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BUCK MOUNTAIN V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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BUCK MOUNTAIN COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. PENN 93-221-R
v.	:	Order No. 3082392, 3/05/93
	:	
SECRETARY OF LABOR,	:	Buck Mountain Slope Mine
MINE SAFETY AND HEALTH	:	Mine I.D. No. 36-02053
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: Richard Kocher, Buck Mountain Coal Company, R.D.4, Pine Grove, Pennsylvania, for Contestant; Gretchen Lucken, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Respondent.

Before: Judge Barbour

This proceeding concerns a Notice of Contest filed by Buck Mountain Coal Company ("Buck Mountain") pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.

801 et seq. (1988) (the "Mine Act" or "Act"), challenging the propriety of an order of withdrawal, issued pursuant to section 103(k) of the Act, 30 U.S.C. 813(k), at its Buck Mountain Slope Mine on March 5, 1993. The notice of contest was received by the Commission shortly before the close of business, Friday, March 12, 1993. In addition to contesting the order of withdrawal, Buck Mountain requested that the contest be heard on an expedited basis. Pursuant to that request a hearing was convened on Thursday, March 18, 1993, in Tremont, Pennsylvania.(Footnote 1)

1 It is appropriate to note that the hearing could not have been held on such short notice without the complete cooperation of counsel for the Secretary and the representative of Buck Mountain and without the assistance of the representatives of the Pennsylvania Department of Environmental Resources, Bureau of Deep Mine Safety, who went out of their way to accommodate the parties and the Commission by making space available for the hearing at the Department's office in Tremont.

It is also appropriate to note that due to the need for expedited resolution of the case, this decision has been prepared without the benefit of the transcript.

BACKGROUND OF THE CONTEST

Buck Mountain Slope Mine is an anthracite coal mine located in eastern Pennsylvania, approximately 70 miles north and east of Harrisburg. The mine employs five to six miners who work a single shift. The mine is owned and operated by Buck Mountain, a partnership composed of three partners.

On the morning of March 5, 1993, a methane explosion occurred in the underground portion of the mine, on the No. 4 Level East Gangway Section. Three miners were burned and taken to the hospital. (As of the date of the hearing, one miner remained hospitalized.) The accident was immediately reported and a MSHA rescue and investigation team was sent to the mine. To insure the safety of persons in the mine and to control the situation while MSHA conducted its accident investigation, MSHA issued the section 103(k) order that is the subject of this proceeding. The order states:

The mine has experienced a three (3) miner non-fatal ignition accident in the underground No. 4 Level East Gangway Section. This order is to assure the safety of any person in the coal mine. An investigation will be conducted to determine the safety of the mine. Only those persons selected from company officials, the Pennsylvania State Officials, miners representatives, and others deemed by MSHA to have information relevant to the investigation may enter or remain in the affected area.

Exh. G-3 at 2.

The order was issued at 9:35 a.m., and it affected the entire underground portion of the mine. Forty minutes later it was modified as follows:

The 103(k) Order No. 3082392, dated 3-5-93, is modified to ensure that there is no misunderstanding of the following requirements associated with the order.

They are:

(1) ventilation facilities and fan operations will not be altered and changed without prior approval; (2) the plans to restore the mine to normal operation must be approved by MSHA prior to this investigation; (3) relocation or changing of mine equipment material or facilities must be approved by MSHA prior to their initiation[;]

- (4) relocation or changing of mine equipment material or facilities must be approved by MSHA prior to implementation.

G. Exh. 3 at 3.

Following issuance and modification of the order, the MSHA accident investigation commenced. As of the hearing date, the immediate investigation had been completed, although a report of the investigation and its findings had not been issued. In addition, John Shutack, District Manager of MSHA District No. 1, the district in which the mine is located, testified that he and District No. 1 personnel still must conduct a review and evaluation of the entire ventilation system at the mine.

On March 11, 1993, Shutack sent to Buck Mountain three (3) letters, each advising Buck Mountain that portions of its ventilation plan had been revoked in conjunction with the investigation. The first letter revoked a portion of the plan which had been granted on January 11, 1988, and which allowed Buck Mountain a waiver from the requirement that its mine fan be continuously in operation. See G. Exh. 4 at 1; G. Exh. 1 at 1. Under regulations in effect when the waiver was granted, an MSHA District Manager could waive the requirement that a main mine fan be kept in continuous operation if he was satisfied that the waiver would provide no less than the same measure of protection to miners. See 30 CFR 75.300, 75.3001-1, 75.300-3 (1988). (Footnote 2)

The letter states, "This is to advise you that your request for waiver from continuously operation of the main fan, approved on January 11, 1988, for your Buck Mountain Slope Mine, has been reviewed in conjunction with the investigation of the explosion of methane gas accident that occurred on March 5, 1993, and is hereby revoked." G. Exh. 4 at 1. Similarly worded letters revoked Buck Mountain's "request for waiver from line brattice maintained within 10 feet of the face" and Buck Mountain's "waiver to equip your fan with a manometer [rather than with a pressure-reading gage.]" Id. at 2-3. (See 30 CFR

75.330(b)(2)(1988) and 30 CFR 75.371(1)(1992); 30 CFR 75.300-2(a)(3)(1988) and 30 CFR 75.310(a)(4)(1992).)

Buck Mountain was adamantly opposed to the revocations. Buck Mountain personnel expressed to MSHA District 1 personnel, including Shutack, their opposition to any requirements to continuously operate the main mine fan; install line brattice to within 10 feet of the face and equip the fan with a

² The regulation was subsequently revised, and the regulation currently in effect states in pertinent part, "[m]ain mine fans shall be continuously operated, except as otherwise approved in the ventilation plan." 30 CFR 75.311 (1992).

~542

pressure-reading gage rather than a manometer. Buck Mountain, which had not resumed mining since the accident, believed that if it turned on the fan in order to begin again to mine, it would signal its acceptance of the waivers and be unable to turn it off without being in violation of its ventilation plan. It had similar concerns regarding the other two revocations.

When Buck Mountain was unable to persuade Shutack to rescind the revocations, Richard Kocher, the foreman at Buck Mountain, filed the notice of contest on Buck Mountain's behalf. The pleading states in pertinent part:

Main fan stoppage plan had a waiver to shut fan off after men are out of coal mine. The Arlington Inv[estigation] Team shut down all ventilation . . . now they want to run fan 24 hrs. . . . There is not any reason to operate fan 24 hrs. a day[,] 7 days a week.

The same reasons I have stated go on the line brattice petition and waiver to equip fan with a manometer.

The fan operated like this for 7 years, starting 1 hr. before preshift, and never had any methane trouble.

Notice of Contest.

At the commencement of the hearing, Richard Kocher, stated that he would represent Buck Mountain.(Footnote 3) The Secretary was represented by Gretchen Lucken, who called Shutack and MSHA Inspector Clyde Turner to testify on MSHA's behalf. At the close of the hearing the parties orally presented their positions and waived briefing of the issues.

THE EVIDENCE

District Manager Shutack was the first to testify. Shutack stated that in 1987 Buck Mountain had applied for the waivers that are at the center of the current controversy, and he identified copies of Buck Mountain's applications. G. Exh. 2. Shutack explained that the applications were investigated and

3 Also present at the hearing to advise or consult with Kocher were David Williams, a certified mining engineer, and Ronald Lickman, owner of the Buck Mountain coal rights and of the land on which the mine is situated. With the agreement of counsel for the Secretary, Williams and Lickman were permitted to not only consult with Kocher, but also to cross-examine the Secretary's witnesses and to make statements on Buck Mountain's behalf.

that as a result of the investigations, he approved the waivers. G. Exh. 1. Shutack noted the language in the letters of approval that the approvals "may be modified or terminated if warranted by subsequent changing conditions or in the event an inspection or investigation reveals . . . [non]compliance with . . . [the waivers'] provisions." Id.

With regard to the waiver of the requirement to operate the fan continuously, Shutack stated that the assertion on Buck Mountain's application that in the five years prior to applying for the waiver the mine had an average methane percentage of "0 percent" was checked against MSHA inspection records and was found to be accurate. G. Exh. 2 at 2. (In other words, prior to granting the waiver, MSHA was satisfied that there was no history of methane at the mine.)

Shutack, then described the events of March 5, 1993, how he was advised of the explosion and how he immediately went to the mine where the section 103(k) order was issued. MSHA's investigation of the accident followed, during which MSHA sought to re-establish ventilation in the mine in order to thoroughly examine the mine in search of the cause of the explosion. Shutack explained that during the course of the investigation, it was determined that the mine was subject to erratic liberations of methane, ranging from 1 percent to 5 percent or higher.(Footnote 4) According to Shutack, it was also determined that Buck Mountain was not maintaining line brattice to within 20 feet of the face, as required under its waiver and that the mine map was not accurate.(Footnote 5) This latter finding was disturbing to Shutack in that the map showed seals existing in the intake air slope which were not, in fact, in existence. Shutack feared that methane or carbon monoxide could seep into the mine from the unsealed and worked-out-areas. Shutack stated that without accurate knowledge of the conditions potentially affecting ventilation he could not be certain the mine was adequately ventilated and could not consider any waivers from the mandatory ventilation requirements.

Shutack agreed, however, that during the course of the investigation the main mine fan was not run continuously and that there even were times on March 6 when electrical problems caused

4 Methane presents an explosion hazard when found in concentrations between 5 percent and 15 percent. See Wyoming Fuel Co., 13 FMSHRC 1210, 1213 n. 3 (August 1991).

5 Although citations were issued alleging violations of mandatory safety standards by Buck Mountain due to these and other conditions, the merits of the alleged violations are not at issue in this proceeding.

~544

the fan to be shut off while MSHA inspection personnel were underground. However, Shutack maintained that MSHA personnel were specially trained for underground investigative work and were alert to the dangers of inadequate ventilation.

Shutack was asked about air samples taken during the course of the inspection. He stated that on March 6 very little methane had been found. (See G. Exh. 6 at 1). However, immediately after the explosion, explosive methane levels and higher were found in the chute and gangway near the explosion area. (Bottle sample No. I6765 revealed 13.3 percent methane in the No. 6 Chute and bottle sample No. F3032 revealed 22.86 percent methane in the No. 4 Level Gangway - No. 6 Chute. Id. at 3-4.) Shutack did not know, however, if any samples were taken to establish whether the methane that was detected had come from the unsealed, worked-out areas of the mine, and he admitted that he could not say for certain that these areas were a source for methane or other air contaminants. In fact, he did not know the source of the methane that had exploded and that continued to be found in the mine.

Finally, Shutack testified that the area where the explosion had occurred was a "blind area," a dead end which was difficult to ventilate. He agreed that if the No. 5 and No. 6 Chutes were connected, ventilation would be improved greatly and methane would be much less likely to accumulate.

Shutack testified that the immediate post-accident investigation revealed the need for a survey and evaluation of the entire ventilation system at the mine to make certain methane was being diluted, rendered harmless and carried away. He had determined that the section 103(k) order could not be modified or terminated and the survey could not begin until Buck Mountain agreed to run continuously the main mine fan (under the waiver the company had been allowed to start it one-half hour before the mine was preshifted), to install line brattice to within 10 feet of the face (rather than to within 20 feet as allowed under the waiver) and to install a main fan pressure-reading gage (rather than to use a manometer as allowed under the waiver).

Shutack further stated that he orally informed Kocher of these conditions and formally advised the company of them by the letter dated March 11, 1993, G. Exh. 4.(Footnote 6) If Buck Mountain complied with these conditions, a review of the entire ventilation system of the mine could commence. In addition, Buck Mountain would be required to submit a new ventilation plan.

6 In addition to representing conditions for the lifting or modification of the Section 103(k) order, the letters are also understood by the parties to constitute revocation of part of the mine's ventilation plan.

On cross-examination, Shutack agreed there were potential hazards to the miners from the fan running continuously. In the winter the slope could ice-up and the buggy could derail. Further, there was little, if any, clearance along the slope from which men could work to remove ice.

Shutack testified, that he was not forever wedded to the revocation of the waivers and that he was not precluding the approval of similar waivers in the future. However, given the accident and the information currently at his disposal, he believed he had to insist that Buck Mountain accept revocation of the waivers before the section 103(k) order could be terminated.

CLYDE TURNER

MSHA Inspector Clyde Turner testified that he was a member of the MSHA team that investigated the accident. Turner described that part of the investigation in which he participated. According to Turner, on March 10, 1993, the main mine fan was started at 6:00 a.m., prior to the investigation team entering the mine. The team went underground and around 11:45 a.m., turned off the underground auxiliary fans and air movers. Team personnel were stationed at various spots and instructed to monitor methane levels. Turner testified that after approximately 30 minutes, .2 percent methane was detected in the gangway. At the face of the No. 5 Chute methane was found to be .5 percent and in the No. 6 Chute methane was found at levels of up to 1 percent. Turner believed that if the main mine fan had been stopped methane would have accumulated to the explosive range in two and one-half to three hours.

Turner also believed that the problem with not having the fan running continuously was that methane could build up to levels above the explosive range while the fan was shut off. Once the fan started the levels would begin to decrease, which would result in methane in the explosive range spreading through the mine as the ventilation moved the methane around and ultimately out of the mine. Turner could think of no circumstances under which it would be safe to allow methane levels to build up and, as he stated, the first and most effective defense to methane was to ventilate it, which was why continuous fan operation was required unless specifically exempted by the ventilation plan. Turner believed that unless continuous fan operation was required, the explosion of March 5, would recur sooner or later.

Turner was asked his opinion why the mine, which had been virtually free of methane, had begun to experience methane liberations. He stated that the depth at which mining was taking place could be a factor in that methane was more likely to be released at greater depths. Further, he stated that methane was known to be liberated in "pockets" and Buck Mountain might be

mining through such a pocket. He admitted that as mining progressed it was possible the area currently liberating methane could be by-passed and the mine could again be virtually methane-free. However, he did not expect that this would be the case. He stated that in his experience once methane was encountered the problem persisted.

Under questioning from Kocher, Turner agreed that on March 7, the day mine ventilation was restored, all methane in the mine had been rendered harmless and carried away within one hour. (On March 7 the fan had not run continuously.) He also agreed that if the fan ran continuously there was a good possibility of winter ice building up on the slope. Men would have to chop the ice to remove it and in so doing could fall and injure themselves. He further agreed that because operation of the fan would prevent closure of the door at the slope portal, there was a potential fire hazard in that a brush fire in the area of the mine could enter the mine through the portal door opening. However, Turner was quick to note that these hazards were speculative, whereas the hazard about which he was concerned -- methane -- was actually present. (Footnote 7)

RICHARD KOCHER

Buck Mountain's case was presented through cross-examination of the Secretary's witnesses and through the statements of Kocher. Kocher presented as evidence and read into the record two statements explaining why, in Buck Mountain's view, the main mine fan does not have to be run continuously to remove methane from the mine. See C. Exhs. 1 and 2. Kocher pointed out that during his preshift examinations of March 6 and 7, before ventilation was re-established in the affected area, he found varying amounts of methane in varying locations, the highest amount being 4.8 percent on March 7 in the No. 6 Chute, C. Exh. 1 at 2. However, after ventilation was re-established the most found was .9 percent and most tests revealed much less -- either .2 or .1 percent or no methane at all. Id. at 3-4.

Further, Kocher contended that methane found by MSHA officials was in the "blind" No. 6 Chute, the chute where ventilation will be greatly enhanced when the chute is cut through to the No. 5 Chute. C. Exh. 2 at 1. (This contention, however, flies in the face of the MSHA bottle sample results which showed traces of methane in by the main fan before ventilation was restored. G. Exh. 6 at 1 and 2.) Further, Kocher contended that during MSHA's investigation on March 5-11, when the fan was shut off all night, no methane was found in the mine. C. Exh. 2 at 1. (This contention, however, is

7 At the close of Turner's testimony, the Secretary rested. Buck Mountain, through Lickman, moved for a directed verdict. I denied the motion.

~547

contradicted by Turner's uncontested testimony concerning the results of his in-mine methane tests on March 10.) Kocher, also noted that ventilation at the last open cross-cut in the mine was 12,000 cubic feet per minute, more than twice the 5,000 cubic feet per minute required by the regulations. Id. (MSHA does not dispute this contention.)

Kocher emphasized that for the past 7 years, with the exception of the March 5 accident, there had been no accident at the mine. He maintained that since the mine has been in operation the fan has been started in the morning and has been shut off after work; and that given the dedication to safety at the mine and the fact that no methane was found at the mine prior to March 5, there is no reason to change the ventilation plan because "with the ventilation plan we already have & the large quantity of air flow that [the] fan produces[,] [the methane] is proven controllable." C. Exh. 2.

RONALD LICKMAN

In his closing statement, Lickman summed up Buck Mountain's position: That the Secretary had not proven the existence of methane in such dangerous quantities that the fan should be run around-the-clock, especially when continuous operation of the fan could lead to other hazards endangering miners.

THE VALIDITY OF THE ORDER

Section 103(k) of the Act, the section under which the contested order was issued, states:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. 813(k).

The section gives MSHA plenary power to make post-accident orders for the protection and safety of all persons. Miller Mining Company, Inc. v. FMSHRC, 713 F.2d 487, 490 (9th Cir. 1983). Section 3(k) of the Act, 30 U.S.C. 802(k), includes an explosion within the statutory definition of "accident" as does

~548

the Secretary's regulatory statutory definition of "accident", found at 30 CFR 50.2(h)(5). Thus, there can be no doubt the explosion of March 5, 1993, was the type of occurrence that properly could trigger a section 103(k) order to insure the safety of persons in the mine.

It is likewise clear that given the issuance of the order, Buck Mountain cannot resume mining without the approval of MSHA, provided MSHA's conditions for the resumption of mining are reasonably related to insuring the safety of persons in the mine. The testimony establishes that MSHA is ready and willing to approve such a resumption provided Buck Mountain accepts the conditions upon which MSHA insists. There is no suggestion that the conditions are incapable of being carried out. Moreover, I am persuaded that under the present circumstances, they are both reasonable and necessary to insure safety.

The explosion of March 5 is a calamity that overshadows this proceeding. The distress and concern of Buck Mountain's representative and consultants over what has occurred was readily apparent at the hearing. The only thing fortunate about the accident is that the three miners involved were injured, rather than killed, which is cold comfort indeed.

The thrust of Shutack's testimony is that he believes Buck Mountain should be required to continuously operate the fan, advance line brattice within 10 feet of the face and install a manometer at least until there has been a complete review of the mine's ventilation system. Shutack credibly testified that without the institution of these procedures, he will be unable to initiate and complete that review.

The evidence suggests that at this time implementation of the provisions enhance, not diminish, the effectiveness of the mine ventilation system's ability to dilute, render harmless and carry away methane. Given the fact methane is being liberated now in potentially dangerous quantities, as graphically established by the explosion; the fact that the source of the methane is, at this point, uncertain; and given the fact the old, worked-out areas are not effectively sealed off from the intake, as MSHA had supposed, it seems the height of responsibility and reason to insist upon Buck Mountain's acceptance of the provisions prior to modifying or terminating the order.

It is, after all, the Secretary's duty systematically to evaluate the conditions and practices at the mine and keep the section 103(k) order in effect until he can determine the hazards that caused the explosion have been corrected and will not recur. In light of the current conditions at the Buck Mountain Slope Mine, I conclude that, to make such a determination, the Secretary may insist that Buck Mountain implement the three provisions at issue.

Therefore, I find Order No. 3082392 was properly issued and is valid.

THE SECTION 103(K) ORDER

AND

THE MINE VENTILATION PLAN

There is an aspect of this case that deserves further comment. As the parties recognize and as the record reveals the three provisions MSHA insists be implemented before MSHA will terminate or modify the section 103(k) order are contrary to provisions in Buck Mountain's current ventilation plan. Should Buck Mountain choose to implement the provisions in order to allow MSHA to terminate or modify the section 103(k) order while MSHA conducts its complete review of the miner's ventilation system, Buck Mountain will not, in my view, be signaling the acceptance of the provisions as a permanent part of its ventilation plan. Rather, the effect of Buck Mountain's acceptance would be temporarily to suspend the provisions of the ventilation plan while MSHA initiates and completes its review of the ventilation system. When the review is finished, the suspension will no longer be in effect, and MSHA must then advise Buck Mountain regarding the results of its studies and regarding any changes it proposes in the existing ventilation plan.

It will be at this point that the well recognized principles of Secretarial approval and operator adoption of a ventilation plan come into effect. If differences then exist between the Secretary and Buck Mountain concerning the provisions, the Secretary and Buck Mountain must negotiate in good faith and for a reasonable period concerning the dispute. If they remain at odds, review may be obtained by Buck Mountain refusing to adopt the disputed provision or provisions, thus triggering litigation before the Commission. See Carbon County Coal Co., 7 FMSHRC 1367, 1371 (September 1985).

It must be emphasized that the validity of the provisions currently in dispute as a part of Buck Mountain's ventilation plan is not at issue in this case, and it would be improper to express any opinion in that regard. Because there is no allegation by the Secretary that Buck Mountain is in violation of its ventilation plan, the plan is not before me. Rather, the sole issue is the validity of the section 103(k) order. To rule on the merits of the ventilation plan would be to express the kind of declaratory judgement the Commission has cautioned is unwarranted under the Mine Act. Kaiser Coal Corp., 10 FMSHRC 1165, 1170-1171 (September 1988).

~550

ORDER

In view of the foregoing, Buck Mountain's contest is DENIED and Section 103(k) Order No. 3082392 is AFFIRMED.

David F. Barbour
Administrative Law Judge
(703)756-5232

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