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VP-5 MINING 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

VP-5 MINING COMPANY,
CONTESTANT
v.
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDINGS

Docket No. VA 92-112-R
Order No. 3800172

Docket No. VA 92-113-R
Order No. 3800173

Docket No. VA 92-114-R
Order No. 3800174

Docket No. VA 92-115-R
Citation No. 3800175

VP-5 Mine

DECISION

Appearances: Timothy M. Biddle, Esq. and Thomas A. Stock,
Esq., Crowell and Moring, Washington, D.C.,
for Contestant;
Robert Wilson, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Respondent

Before: Judge Melick

These contest proceedings were filed by the VP-5 Mining Company (VP-5) pursuant to sections 105(d) and 107(e) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," to challenge two citations and two "imminent danger" withdrawal orders issued by the Secretary of Labor at the VP-5 Mine on March 25 and 26, 1992.

The VP-5 Mine is a shaft coal mine located in southwestern Virginia employing 348 miners and annually producing about 1.37 million tons by both longwall and continuous miner methods. The north side of the mine where longwall panels have been extracted is known as the East Gob. The East Gob is a large (4,600 foot by 6,000 foot) inaccessible area remaining from seven mined-out longwall panels and is surrounded by bleeder entries on the north and west, by the

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9th Development Panel on the east (the site of an extant longwall mining operation), and by barriers separating it from the main intake air courses on the south (See Joint Exhibit No. 1).

Methane is liberated during the mining process and continues to be liberated from the gob area. If the ventilating system is properly functioning, methane liberated at the longwall face is diluted and carried out of the mine by ventilating air currents. Methane not removed by such ventilation is ordinarily pulled into the gob by a pressure differential between the longwall face area and the gob. The methane moves from an area of relatively high pressure (the longwall face) to an area of lower pressure (the gob) Methane liberated from fallen roof in the gob flows out of the gob by air drawn through the gob and into adjacent bleeder connectors and bleeder entries which in turn, direct the methane to the main return air course. Under the Secretary's regulations, at the point where the bleeder entries intersect a main return, the methane concentration must be no more than 2.0 percent. See 30 C.F.R. 75.316-2(h). Additional methane is drawn off the gob through vertical ventilation holes drilled into the gob from the surface.

MSHA Inspector Carl Duty appeared at the VP-5 Mine on March 25, 1992, to perform a spot inspection required under section 103(i) of the Act at mines liberating large amounts of methane. He proceeded to the bleeder entries surrounding the East Gob entering at the 1 North Main entries and traveled across the northern portion of the East Gob through one of the bleeder entries checking roof conditions and, using a Riken detector, taking methane readings. These readings were all below 3.0 percent methane. He also obtained methane readings in each of 32 bleeder connectors across the north side of the gob. In three of these connectors he detected methane concentrations of 4.2 percent, 4.1 percent and 4.0 percent respectively. Laboratory analysis of a bottle sample then taken at the No. 1 connector of the No. 6 Development also showed 4.13 percent methane along with .16 percent carbon dioxide, 20.1 percent oxygen and .107 percent ethane.

When Inspector Duty found 4.2 percent methane in the No. 1 connector of 6 Development he issued a section 107(a) imminent danger withdrawal order directing that longwall operations be halted until further notice. Although the longwall had already been shut down by the operator, Duty

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was unaware of this at the time he issued this order. Duty also issued a section 104(a) citation alleging that the VP-5 Mine had failed to comply with its Ventilation Plan in violation of 30 C.F.R. 75.316. The inspector maintains that VP-5 was not controlling methane levels in the East Gob as required by Paragraph 10 of the Ventilation Plan. The order was terminated later the same day when methane levels in the bleeder connectors were reduced to below 3 percent.

The following day, March 26, 1992, Inspector Duty returned to the same area of the mine and obtained methane readings in the same bleeder connectors. Again he issued a section 107(a) Order and section 104(a) citation. He found 4.75 percent and 4.8 percent methane at the Nos. 1 and 2 entries, respectively, at the 4 Development and 5.2 percent methane at the 6 Development. The inspector's methane readings on both dates are undisputed.

The citations at bar, Nos. 3800173 and 3800175, issued March 25, 1992 and March 26, 1992, respectively, charge violations of the VP-5 Ventilation Plan under the standard at 30 C.F.R. 75.316 and allege as follows:

The bleeder system was not functioning properly in that the methane content at the bleeder connectors from No. 2 Development through No. 6 Development ranged from 4.0 percentum at No. 2 Development to 4.2 percentum at No. 6 Development. This is a significant increase in the amount of methane that is normally observed in these areas indicating that the methane content in these areas are [sic] not being controlled. (Citation No. 3800173)

The bleeder system was not functioning properly in that 4.5 to 5.2 percentum of methane was present in the bleeder connectors from No. 2 Development to No. 6 Development. The approved ventilation plan was not being complied with in that permanent type stoppings were being erected in the bleeder connectors at the top of No. 2 through No. 7 Developments that prevents the gob areas from being ventilated as approved by the MSHA District Manager. (Citation No. 3800175)

In particular the Secretary maintains that in each case VP-5 violated paragraph 10 of its Ventilation System and Methane and Dust Control Plan, and, more specifically, the following language of that plan:

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The bleeder entries, bleeder systems, or equivalent means will be used in all active pillaring areas to ventilate the mine areas from which the pillars have been wholly or partially extracted so as to control the methane content in such areas. (Exhibit G - 12; Tr. 67-68, 115).

The Secretary maintains, in addition, that under Citation No. 3800175, VP-5 also violated the provisions of subsection (a) of paragraph 10 of the Ventilation Plan. Those provisions read as follows:

Bleeder entries will be defined as special air courses developed and maintained as part of the mine ventilation system and designed to continuously move air-methane mixtures from the gob, away from active workings, and deliver such mixtures to the mine return air courses. Bleeder entries will be connected to those areas from which pillars have been wholly or partially extracted at strategic locations in such a way to control air flow through such gob area, to induce drainage of gob gas from all portions of such gob areas, and to minimize the hazard from expansion of gob gases due to atmospheric change.

Paragraph 10 of the Ventilation Plan requires in essence that the methane content of the gob must be controlled by the bleeder system or equivalent means. As noted by VP-5 however neither the Secretary's regulations nor the VP-5 Ventilation Plan specifically define what is meant by "control" of the methane content. The Secretary's regulations state only that bleeder entries are "designed to continuously move air-methane mixtures into the gob, away from active workings, and deliver such mixtures to the mine return air courses." See 30 C.F.R. 75.316-2(e)(1). As further noted by VP-5 there is no regulation or provision of the subject Ventilation Plan which mandates any particular concentration of methane as indicative of "control." VP-5 argues that evidence of such control is implicit in the requirements under 30 C.F.R. 75.316-2(h) that air exiting bleeder entries must contain no more than 2.0 percent methane where it enters a return air course. There is no dispute in this case that VP-5 was, indeed, maintaining its bleeder air at 2.0 percent or less at the relevant checkpoint when Inspector Duty issued his citations. VP-5 argues that since this is the only indicia of control mentioned in the Ventilation Plan, that should be the end of the matter.

It is established law that once a ventilation plan is approved and adopted, its provisions are enforceable at the mine as mandatory safety standards. Zeigler v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976), Carbon County Coal Co.,

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6 FMSHRC 1123 (1984), Carbon County Coal Co., 7 FMSHRC 1367 (1985), Jim Walter Resources, Inc., 9 FMSHRC 903 (1987). In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation. In plan violation cases the Secretary must establish that the provision allegedly violated is part of the approved and adopted plan and that the cited condition or practice violates the provision. Jim Walter Resources, Inc., supra, at p. 907. Where the plan provisions are ambiguous the Secretary may establish the meaning intended by the parties by presenting credible extrinsic evidence, for example, as to the history and purpose of the provision and evidence of prior consistent enforcement. See Penn Allegh Coal Co., 3 FMSHRC 2767 (1981).

The term "control" as used in Paragraph 10 of the Ventilation Plan is ambiguous and may indeed be subject to different interpretations. The issue here is whether the undisputed methane concentrations found in these cases constitute a lack of such "control." It is not clear whether there has been prior consistent enforcement by MSHA of its present interpretation of these provisions. The Secretary failed to produce evidence of any similar prior citations and noted only that Inspector Duty had testified that in the preceding month he had issued an imminent danger withdrawal order under similar circumstances. Mine Manager Eddie Ball testified on the other hand that there had never been prior enforcement action by MSHA comparable to the charges made herein. The latter testimony is, however, not sufficiently detailed from which it may reasonably be inferred that MSHA inspectors had indeed observed essentially the same conditions in the past and decided not to cite those conditions. The evidence is therefore insufficient in this case from which any inference may be drawn either that there has been prior consistent enforcement of the construction now taken by the Secretary or that there has been prior consistent non-enforcement.

In any event I find that the policy and practices followed at the VP-5 Mine may also demonstrate what the parties intended by the term "control." See Penn Allegh Coal Co., supra. VP-5 policy regarding methane in the connecting entries was described by Mine Manager Eddie Ball at hearing as follows:

Well, my orders to all three shifts at the coal mine I'm at and at the previous coal mine, "At 4 percent [methane] you stopped the longwall. If it goes to 4.5, or you find 4.5, you stay right there where you find it, you monitor it, if it continues to rise, go withdraw your people. If it is not something you can see that's an immediate area that you can immediately do something about, then you withdraw your people."
(Tr. 271-272, See also Tr. 252, 257, 274 and 275.)

Within this framework I conclude that when methane levels reach 4 percent in the bleeder connectors there has been recognition in VP-5 company policy and practice that the methane in the gob is not adequately controlled. This policy and practice is entirely consistent with the Secretary's view that such levels of methane in the bleeder connectors under the facts of these cases constitute a violation of those Ventilation Plan provisions requiring the methane level in the gob to be controlled. This evidence therefore establishes the meaning intended by the parties and, considering the undisputed methane levels found in these cases, I conclude that there were indeed violations of paragraph 10 of the Ventilation Plan as charged on March 25 and March 26, 1992. In light of the above findings there is no need to also determine whether there was a violation in Citation No. 3800175 under the Secretary's alternate theory. It appears in any event that this alternate theory was withdrawn at hearing (Tr. 125-127).

The violations were also "significant and substantial" for the same reasons that the underlying conditions also constituted "imminent dangers." Mathies Coal Co., 6 FMSHRC 1 (1984). See discussion, *infra*. See also National Gypsum Company, 3 FMSHRC 822 at p. 828.

Withdrawal Orders No. 3800172 and 3800174, issued pursuant to section 107(a) of the Act, charge on March 25 and March 26, 1992, respectively, as follows:

The bleeder system was not functioning properly in that the methane content at the bleeder connectors from No. 2 Development through No. 6 Development ranged from 4.0 percentum at No. 2 Development to 4.2 percentum at No. 6 Development. This is a significant increase in the amount of methane that is normally observed in those connectors indicating that the methane content in these areas are [sic] notbeing controlled (75.316). (Order No. 3800172).

The bleeder system was not functioning properly in that 4.5 to 5.2 percentum of methane was present in the bleeder connectors from No. 2 Development to No. 6 Development. Permanent type stopping were [sic] being erected in the bleeder connectors that prevent the air from being coursed through the gob area as approved by ventilation plan for this mine. Order No. 3800174).

Inspector Duty also noted in Order No. 3800172 that the "Area or Equipment" was the development off 2 East Mains Face Area and in Order No. 3800174 that the "Area or Equipment" was the "Entire Mine".

Section 107(a) of the Act provides, in part, as follows:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exists.

Section 3(j) of the Act defines "imminent danger" as the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated. This definition was not changed from the definition contained in the Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq.. (1976) (Amended 1977) ("Coal Act"). The Senate Report for the Coal Act states that an imminent danger is present when "the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered without waiting for any formal proceeding or notice." S. Rep. No. 411, 91st Cong., 1st Sess. 89 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess. Part I, Legislative History of the Federal Coal Mine Health and Safety Act of 1969 at 215 (1975) (quotes Coal Act Legislative History). It further states that the "seriousness of the situation demands such immediate action" because "delays, even of a few minutes, may be critical or disastrous." See Utah Power and Light Company, 13 FMSHRC 1617 (1991).

In *Rochester and Pittsburgh Coal Company v. Secretary*, 11 FMSHRC 2159 (1989), the Commission set forth the analytical framework for determining the validity of imminent danger withdrawal orders issued under section 107(a) of the Act. The Commission indicated that it is first appropriate for the judge to determine whether the Secretary has met her burden of proving that an "imminent danger" existed at the time the order was issued. The Commission also suggested, however, that even if an imminent danger had not then existed, the findings and decision of the inspector in issuing a section 107(a) order should nevertheless be upheld "unless there is evidence that he has abused his discretion or authority." *Rochester and Pittsburgh*, supra, at p. 2164 quoting *Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals*, 523 F.2d 25 at p. 31 (7th Cir. 1975).

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In evaluating whether an imminent danger existed in these cases it is important to consider the three ingredients necessary for a methane ignition or explosion, i.e. fuel, adequate oxygen and an ignition source. The record in this case is undisputed that methane at concentrations of 5 to 15 percent and, in the presence of ethane, even less than 5 percent, can provide the fuel for an ignition or explosion. It is further undisputed that methane concentrations in three of the bleeder connectors on March 25 were 4.2 percent, 4.1 percent and 4.0 percent. Bottle samples taken that date also demonstrate the presence of 4.13 percent methane and .107 percent ethane.

These methane concentrations also represented an increase over readings in the 3 to 3.5 percent range obtained by Inspector Duty during biweekly inspections in the previous three months. It was Duty's expert opinion that his readings on March 25 were "abnormally high" and with this increase the system was "overloaded." He further opined that the methane was not being removed and could increase in a matter of moments to the explosive range. These findings are consistent with the VP-5 policy and practice to close down longwall operations when methane in the bleeder connectors reaches 4 percent. See discussion, supra.

It is undisputed that at least 12 percent oxygen is also necessary for a methane ignition. It is further undisputed that bottle samples indicated that on March 25, 1992, there was 20.1 percent oxygen present in the 6 Development No. 1 Connector. Finally, according to the undisputed testimony of the Secretary's expert on mine ignitions and explosions, Cleat Stephans, ignitions can be triggered from frictional heat from rocks sliding against one another during a roof fall. Moreover, roof falls are expected to occur within, and on the fringes of, the gob. While there is additional record evidence of other ignition sources disputed by VP-5, this undisputed source, i.e., frictional heat, is clearly sufficient in itself to complete the equation for an imminent danger.

In regard to one of these disputed ignition sources, the inspector testified that he was concerned, in issuing the orders, that the building methane would back up into the longwall face where he believed other ignition sources existed. While it turned out that on March 25 the longwall had already been shut down, the operator was under no binding restraint preventing it from restarting the longwall absent Inspector Duty's order. The operator's policy of shutting down the longwall when methane concentrations at the bleeder connectors reach 4 percent is also consistent with Inspector Duty's concerns that these methane concentrations indicated that the ventilation system was "overloaded" and that methane would back up into an operating longwall

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face with its recognized potential ignition sources. In any event, I find that even within the framework of the undisputed evidence, there was clearly an imminent danger as charged in Order No. 3800172.

Additional conditions existed at the time Order No. 3800174 was issued that provide even further support for the Inspector's finding therein of an imminent danger. In his March 26 order the inspector noted that methane was present in the bleeder connectors at a 4.5 to 5.2 percent concentration. Bottle samples also confirmed the presence of 4.48 percent methane with .113 percent ethane. While Contestant does not dispute the existence of 5.2 percent methane at this time it claims that this reading was obtained after the order was already issued. The record however does not support this claim. It is apparent from the testimony of Inspector Duty and the face of the order itself, that while he believed he already had sufficient evidence based on his methane readings at the No. 4 Development to issue an imminent danger order, the order itself was not issued until he had also obtained a 5.2 percent methane reading at the No. 6 Development No. 1 Connector (Government Exhibit No. 15; Tr. 77-78). In addition, Duty noted that a crew of miners had been working in the area with, among other things, metal hammers and axes. While those miners were having lunch at the time he issued his order it is reasonable to expect that they would have resumed working with these metal tools -- a high potential ignition source -- in the very near future. See Utah Power and Light Company, 13 FMSHRC 1617 at p. 1622 (1991).

While Contestant also mildly protests in a footnote to its brief that Inspector Duty presented no evidence that there was at this time sufficient oxygen for methane ignition, a bottle sample taken during his March 26 inspection showed the presence of 18.89 percent oxygen at the "bleeder connector No. 2 Entry of 4 Development" (Government Exhibit No. 14). The clear potential source for ignition or explosion from miners working with metal tools in the presence of sufficient oxygen and explosive levels of methane, without question, constitute an imminent danger. Order No. 3800174 must accordingly also be upheld.

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ORDER

Citation Nos. 3800173 and 3800175 and Order Nos. 3800172 and 3800174 are AFFIRMED and the contests of said citations and orders are DISMISSED.

Gary Melick
Administrative Law Judge
703-756-6261