

CCASE:
SOUTHERN OHIO COAL 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

SOUTHERN OHIO COAL COMPANY,
CONTESTANT

v.

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

CONTEST PROCEEDINGS

Docket No. LAKE 91-650-R
Citation No. 3329922;
6/11/91

Docket No. LAKE 91-664-R
Citation No. 3329504;
7/16/91

Meigs No. 2

Mine ID 33-01173

DECISION

Appearances: David M. Cohen, Esq., Electric Power Service Corporation, Lancaster, Ohio for Contestant; Maureen M. Cafferkey, Esq., U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio for Respondent.

Before: Judge Weisberger

STATEMENT OF THE CASE

On July 3, 1991, the Operator (Contestant), filed a Notice of Contest contesting the issuance of Citation No. 3329922 which alleges a violation of 30 C.F.R. 75.1704-2(a). Also on July 3, 1991, Contestant filed a Motion to Expedite.

On July 3, 1991, in a telephone conference call initiated by the undersigned with counsel with both parties, it was agreed that a hearing in this matter shall be held on July 11, 1991, in Columbus, Ohio.

At the hearing on July 11, 1991, Charles Jones and Edwin P. Brady testified for Respondent, and Nelson Kidder testified for Contestant. Both parties waived their right to submit a post hearing brief, but in lieu thereof each presented a closing argument.

On July 11, 1991, at the hearing, Contestant filed an Application for Temporary Relief, and the Secretary (Respondent) reserved its right to file a reply to this application. The

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Secretary's Reply was filed July 16, 1991. On July 16, 1991, Contestant filed a Reply to Secretary's Response. Both parties waived their right to an additional hearing on the issues raised by the Application for Temporary Relief.

FINDINGS OF FACT AND DISCUSSION

In Contestant's Meigs No. 2 Mine, prior to April 25, 1991, the primary designated escapeway from the 3 South Longwall Section, ran a distance of 16,200 feet to the No. 1 intake air shaft, (air shaft No. 1) from which point miners exited underground and went to the surface. In May 1990, Contestant decided to install a new intake air shaft (air shaft No. 2), in order to better ventilate the working sections in the southwest area, and to ventilate the gob situated north of the southwest working sections. Air Shaft No. 2 was placed on a ventilation map in July of 1990, and was placed in operation on February 23, 1991. An escape capsule (hoist) was approved by MSHA on April 25, 1991. Hence on April 25, 1991, air shaft No. 2, became a mine opening suitable for the safe evacuation of miners.

Upon the approval of the escape capsule, Contestant designated a new primary escapeway to air shaft No. 2 to replace the 16,200 foot escapeway to air shaft No. 1. The new designated escapeway, on June 11, 1991, ran straight north from the face approximately 2,500 feet to the mouth (neck). From that point it ran approximately 2,000 feet east parallel and two entries south of the entry containing the trolley and belt lines. It then travelled 4 Entries North, and then turned west at the 4th entry and travelled approximately 2,000 feet to air shaft No. 2. The total distance the escapeway travelled from the mouth to the Air Shaft No. 2 was 4,800 feet. The total distance of the escapeway from the longwall face on June 11, 1991 to air shaft No. 2 was 7,700 feet.

On June 11, 1991, Charles Jones an MSHA Inspector walked the escapeway from the mouth of the 3-South longwall section to air shaft No. 2. He said that the escapeway was in good condition except for its distance. He estimated that it took 25 minutes to walk from the mouth to air shaft No. 2.

The mouth is approximately 200 to 300 feet south of air shaft No. 2. It is physically possible to traverse this distance from the mouth by taking a route which runs one crosscut through a track-door, then goes diagonally to the north east one crosscut, and continues west one crosscut through a man-door, then goes west one crosscut to air shaft No. 2 (See joint Exhibit 1). Another path from the mouth to air shaft No. 2 covering approximately the same distance and located in approximately the same area is illustrated in Joint Exhibit No. 2. These paths are in intake air. However, the air in these paths mixes with air from the belt entry that also contains trolley wires.

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Jones issued Citation No. 3329922 alleging a violation of Section 75.1704-2(a) supra. This Citation as pertinent, provides as follows:

The most direct practical route to the nearest mine opening was not provided from the 3rd South Longwall section in that miners were required to travel an additional 4,800 feet by traveling outby from the mouth of the section for 2,300 feet and traveling inby for about 2,500 feet. The emergency escape shaft is located at the mouth of the 3 south Longwall section (across the track and belt entry).

Section 75.1704-2(a) supra, provides as follows:

In mines in working sections opened on and after January 1, 1974, all travelable passageways designated as escapeways in accordance with section 75.1704 shall be located to follow, as determined by an authorized representative of the Secretary, the safest direct practical route to the nearest mine opening suitable for safe evacuation of miners. Escapeways from working sections may be located through existing entries, rooms, or crosscuts (emphasis added).

Section 1704-2(a) supra, thus provides that a designated escapeway shall be located to follow the route determined by the Secretary's representative to be the "safest direct practical route". Hence, section 1704-2(a) is violated where the operator's designated escapeway is located along a route that has not been determined by the Secretary representative to be the safest direct practical route.

The cited escapeway, designated by Contestant in accordance with 30 C.F.R. 1704 was determined by Jones, the Secretary's authorized representative to not have been the safest direct practical route. Hence, the utilization by Contestant of its designated escapeway is a violation of Section 75.1704, supra, if it is established that Jones' determination was proper i.e., that the designated route was not the safest direct practical route.

Inasmuch as the escapeway in question turns east for 31 crosscuts, then makes a 90 degree turn to go north for 4 crosscuts, then makes another 90 degree turn and goes east for 23 crosscuts, then makes another 90 degree turn to go south for 1 crosscut, then makes another 90 degree turn for 9 crosscut through air shaft No. 2, it clearly cannot be found to be a "direct" route. As was stated in Rusthon Mining Co. 10 FMSHRC 713, 716 (aff'd on other grounds) 11 FMSHRC 1432 (1989) "To find otherwise would violate the clear meaning of the word "direct" as defined in Webster New Collegiate Dictionary, (1979 Edition), as: 1a: proceeding from one point to another in time or space

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without deviation or interruption: straight b: proceeding by the shortest way . . . " Hence, the record establishes that Jones properly determined that the designated escapeway was not "direct".

Essentially, according to Jones he "suggested" to Respondent that an overcast be constructed in the "area" of the mouth, to allow miners to continue the escape from that point directly to the air shaft No. 2, utilizing a path that would be in intake air separated from the belt and track haulage entries. It appears to be Contestant's position that section 75.1704-2(a) supra, does not require an operator to engage in any construction in order to have an escapeway in conformity with its provisions. Contestant also argues that it is not "practical" for the overcast to be constructed, as miners engaged in the construction would be exposed to the hazards inherent in the construction and its attendant clean up. In addition, construction of the overcast requires excavation of a supported roof which could weaken the roof in other areas. Contestant also asserts that construction of the overcast requires interruption of cable, telephone, belt and trolley service inby. Contestant argues that, accordingly, construction of an overcast would curtail production at Meigs No. 2 Mine to a significant degree, as 50 percent of its production occurs in the southwest portion inby the overcast. All of these allegations of Respondent are borne out in the testimony of its witness Nelson Kidder an engineering superintendent for the Meigs division. However, the ultimate issue before me is not the property of a "suggested" abatement, but rather whether the record supports a determination that the cited escapeway was not the safest direct route. (Footnote 1) I find that the record establishes that the escapeway was not "direct". Accordingly Jones' determination is supported by the record. Since Contestant designated an escapeway which was determined by Jones to not be direct, I conclude that Contestant herein did violate Section 75.1704-2(a). In light of this conclusion Contestant's

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Application for Temporary Relief must be denied.(Footnote 2)

According to Jones and Edwin P. Brady an MSHA Chief of the Office of the Engineering Service, the violation herein is significant and substantial. According to Jones fire is always possible in a coal mine, and, given the added distance of the cited escapeway, and the fact that it parallels and surrounds a belt entry which also contains trolley wires, smoke could get into the escapeway. However, he agreed on cross examination that, essentially, there were no particular conditions in the area in question that would make it reasonably likely for the hazard of smoke to exist, but that there was a "general concern" about airtightness of stoppings.

In *Rusthon Mining Co.*, 11 FMSHRC 1432 (1989), the Commission held that the length of a mine escapeway in and of itself is not dispositive of the existence of a discrete safety hazard." (*Rusthon supra.* at 1436). Here, as in *Rusthon*, I conclude that Contestant has failed to show that the length of the cited escapeway and its non direct route per se posed a threat involving a reasonable likelihood of a reasonably seriously injury in the event of a fire. Nor has the Respondent shown that the occurrence of a fire and smoke was reasonably likely to have occurred, as its witnesses have not indicated the existence of any specific conditions that would have been likely to have caused a fire, or leakage of smoke into the escapeway. For all these reasons I conclude that the violation herein has not been established to be significant and substantial. (See *Mathies Coal Co.*, 6 FMSHRC 1 (1984).

ORDER

It is ORDERED that Docket No. LAKE 91-664-R be consolidated with Docket No. LAKE 91-650-R.

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It is ORDERED that the Notice of Contests filed July 3 and July 16, be DISMISSED, and the Applications for Temporary Relief filed July 11 and July 16 be DENIED.

It is further ORDERED the Citation No. 3329922 be Amended to reflect the fact that the violation cited therein is not significant and substantial.

Avram Weisberger
Administrative Law Judge

1. According to Jones' uncontradicted testimony, in discussing abatement he "suggested" that an overcast to constructed in the area between the mouth and air shaft No. 2. Neither Jones nor any other representative of the Secretary mandated a specific route that shall be designated on escapeway, in order to abate the violation cited herein. Nor has the Secretary expressly designated any route as the safest direct practical route from the mouth to air shaft No. 2. Accordingly, it is beyond the scope of these proceedings to resolve the issues raised by Contestant i.e., whether an escapeway route requiring the construction of an overcast is "practical".

2. On July 16, 1991, the Operator filed a Notice of Contest and Application of Temporary Relief seeking the vacation and dismissal of a Section 104(b) order issued on July 16, 1991, which alleges that since the last extension "little effort" has been made to abate Citation No. 3329922, which is the subject of the Contest Proceeding which was heard on July 11, 1991. (Docket No. LAKE 91-664-R) It is ordered that Docket No. LAKE 91-664-R be consolidated with Docket No. LAKE 91-650-R.

It appears that Contestant's basis for the Notice of Contest and the Application for Temporary Relief is its position, in essence, that the cited escapeway was not violative of Section 75.1704-2(a) supra. Inasmuch as it has been found infra that Citation No. 3329922 was properly issued, the Notice of Contest and Application for Temporary Relief filed July 16, 1991 are denied and ordered dismissed.