTESTANT	CONTEST PROCEEDING
v.	Docket N. WEVA 91-293-R Citation No. 3751114; 3/20/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Eagle Nest Mine Mine ID 46-04789

DECISION

Appearances: David J. Hardy, Esq., Jackson & Kelly, Charleston, West Virginia, for Contestant;
Pamela S. Silverman, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Respondent.

Before: Judge Weisberger

Statement of the Case

On April 9, 1991, the Operator, Eagle Nest, Incorporated (Contestant), filed a Notice of Contest alleging that Citation No. 3751114 issued to it on March 20, 1991, is invalid and should be vacated. Contestant also filed on April 8, 1991, a Motion for Expedited Proceedings. In a telephone conference call initiated by the undersigned, with Counsel for both Parties on April 11, 1991, the matter was set for hearing in Charleston, West Virginia, for April 16, 1991. At the hearing, Ronnie Joe Dooley, Franklin Miller, and James P. Addison testified for the Secretary (Respondent). Donnie G. Roberts and Steve Alexander, Jr., testified for Contestant. At the conclusion of the hearing, pursuant to the request of the Parties, they were granted until May 1, 1991, to file Proposed Findings of Fact and a Brief, and were granted until May 8, 1991, to file a reply. Pursuant to a request by Respondent, not opposed by Contestant, these dates were extended to May 6 and May 13, respectively. the parties each filed a post-hearing brief on May 6, 1991. Reply briefs were filed on May 15, 1991.

Findings of Fact and Discussion

I. Introduction

On March 20, 1991, while making a spot inspection of the longwall, A panel, at Contestant's Eagle Nest Mine, Ronnie Joe Dooley, an MSHA Inspector, issued Citation No. 3751114 alleging as follows: "At least one entry of the longwall tailgate return entry could not be made safely in its entirety. Water had accumulated in depth exceeding 16 inches at survey spad No. 3777 and various locations outby. This condition creates a hazard to those persons required to make weekly examinations" (sic). The Citation alleges a violation of 30 C.F.R. 75.305. Section 75.305, supra, provides, as pertinent, that, "At least once a week," an examination of the return entry "in its entirety," shall be made. Section 75.305, supra, requires that the examinations shall be made for "hazardous conditions," including tests for methane, and for compliance with mandatory health or safety standards, and that the examiner shall place his initials and the date and time at the places examined, and, "if any hazardous condition is found, such condition shall be reported to the operator promptly." Section 75.305, supra, further provides that "Any hazardous condition shall be corrected immediately."

In essence, it is Contestant's position that the Citation is invalid, in that it does not allege that a weekly examination was not made, or that hazardous conditions noted in the previous examination were not corrected. Contestant further argues, in essence, that an accumulation of water up to 34 inches does not, constitute a hazardous condition. For the reasons that follow, I do not find merit in Contestant's arguments.

Respondent is correct in its assertion, that, on its face, the Citation in issue does not allege that a weekly examination was not performed or that hazardous conditions previously noted were not corrected. Neither did the testimony of Dooley set forth such allegations. Further, a record of weekly examinations at the subject mine contains the following note: "A-Panel Return-Ch4 Neg-Water 4 feet deep at #23 Pump 3/14/91. . . "(Footnote 1) (Government Exhibit 4). Hence, at the time the Citation was issued, March 20, 1991, there is evidence, which has not been impeached or contradicted by Respondent, that an examination had been made within the immediate preceding 7 day period, and this examination did report the existence of water 4 feet deep in the entry in question. However Section 75.305, supra, requires, in essence, that any "hazardous condition" that is found during a

weekly examination, be reported to the Operator and "shall be corrected immediately." Hence, it must be resolved whether, on March 20, 1991, the date of Dooley's inspection, there had been a report of hazardous conditions which had not been corrected immediately.

II. Hazardous Condition

On March 14, 1991, an examiner reported water 4 feet deep at #23 pump. On March 19, 1991, Ronnie G. Roberts, Contestant's longwall coordinator, examined the entire return entry in question. At the #23 pump he observed that there was an accumulation of water approximately 48 inches deep. (Footnote 2)

On March 20, 1991, when Dooley examined the entry in question, he walked down the entry outby from the face and indicated that he encountered water, and at spad 377 (cross-cut 40). He said that when the water had reached the top of the 16 inch boots he was wearing, he stopped and did not proceed further. He indicated that the water extended across the width of the entry, which he approximated as being 20 feet, and extended outby as far as he could see.

Essentially, it is Contestant's position that the accumulations of water did not constitute such a hazard as to bar an examiner from performing an examination of the entire entry. In essence, Roberts opined that water at a level of 16 inches is not a hazard, as one could walk around it while staying within the walkway, wearing hip boots provided by Contestant. He indicated that the water could be traversed safely by walking slowly and carefully by keeping one foot placed in a firm position and using the other to feel for underwater hazards. Roberts indicated that those miners required to perform examinations in the area could be trained in this fashion.

In essence, Roberts' testimony in this regard was corroborated by Steve Alexander, Jr., the superintendent of the mine in question. Also, Roberts and Alexander indicated, in essence, that hazards encountered on the floor of the entry underwater, such as rocks, mud, and slippery surfaces would similarly exist in the absence of water. In this connection, Alexander stated that there have been more accidents due to falls in dry areas than in areas with water.

According to Dooley, the accumulations of water that he observed on March 20, 1991, were murky, and the bottom could not been seen. Accordingly, he opined that one walking in the area would be exposed to slipping hazards occasioned by mud on the

bottom of the mine floor, as well as submerged rocks, and abandoned pieces of wood from cribs and pallets. In essence, he opined that if a person wearing 16 inch boots would enter water at a lever higher than that, the water would enter his boots making them heavier and, in essence, decreasing his agility if he were to slip and lose his balance. He indicated that this problem would be exacerbated by wearing hip boots and encountering water at a lever higher than the boots, allowing water to enter and fill the boots.

Dooley opined that one slipping and falling could suffer injuries such as a broken limb. He further indicated that a fatality could occur by drowning, if a person in falling would hit his head and lose consciousness. Also, according to Dooley, a fatality by drowning could also result if an examiner loses his balance while walking in the water and is unable to arise from the water due to the weight of the water in his boots.

I thus find, based on the testimony of Dooley, that the accumulation of water herein did present a hazard to those miners who would have to traverse it to make an examination. I find that at best the testimony, of Roberts and Alexander, indicates that steps may be taken to minimize the degree of exposure to the hazards. However, their testimony does not negate the fact that the accumulation of water herein did constitute a hazardous condition.

III. Immediate Correction

According to Roberts, Contestant had, prior to the opening of the longwall panel in question, anticipated problems with water accumulation and attempted to alleviate these problems by a number of methods. Test were taken which indicated that the water in the areas in question came from the surface, and attempts were made to divert surface streams from leaking into these areas. Also, surveys were made to establish the low points along the floor of the entry in question. Electrical pumps were then installed in these locations to pump water out of the entry through a 10 inch pipe, which had replaced a 6 inch pipe, to make the removal of water more efficient. However, in spite of these efforts, the conclusion is inescapable that the accumulations of water reported by the examiner on March 14, 1991, had not been corrected immediately, as accumulations were observed again on March 19, 1991, by Roberts, and again noted, on March 20, 1991, by Dooley and Franklin Miller, who accompanied him.

Accordingly, inasmuch as the hazardous condition of water accumulation had not been immediately corrected by March 20, 1991, the Contestant herein did violate Section 75.305 as alleged.

In light of this finding, I deny Contestant's request for a declaratory rulling that it is not a hazardous condition for its examiners to travel through water accumulations of 24 inches or less when they are wearing hip boots and proceeding at a careful leisurely pace.

IV. SIGNIFICANT AND SUBSTANTIAL

In order to establish that the violation herein is significant and substantial, the Secretary must establish a violation of a mandatory standard, a discrete safety hazard contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and that a reasonable likelihood exists that the resulting injury will be of a reasonably serious nature. Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984).

As set forth infra, the evidence establishes a violation of a mandatory standard, as well as a safety hazard of slipping or falling contributed to by, the violation. The key issue is whether they was a reasonable likelihood that the hazard of slipping or falling will result in an injury. As explained by the Commission in Consolidation Coal Co., 6 FMSHRC 189, at 193 (1984), proof as this issue "embraces a showing of a reasonable likelihood that the hazard will occur because of course, there can be no injury of it does not".

Although a stumbling or falling hazard certainly is present, due to the depth and musky nature of the water accumulation, the hazard can be mitigated by walking cautiously to feel for submerged objects so they may be avoided.

I conclude that accordingly, it has not been established that there was a reasonable likelihood that the hazard of falling or slipping would occur. Hence the violation is nor "significant and substantial".

ORDER

It is ORDERED that the Notice of Contest be DISMISSED. It is further ORDERED that Citation No. 3751114 be amended to reflect the fact that the violtion cited therein is not significant and substantial.

Avram Weisberger
Administrative Law Judge

Footnotes start here_:

1. A signature appears after the date of 3/14/91, but the signature is not legible.

2. Roberts testified that he is authorized to make examinations pursuant to Section 75.305, supra.