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ROCHESTER & PITTSBURGH COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ROCHESTER & PITTSBURGH COAL
COMPANY,

CONTESTANT

v.

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

CONTEST PROCEEDINGS

Docket No. PENN 92-70-R
Citation No. 3705517;
10/11/91

Docket No. PENN 92-71-R
Citation No. 3705518;
10/11/91

Docket No. PENN 92-100-R
Citation No. 3705241;
10/23/91

Greenwich Collieries No. 2
Mine

Mine ID 36-02404

DECISION

Appearances: Joseph A. Yuhas, Esq., Pennsylvania Mines
Corporation, Ebensburg, Pennsylvania,
for Contestant;
Edward H. Fitch, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for Respondent.

Before: Judge Maurer

These proceedings concern Notices of Contest filed by the
contestant (R&P) against the respondent (MSHA) challenging the
validity of "S&S" Citation Nos. 3705517, 3705518, and 3705241,
all issued pursuant to section 104(a) of the Federal Mine Safety
and Health Act of 1977. The citations all charge R&P with an
alleged violation of the mandatory standard found at 30 C.F.R.
75.311. The respondent filed a timely answer asserting that the
citations were properly issued and in due course a hearing was
held on March 17, 1992, in Indiana, Pennsylvania. The parties
filed posthearing briefs, and I have considered their respective
arguments in the course of my adjudication of this matter. I have
also considered the oral arguments made during the course of the
hearing.

STIPULATIONS

The parties stipulated to the following:

1. Greenwich Collieries is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

2. The Administrative Law Judge has jurisdiction over these proceedings.

3. The subject citations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the respondent at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

4. The respondent demonstrated good faith in the abatement of the citations.

5. The assessment of a civil penalty in this proceeding will not affect respondent's ability to continue in business.

6. The parties stipulate to the authenticity of their exhibits, but not to their relevance, nor to the truth of the matters asserted therein.

7. An inlet evaluation point ("IE") is a point where air enters an abandoned area. (Tr. 19).

8. Citation No. 3705517 was issued on October 11, 1991, charging a violation of section 75.311.

9. Citation No. 3705517 states correctly that air was passing by openings to abandoned areas, IE's 39 and 45 within the meaning of section 75.311.

10. The air passing by IE's 39 and 45 was coursed to ventilate the 1 Butt section of the mine.

11. An examination of this air passing by IE's 39 and 45 was not made during a preshift examination at the point where the air passed by the opening to the abandoned area nor was an examination conducted immediately inby this point.

12. The distances from IE's 39 and 45 to the faces of the 1 Butt section are approximately 1,500 feet and 3,000 feet, respectively. (Jt. Exh. 1).

13. The air at IE 45 was traveling in its proper direction, into the gob, on October 11, when checked by the inspector. (Tr. 19, 36).

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14. The air at IE 45 contained no methane on October 11, when checked by the inspector. (Tr. 36).

15. The inspector did not travel to IE 39 on October 11. (Tr. 36).

16. The inspector did not travel to the faces of 1 Butt section on October 11. (Tr. 37).

17. The air at IE 45 was traveling into the gob at a velocity of over 400 feet per minute. (Tr. 36).

18. Citation No. 3705518 issued on October 11, 1991, charges a violation of section 75.311.

19. Citation No. 3705518 correctly states that air was passing by an opening to an abandoned area, IE 38.

20. The air passing by IE 38 was ventilating the M11X-01 section of the mine.

21. An examination of the air passing by IE 38 was not made during a preshift examination at the point where the air passed by IE 38 nor was an examination conducted immediately inby this point.

22. The inspector did not travel to IE 38 on October 11. (Tr. 44).

23. The inspector issued Citation No. 3705518 based on his inspection of mine maps. (Tr. 45).

24. The inspector did not travel to the M11X-01 section on October 11. (Tr. 45).

25. Citation No. 3705241 was issued on October 23, 1991 and charges a violation of section 75.311.

26. Citation No. 3705241 differs from Citation Nos. 3705517 and 3705518 in that the air passing by the IE's in 3705517 and 3705518 is directly adjacent to the IE's whereas at IE's 20, 20A, and 15 cited in No. 3705241 the air traveling to the M11X-02 section is a minimum of 90 feet from the nearest IE. The air does pass directly adjacent to IE's 43(a), (b), and (c). (Tr. 48).

27. The air traveling to IE's 20, 20A, and 15 splits from the air traveling to the M11X-02 section approximately 90 feet from those IE points. The Secretary requires an examination immediately inby the split point. (Tr. 49).

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28. After the air traveling to IE's 20, 20A, and 15 splits from the air traveling to the M11X-02 section, it travels through the inlet evaluation points, through the gob and does not ventilate the M11X-02 section. (Tr. 49, 74).

29. The air ventilating the M11X-02 section was not examined for methane during a preshift examination prior to it entering the mouth of the M11X-02 section.

30. The inspector did not examine the areas of the mine cited in Citation No. 3705241 on October 23, 1991. (Tr. 32).

DISCUSSION

On October 11, 1991, MSHA Inspector Nevin J. Davis issued section 104(a) Citation No. 3705517, citing a violation of 30 C.F.R. 75.311(FOOTNOTE 1) and charging as follows:

Preshift type examinations for methane content levels are not being conducted for the areas of the bleeder inlet evaluation point numbers 45 and 39; previously approved for the old 1 Butt abandoned gob area. Intake air current is being coursed, at this time, directly past these bleeder point openings and then flowing onto and ventilating the active 1 Butt (051) working section. Twenty-one citations have been issued at this mine under Part/Section 75.300 series from 7/1/91 to 9/30/91.

Also on October 11, 1991, Inspector Davis issued Citation No. 3705518, citing the identical section and charging as follows:

Preshift type examinations for methane content levels are not being conducted for the areas of the bleeder inlet evaluation point number 38; previously approved for the old M11X abandoned gob area. Intake air current is being coursed, at this time, directly past this bleeder point opening and then flowing into and ventilating the active M11X (013) working section. Twenty-one citations have been issued at this mine under Part/Section 75.300 series from 7/1/91 to 9/30/91.

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On October 23, 1991, Inspector Davis issued Citation No. 3705241, again citing the same section and charging as follows:

Preshift type examinations for methane content levels are not being conducted for the areas of the bleeder inlet evaluation point numbers, previously approved for the M-11 to M-9 gob area, bleeder numbers 20-20A-15, M-11X to M-9 gob area. Bleeder number 43A-43B and 43C, M11X-1 gob area with bleeder number 34. Intake air current flow is now being coursed past these inlet points and into the active M11X-2 (009) working section. Twenty-one citations have been issued at this mine under Part/Section 75.300 series from 7/1/91 to 9/30/91.

Basically, it appears to me that the operator was not examining air which was passing by various openings to abandoned areas at or immediately inby those points or at least before that air mixed with other intake air flowing to the working place and downstream that air was being used to ventilate working places(FOOTNOTE 2) in the mine. The cited mandatory standard requires examination of such air during the preshift examination.

The operator's basic substantive disagreement is that they believe that so long as a methane check is made of that totality of intake air before it ventilates the working faces, then the purpose and intent of the ventilation regulations have been served and they are in compliance. Counsel at hearing noted the anomalous situation that arises where if you had air passing by an inlet evaluation point (IE) that contained .3 percent methane that went to the face, you would be in violation of section 75.311, but you could have air that contained .2 percent methane as it passed that point which later picked up more methane inby that point and contained .9 percent methane by the time it got to the face. The latter situation, even though a greater concentration of methane gas reaches the working face, is permissible. There is no violation in that situation.

Contestant also argues that section 75.311 does not apply to sections which are not producing coal. But I find no such requirement in the specific language of 30 C.F.R. 75.311 and therefore the failure to prove that the relevant working places alluded to in the citations at bar were actually producing coal at the time is irrelevant.

Another issue raised by the operator is the admitted fact that they were led to believe by MSHA personnel that these examinations for methane at or immediately past the IE points would not be required if a velocity of 400 feet per minute of air was maintained traveling into the IE points. It is undisputed that this interpretation came from the MSHA District Office at Pittsburgh and was conveyed to the operator. However, it is also undisputed that these personnel had no actual authority to waive regulatory requirements or substitute alternative criteria in their place. Absent a granted petition for modification under section 101(c) of the Mine Act, MSHA personnel do not have authority to waive compliance with a mandatory standard for any reason. On the other hand, the contestant is charged with knowledge of the regulations and is required to comply with all mandatory health and safety standards at all times.

The Secretary is willing to concede only that to the extent the contestant relied on MSHA personnel for the opinion that compliance with 30 C.F.R. 75.311 was not necessary if they maintained an air velocity of 400 feet per minute in the intake entry adjacent to the openings into the abandoned areas involved, the negligence factor should be lower than might otherwise be expected, at least for the two citations issued on October 11, 1991.

I concur with the Secretary on this point. The Mine Act requires that a citation be issued and a penalty assessed when a violation is found to have occurred. Relying on well-settled precedent, the Commission has rejected the doctrine of equitable estoppel against the Secretary in *Secretary v. King Knob Coal Co., Inc.*, 3 FMSHRC 1417, 1421-22 (June 1981). Therein the Commission held that approving an estoppel defense would be inconsistent with the liability without fault structure of the Mine Act since such a defense is in reality a claim that although a violation occurred, the operator was not to blame for it.

The Supreme Court long ago held that equitable estoppel does not lie against the federal government generally. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 383-386 (1947).

I believe this case ultimately turns on the legal argument concerning the weight or deference to be given the Secretary's interpretation of her own regulations.

The Secretary argues that 30 C.F.R. 75.311 requires that air which passes by openings into abandoned areas must be checked for methane during the preshift examinations at a point prior to that air mixing with other air in the same intake air course.

Her reasoning is that in order to examine the air which has passed by any particular opening of any abandoned area, it is necessary to examine that air prior to its mixing with any other

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air from adjacent entries in the same air course. This requirement is also consistent with 30 C.F.R. 75.312(FOOTNOTE 3) which prohibits the use of any air which has passed through an abandoned area to ventilate any working place in the mine. The existence of methane above .25 percent in the intake air just inby an opening of any abandoned area would be an indication that there may well be a ventilation problem where gases are migrating out of the gobs into the intakes. Therefore, I view section 75.311's purpose as being a mandatory gas check to assure that a violation of section 75.312 does not occur. It is a consistent scheme of regulation.

It is also well-settled that an agency's interpretation of its own regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945). A regulation must also be interpreted so as to harmonize with and further rather than conflict with the objective of the statute it implements. *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411 (10th Cir. 1984).

In this case, I find the Secretary's interpretation of the mandatory standard at issue to be reasonable and harmonious with the objectives of the Mine Act. I also find it to be consistent with the scheme of ventilation regulation in general. Accordingly, I find it to be the preferred interpretation.

Given that the Secretary's interpretation is correct, contestant next raises the issue of whether they had adequate notice that examinations for methane were required at or immediately past the IE points.

The Commission addressed the issue of notice in *Lanham Coal Company, Inc.*, 13 FMSHRC 1341, 1343-44 (September 1991). The Commission found:

When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test. The Commission recently summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990). "In order to

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afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." Id., quoting Alabama By-Products Corp., 4 FMSHRC at 2129 (citations omitted).

In my opinion, a reasonably prudent person familiar with the mining industry and the purpose of the regulation at bar would have recognized that for this regulation to have any meaning at all, that air passing by the IE points had to be checked for methane before it mixed with any other air. The standard specifically mentions air that has passed by an opening of any abandoned area. The obvious purpose of the standard is to check for methane gas coming into the intake air from the gob. Implicitly therefore, it requires the air to be checked right there or just past that point if any meaningful information is to be gained from the examination.

Contestant has raised several points, but does not dispute the essential fact that it was not making preshift examinations of this particular air at or immediately inby the cited openings [or reasonable extensions of those openings as cited in Citation No. 3705241]. I accept as "reasonable" the inspector's explanation of why he extended the openings of the actual IE points at 15, 20, and 20A the approximately 90 feet to a point where they would open to the intake air. The air traveling to IE's 15, 20, and 20A splits from the air traveling to the M11X-02 section approximately 90 feet from those IE points, and the Secretary interprets section 75.311 as requiring an examination for methane immediately inby the split point. I find this to be a reasonable interpretation and also entitled to deference. See, e.g., Bowles, supra.

Accordingly, I find the violations alleged in Citation Nos. 3705517, 3705518, and 3705241 to be proven as charged.

Turning now to the issue of "significant and substantial," a "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the 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 825 (April 1981).

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In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor 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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

We have explained further that 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). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U. S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U. S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

I do not believe that the Secretary has shown that there was a reasonable likelihood of a hazard given the particular facts surrounding the violations contested herein.

The inspector's rationale for designating the citations as S&S was that methane could come out of the gob, come into contact with an ignition source and cause an explosion. While that may well be adequate grounds for an S&S finding in the abstract, there are no facts proven in this particular record to support such a finding. In fact, the reporting inspector himself appears to distance himself from his own purported finding at Tr. 47:

Q. So, what you're saying is then you based your S and S findings on arrows on the map and a remote possibility that air could come out of the gob, contaminate this air ventilating the faces, not be detected by the person preshifting the faces and cause an explosion at the face?

A. Yes.

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Q. Would you consider that a reasonable likelihood of occurring?

A. No, I wouldn't.

The fact of the matter is that there is no evidence whatsoever in this record that any ignition sources were present inby or that any undetected methane was coming out of the abandoned areas. To the contrary, where the inspector did in fact check, the IE points were all working properly and no methane was detected. Accordingly, I am going to delete the special findings pertaining to S&S from the three citations at bar, which will be otherwise affirmed.

ORDER

Citation Nos. 3705517, 3705518, and 3705241 ARE AFFIRMED as non S&S violations of 30 C.F.R. 75.311.

Roy J. Maurer
Administrative Law Judge

FOOTNOTES START HERE-

1. 30 C.F.R. 75.311 provides in pertinent part that: Air which has passed by an opening of any abandoned area shall not be used to ventilate any working place in the coal mine if such air contains 0.25 volume per centum or more methane. Examinations of such air shall be made during the preshift examination required by section 75.303.
2. 30 C.F.R. 75.2(g)(2) defines working place as the area of a coal mine inby the last open crosscut.
3. 30 C.F.R. 75.312 provides in pertinent part that: Air that has passed through an abandoned area or an area which is inaccessible or unsafe for inspection shall not be used to ventilate any working place in any mine.