CCASE:
FREEMAN UNITED COAL MINING v. SOL (MSHA)
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TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

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| FREEMAN UNITED COAL MINING COMPANY, CONTESTANT | CONTEST PROCEEDING<br>Docket No. LAKE 91-746-R |
| v. | Citation No. 3218200; 8/8/91 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT | Crown II Mine<br>Mine ID 11-02236 |

DECISION

Appearances: Richard R. Elledge, Esq., Gould & Ratner, Chicago, Illinois for Contestant.
Lisa Gray, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent;

Statement of the Case

This case is before me based on a Notice of Contest filed by Freeman United Coal Mining Company (Contestant), contesting the issuance of Citation No. 3218200 which alleges a violation of 30 C.F.R. 75.321. Contestant also filed a Motion for Expedited Hearing, and in a conference call initiated by the undersigned on August 16, 1991, with counsel for both parties, counsel presented oral argument on the merits of this motion. The motion was granted, (Footnote 1) and the Secretary (Respondent), did not object to Contestant's request that a hearing be held in Arlington, Virginia.

A hearing was held in Falls Church, Virginia, on August 19, 1991. At the hearing Lonnie Deon Conner, Tim Yakus, Kenneth Fox and Charles Dana Campbell testified for Respondent, and Patrick J. Peterson, Harry A. Schum, and Kenneth E. Miller testified for Contestant. The parties waived their right to submit written Post Hearing Briefs, and in lieu thereof presented closing arguments at the conclusion of the evidentiary hearing.

Findings of Fact and Discussion

On June 15, 1991, the only fan providing ventilation at Respondent's underground Crown II mine stopped during a thunderstorm. It is uncontested that all persons were not withdrawn from the mine as a consequence of the stoppage of the fan.

On August 8, 1991, Lonnie Deon Conner, an MSHA Inspector issued Citation No. 3218200. The Citation alleges that "based on information obtained from the main fan pressure recording gauge chart, the main fan was stopped for more than 15 minutes during the evening of June 15, 1991, between 6:00 p.m. and 7:00 p.m." The citation alleges a violation of Section 75.321 supra, which in essence, requires an operator to adopt a plan to provide ". . . that when any mine fan stops," (emphasis added), immediate action shall be taken by the operator to withdraw all persons from the working sections. In this connection, the revised fan stoppage plan (the Plan) in effect in June 1991 provides, as pertinent, as follows: "All persons shall be withdrawn from the mine to the surface after a fan stoppage of 15 minutes or longer." (Joint Exhibit No. 2, page 2). The sole issue for resolution herein is whether Respondent has proven that during the evening of June 15, 1991, there was "a fan stoppage" of 15 minutes or longer. For the reasons that follows I conclude that Respondent has not met this burden.

The testimony adduced at the hearing is not sufficiently convincing to establish the time the fan stopped, and the time it restarted. Kenneth Fox, a miner operator, was working underground on June 15, 1991. He indicated that he was wearing a watch and noted that the power went off a little before 6:15 p.m. He did not testify specifically as to the time that the fan went off. Neither Fox, nor Tim Yakus Respondent's other witness who was working in the hoist building on the shift in question on June 15, 1991, convincingly established that the fan went off the same time the power went off and not later. Yakus in this connection testified that the lights went off, but did not explicitly say that the fan went off at the same time. I find more convincing the explicit testimony in this regard by Contestant's witnesses. Harry Schum a maintenance foreman testified that when he was at the bottom shop the power went off, but that he could hear the fan as there is a "tremendous" amount of air drawn there past a stopping and "it's whistling very loud" (Tr. 206). Kenneth E. Miller, Contestant's shift mine manager testified that at 6:00 p.m. on June 15, 1991, he was told that there was no power underground. He then went to the power box and discovered that the fan was off, as there was no air being drawn at the stopping.

According to Fox when he heard Yakus tell Miller that the fan had restarted, he looked at his watch and it was 6:35 p.m.

However, as noted above, he did not state explicitly the time according to his watch when the fan stopped working. Yakus who was only 15 to 20 yards away from the fan, noted when the fan stopped, as he heard the alarm go off. He also heard the fan restart. However, he was not wearing a watch at the time, and had no personal knowledge of the time of the stoppage of the fan. Yakus testified that he asked Tom Crays who was present with him on June 15, 1991, the time when the fan stopped, and Crays told him 6:20 p.m., and he reported this to Miller. Also Yakus testified that when the fan restarted he asked Crays the time, and Crays told that it was 6:40 p.m. I find this hearsay testimony inherently unreliable to establish the time of the stoppage of the fan, as Crays did not testify and thus the record does not contain any basis to evaluate the probative value of the out of court conclusionary declarations he made to Yakus when asked the time.

Respondent also relies on the pressure recording gauge chart of the fan as interpreted by Charles Dana Campbell an MSHA Senior Mining Engineer, and who is a professional engineer, and works in a ventilation division technical support group. The chart was made by a Bristol Babcock serial 500 pressure recorder (the recorder) which is designed to record negative air pressure created by the exhaust fan in question over a 7 day period. As the chart rotates indicating a passage of time, pressure is recorded by way of an ink stylus. It thus is possible to correlate the negative pressure created by the fan, to a specific hour in a 7-day cycle (See Government Exhibit No. 1).

Campbell examined a copy of the chart, and with the use of a protractor located the center of the chart. He calculated the angle of the arc denoting the distance on the chart between the point in time on Saturday, June 15, when the pressure started to go down, to the point in time where the pressure returned to the level it was at before the fan lost power. He then translated the degree of this angle into minutes, and arrived at a figure of 19.6 minutes, with a margin of error of plus or minus 2.8 minutes. He opined that once the fan is re-energized it would take 1 or 2 seconds to regain its operating negative pressure.

According to the plan the key element for analysis is the time of the fan's "stoppage". This would appear to call for a measurement of the time interval during which time the fan had stopped. Patrick J. Peterson, a Senior Mining Engineer employed by Contestant, testified that he observed the stylus on the recorder to take several minutes to go from 0, its position when the fan is not on, back to negative 6. I place more weight on his testimony in this regard rather than that of Campbell, inasmuch as it was based on his observations, whereas Campbell never observed the recorder in operation. Also, Peterson testified that, by comparing the regular upward slope of the stylus from zero up to maximum pressure, to the upward stroke in

that direction indicated on the chart for Saturday, June 15, it can be seen that the latter stroke did not follow the regular slope. According to Peterson this indicates that the return to maximum pressure once the fan was restarted took more time than it took to go from maximum pressure to zero when the fan was turned off by the storm.

Further, Peterson indicated that it takes less time for the pressure to go down to zero once the fan is shut off, then it does for the pressure to go back to the maximum level once the fan is turned on, as in the former situation there are three sources for air to enter to stabilize the pressure (the fan shaft, man and material shaft, and track slope shaft), whereas when the fan restarts only the man and material shaft and track slope shaft are available, and hence the quantity of air entering is less.

Also, as testified to by Peterson, due to the small scale of the chart, the width of the ink line makes it very difficult to perform precise measurements, and is thus inherently unreliable.

Peterson also indicated that the recorder is not designed to chart the loss of power to a fan.

In the main, Peterson's testimony has not been rebutted or impeached and I accept it. I find his opinions to be well supported.

Taking into account all of the above I conclude that Respondent has failed to establish, by way of convincing evidence that, on June 15, 1991, there was a stoppage of the fan in question that lasted for more than 15 minutes. Accordingly the Notice of Contest is sustained.

ORDER

It is ORDERED that Citation No. 3218200 be DISMISSED.

Avram Weisberger
Administrative Law Judge

Footnote starts here:-

1. In order to expedite the decisional process, the reporting service contracted to transcribe the hearing, was required to file the transcript within 3 days after the hearing. The transcript was not filed until September 3, 1991.