CCASE:
EAGLE NEST V. MSHA
DDATE:
19920326
TTEXT:

EAGLE NEST, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 92-729-R
	:	Citation No. 3754287; 3/2/92
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	East Nest Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	

DECISION

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

Before: Judge Weisberger

This case is before me upon based upon a Notice of Contest filed by the Operator on March 5, 1992, challenging the issuance of Citation No. 3754287 which alleges a violation of 30 C.F.R. 75.1002.(Footnote 1) On the same date, the Operator filed a Motion for Expedited Proceedings. In telephone conference calls on March 5 and 6, 1992, counsel for the Operator presented argument in favor of the Motion, and counsel for the Secretary presented argument in opposition to the Motion. The Motion was granted, and the case was scheduled for hearing on March 12, 1992 in Charleston, West Virginia and was heard on that date. At the hearing, Ronald Lorrison, Thomas Hager, and Steve Alexander testified for the Operator. Ernest H. Thompson and Ernest Sheppard testified for the Secretary. The parties waived their right to submit written post hearing briefs, and in lieu thereof presented oral argument. The Secretary, in addition, filed a written argument on March 17, 1992, and the Operator filed a response to this argument on March 18, 1992.

_____

1The Secretary filed an Answer on March 12, 1992.

FINDING OF FACT AND DISCUSSION

I. Violation of 30 C.F.R. 75.1002

On February 19, 1992, longwall mining had commenced in the E-Panel at the Operator's Eagle Nest Mine. In general, as longwall mining proceeds, a gob area is built up behind (inby) the longwall face. In the E-Panel immediately inby the gob (mined-out areas), the Operator located a set up entry wherein various equipment to develop a future longwall panel was stored. Immediately inby this entry, a bleeder entry vented gases from the gob to the return entries, and then out of the mine. An intake entry, containing trolley wires and tracks, was located immediately inby the bleeder entry, and was separated from the bleeder entry by a double row of cement blocks, each row consisting of blocks 8 inches x 8 inches x 16 inches. On February 24, 1992, as part of the normal longwall mining process, the first roof fall in the gob area occurred.

On February 27, 1992, the entry containing the trolley tracks and wires was inspected by MSHA Inspector Ernest Thompson. The trolley wires were 108 feet from the inby end of the set-up entry, but were approximately 350 feet from longwall face.

Thompson issued a Citation alleging a violation of 30 C.F.R. 75.1002 which, as pertinent, provides that trolley wire "...shall be kept 150 feet from pilar workings". (emphasis added). The initial issue for resolution is whether the term "pilar workings", encompasses the gob or mined out area or, whether it means the longwall face.

The term "pilar workings", as set forth in Section 75.1002, supra, is not defined in Volume 30 of the Code of Federal Regulations. Section 75.1002, supra, sets forth the statutory provision found at Section 310(c) of the Federal Mine Safety and Health Act of 1977 (P.L. 95-164, "the 1977 Act", and, its predecessor, Section 310(c) of the Federal Coal Mine Health and Safety Act of 1969, (P.L. 91-173, "the 1969 Act"). Neither the 1969 Act, nor the 1977 Act contains any definition of the term "pilar workings". Neither is that term defined in A Dictionary of Mining, Mineral, and Related Terms (U.S. Department of the Interior, 1968). Hence, in analyzing the scope to be accorded the term "pilar workings", emphasis is placed on the Congressional intent behind the enactment of Section 310(c), supra.

The only indication of any Congressional intent with regard to Section 310(c) supra, consists of the following language contained in the Section-by-Section analysis of the Senate

version of the 1969 Act "This Section(Footnote 2) requires that ...trolley wires...be kept at least 150 feet from pilar workings...because the ventilating current may contain explosive mixtures of gas. Also, pilar falls may damage and cause short circuits in the cables and transformers." (S. Rep. No. 91-411, 91st, Cong., 1st Sess. 77, reprinted in Legislative History Federal Coal Mine Health and Safety Act, at 77) Since the gob area of a longwall panel can liberate gas, and can cause a "sudden outrush of air" (Tr. 147) when the gob roof falls, even after the first fall, it would appear that Congress, in enacting Section 75.1002 supra, intended to minimize the hazard of gob gases being forced over trolley wires, a source of ignition (See, Consolidation Coal Company, 4 FMSHRC 2153, 2161 (1982), petition for discretionary review denied (January 14, 1983), wherein Judge Broderick, in analyzing whether the measurement of the distance to certain non- permissible equipment should be taken from the outby corner of the pilar being mined, or from the actual place of the cut, set forth as follows with regard to Section 75.1102 supra: "The hazard which the standard is designed to prevent is an ignition or explosion which could result from methane being forced back over electrical equipment which may arc."

Thomas Hager, the Operator's mine foreman, and Steve Alexander, underground superintendent at Eagle Nest, both of whom have more than 20 years experience each in the mining industry, testified, in essence, that the term "pilar workings" means the area where coal is being extracted i.e., the longwall face. Also, in support of its position herein, the Operator relies on the Secretary's Program Policy Manual, Volume V, Part 75, wherein, under the heading 75.1002-1, location of other electric equipment; requirements for permissibility, the following language is set forth: "In longwall mining, the 150-foot distance shall be measured in a straight line from the wire, cable or electric equipment in question to the outby edge of the longwall roof-support system." It was not controverted that this language contemplates that the measurement be taken from the longwall face.

The Program Policy Manual, supra, does not explicitedly defined the term "pilar workings". Further, to the extent that the Program Policy Manual supra, is inconsistent with the expressed Congressional intent behind the enactment of Section 310(c), supra, I accord more weight to the latter with regard to the scope to be accorded the term "pilar workings". Also, I have considered the definitions of the term "pilar workings", as provided by Hager and Alexander. Although they each have extensive mining experience, they did not explicity testify as to the common usage of that term in the industry.

_____

2In the Senate version of the 1969 Act, the statutory provision at issue was set forth as Section 211(c).

Instead, it appears that their definitions of "pilar workings" were based on what the term meant to them. In contrast, I place more weight on the testimony of Ernest Sheppard an MSHA Ventilation Specialist who indicated that, in his experience mining prior to MSHA, and during the time he has worked for MSHA, he has not known the term "pilar workings" to exclude the gob area. (Tr.270)

Hence, for all the above reasons I conclude that the Operator violated Section 75.1002 supra, inasmuch as the trolley wires were located less than 150 from the set-up entry which is immediately inby the gob area which is part of the "pilar workings."

II. Significant and Substantial

The Citation herein alleges that the violation is significant and substantial. In Southern Ohio Coal Company, 13 FMSHRC 912, (1991), the Commission reiterated the elements required to establish a significant and substantial violation as follows:

> We also affirm the judge's conclusion that the violation was of a significant and substantial nature. A violation is properly designated as significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:
>
> > In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary 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.
>
> See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which

there is an injury" (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986)." (Southern Ohio, supra at 916-917).

With regard with the first element, I find that a violation Section 75.1002 supra has been established. Also, as discussed above, infra, the presence of trolley wires 108 feet from the gob contributed to the hazard of an explosion, inasmuch as the trolley wires, an ignition source, could have come in contact with gob gas. However, the record fails to establish the third element set forth in Mathies, supra, i.e. a reasonable likelihood that the hazard contributed to would result in an injury, as it has not been established that there was a "reasonable likelihood" that the hazard contributed to would result in an event in which there is injury", U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

Hager, on cross examination, agreed with Thompson that the trolley wires are an ignition source. Readings taken by Thompson with an MX270 Methane Tester on February 27, 1992, did not reveal the presence of methane. Samples taken at two evaluation points on February 27, indicated the presence of 1/100th of one percent and 1/10th of one percent of methane, and, at the latter location, 8,706 cubic feet of methane in 24 hours. The amount of methane produced was not within the explosive range, and was considered by Thompson to be "not high", (Tr. 173), but the positive readings indicated to him that the gob area was liberating methane. However, the area that the evaluation points were located in was approximately three crosscuts removed from the track entry in question, and separated by stoppings from that entry. Also, any methane present at the evaluation points would go directly into the return and be vented out of the mine.

Of more significance is the fact that any hazard of a gas explosion occasioned by the location of the trolley wires, is minimized by the presence of a double row of cement block stoppings, 8 inches x 8 inches x 16 inches, between the bleeder entry and the trolley track entry. Although Thompson performed a smoke test which showed air going from the bleeder to the track through four stoppings on March 3 and 4, and observed a hole 6 inches by 6 inches between the rib and one of the stoppings, there is insufficient evidence to base a conclusion that these conditions had existed on February 27, the date of the original citation. Indeed, Thompson indicated that he did not check the stoppings on that date. Also, according to Hager, smoke readings that he took at one of these stoppings on February 20, 26, 27, 29, and 3 dates subsequent to March 4, indicated the air to be travelling into the bleeder entry. Moreover, although the

planned longwall roof fall that had occurred on February 24, 1992, did blow out some stoppings, there is no evidence that the roof fall affected any of the stoppings between the bleeder and track entries.

Thompson indicated that had observed an area of bad roof and indicated that if it should fall, it could crush ventilation controls. However, an examination of the mine map, Joint Exhibit No. 1, indicates, as explained by Alexander, that should the roof fall in the area indicated by Thompson and ruin stoppings, then air would flow to the return entries, and not to the track entry.

Although Thompson indicated that even with various precautions something can happen to release gas at the gas well that is present in the solid pilar to be mined, the specific safety precautions to be taken, Operator's Exhibit No. 3, appear to mitigate against the degree of this hazard.

Further, the presence of a low level of incombustible elements, the energized power center, and the presence of coal dust and saturated oil on the mine floor do not increase the likelihood of an explosion, in the absence of a reasonable likelihood of gas from the gob reaching the area in which the trolley track was located.

Thompson observed that 11 rail bonds, used to prevent the trolley tracks from arcing, were missing, and that the balance were struck on rather than welded. This condition extended over five crosscuts. However, it is significant to note, as indicated by Hager, that this area was 200 to 800 feet from the area in question.

Accordingly, for all the above reasons, I conclude that the violation herein was not significant and substantial.

ORDER

It is ORDERED that Citation No. 3754287 be amended to indicate that the violation alleged therein is not significant and substantial. It is further ordered that the Notice of Contest be DISMISSED.(Footnote 3)

Avram Weisberger
Administrative Law Judge

Distribution:

David J. Hardy, Esq., Jackson & Kelly, P.O. Box 553, Charleston, WV 25322 (Certified Mail)

Pamela Silverman, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

nb

_____

3Counsel have each presented argument as to the level, if any, of the Operator's negligence. I decline to reach any decision on this issue. I find that a finding on the issue of negligence is only necessary in deciding the amount of a civil penalty pursuant to Section 110(i) of the act. Hence, a decision on the issue of negligence at this stage of the proceedings would not be in harmony with the statutory scheme for enforcement of violations set forth in the Act, which provides for the Secretary to initially propose a penalty (See, Section 105(c) and 110 of the Act).