CCASE:
ENERGY WEST MINING V. SOL (MSHA)
DDATE:
19930621
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

ENERGY WEST MINING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 92-216-R
v.	:	Citation No. 3583185; 12/26/91
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Deer Creek Mine
	:	Mine I.D. 42-00121
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 92-421
	:	A.C. No. 42-00121-03763
v.	:	Deer Creek Mine
	:	
ENERGY WEST MINING COMPANY, Respondent	:	

DECISION

Before: Judge Lasher

This matter arises upon the filing by Energy West of a Motion for Summary Decision seeking to vacate Citation No. 3583185 issued by Inspector Robert L. Baker which alleges the following condition or practice was a violation of 30 C.F.R. 75.316

> The approved ventilation, methane, and dust control plan was not being complied with in the 6th Right longwall section as the plan requires 30,000 CFM of air to reach the intake end of the longwall face, the air reading was 22,680 CFM reaching the intake end of the longwall. The crew had been withdrawn to the headgate before my arrival on the section.

Both parties have agreed that summary decision is appropriate in this matter and following Energy West's motion, the Secretary filed a cross motion for summary decision and Energy West filed a response thereto.

In summary, Energy West contends (1) that the Citation should be vacated because the Secretary cannot prove that the Mine's Section 75.316 Ventilation Plan was violated when less that 30,000 CFM of air was supplied to a longwall face during an idle shift, (2) that the regulations in effect at the time, Section 75.301 et seq. (1991), required certain minimums (3000 CFM or 9000 CFM) at each working face unless otherwise specified in the ventilation plan, and (3) that while at Deer Creek its Ventilation Plan did specify otherwise for longwalls during mining, and required 30,000 CFM on the "water spray diagram" pages thereof which described the dust controls and practices required for the operation of each longwall MMU, the context makes clear that the 30,000 CFM requirement can only reasonably be construed to apply during coal producing operations, (a) because such high volume of air could only be needed for methane or dust control when the longwall is operating, producing dust and potentially producing methane (Footnote 1); and (b) because that page of the Plan en- titled "Water Spray Diagram," also contains requirements for the number of sprays that must be operating and the number of gallons per minute ("GPM") of water they must be spraying to keep down the dust generated by longwall operations--and no one contends that the water sprayers need to be operating during idle shifts. See Energy West's Motion and Attachment B and Exhibit 1 thereto. Thus Energy West maintains it only makes sense to construe the 30,000 CFM standard, like the water spray standards, to apply to coal production periods, not to idle shifts.

Energy West explains that other references in the plan show that the increased air quantity was only required during mining and that Section XVII of the Ventilation Plan is clear that the Plan's ventilation quantities during the period of longwall set-up and extraction need not be followed. Exhibit 1 to Attachment B, Energy West's Motion. Energy West also maintains that it was its intent in the Ventilation Plan to require 30,000 CFM only during mining, not during idle periods when dust is not being generated and methane is not potentially being released by the use of the longwall, referring to Attachment B of its Motion.

Alternatively, Energy West contends that even if the scope of the 30,000 CFM provision were deemed not limited to operating longwalls, the plan would be ambiguous and unenforceable under

_____

1 The Deer Creek Mine is virtually methane free. Only trace quantities of methane have ever been detected at this Mine.

Commission precedents governing the interpretation and enforce- ment of such plans.

In a "Statement of Facts" contained in its motion, Energy WEST sets forth a list of 14 facts as to which it believed there was not genuine dispute. The Secretary, however, does not concur in items numbered 9 and 10, 13 and 14 therein. Thus the Secre- tary denies the contention of paragraph 9 of the Statement of Facts that "it (Energy West) intended [emphasis supplied] the air quantity requirement of 30,000 CFM ... to apply only during peri- ods of coal production," and the allegation stated in paragraph 10 that "Energy West has consistently interpreted the 30,000 CFM requirement to apply only during periods of coal production." The Secretary states that theses statement as well as the argu- ments propounded at paragraphs 13 and 14, all of which are based upon the Affidavit submitted by Energy West's Director of Health and Safety, Dave Lauriski, cannot be adopted by the Secretary."

The Secretary does accept Energy West's Facts numbered 1-8 and 11-12 and this is reflected in the "Findings" which follow. The parties agree that if the Citation should be affirmed, then the $20 penalty proposed in Docket No. WEST 92-421 would be appropriate.

FINDINGS

Based on the facts set forth and agreed to in the motions, the following findings of fact are made:

1. Energy West Mining Company owns and operates the Deer Creek Mine in Emery County, Utah.

2. The Deer Creek Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 (the "Act").

3. The presiding Administrative Law Judge has jurisdiction over this proceeding pursuant to Section 105 of the Act.

4. The Citation was issued on December 26, 1991, by In- spector Robert Baker, alleging that Energy West violated 30 C.F.R. 75.316 by failing to comply with the approved ventila- tion, methane, and dust control plan at the 6th right longwall section insofar as the Plan allegedly required 30,000 cubic feed per minute ("CFM") of air to reach the intake end of the longwall face. The Citation was terminated on December 30, 1991.

5. The applicable standards for measuring Energy West's compliance with 30 C.F.R. 75.315 are set forth in the Ventila- tion System and Methane and Dust Control Plan (October 2, 1989) ("Plan") prepared by Energy West (then known as Utah Power and Light Company, Mining Division), and initially approved by the

Mine Safety and Health Administration ("MSHA") on November 1, 1989. MSHA subsequently approved amendments on various dates in 1990 and 1991. See Plan excerpts attached as Exhibit 1 to Affidavit of Dave D. Lauriski, appended as Attachment B to Energy West's motion.

6. The air quantity requirement on which the Citation is based is set forth on the individual water spray schematic for mechanized mining unit ("MMU") No. 051-0 in Part V of the Plan and was approved by MSHA on November 2, 1990.

7. The individual water spray schematic on which the Citation is based states that the "minimum quantity of air reaching the intake end of the longwall face shall be 30,000 CFM." This schematic is the sole basis for the Secretary's Citation alleging that the failure to maintain air velocity at 30,00 CFM constituted a violation of 30 C.F.R. 75.316.

8. At the time the Citation was issued, the air quantity measured 22,680 CFM at the intake end of the longwall face.

9. At the time the Citation was issued, no coal production was occurring.

10. At the time the Citation was issued, the 6th right longwall was idle.

After consideration of the arguments, evidence presented by the parties and analysis of the supporting affidavits (one each by Energy West and the Secretary), it is concluded that the Secretary's position is meritorious and it is here adopted.

A ventilation plan such as that involved here must be approved by the Secretary and adopted by the mine operator pursuant to Section 75.316 and Section 303(o) of the Mine Act. 30 U.S.C. 863(o). Once the plan is approved and adopted, its provision are enforceable as mandatory standards. Jim Walter Resources, Inc., 9 FMSHRC 903, 907 (May 1987); Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 409 (D.C. Cir. 1976); Carbon County Coal Co.. 7 FMSHRC 1367, 1371 (September 1985); Penn Allegh Coal Co., 3 FMSHRC 2767, 2771 (December 1981).

Coal Mine Inspector Robert Baker issued Citation No. 3583185 on December 26, 1991.

The ventilation plan referenced in the Citation clearly and unequivocally states: "The minimum velocity of air reaching the intake end of the longwall face shall be 30,000 CFM." (See Tab A; Ex. 1, Diagram at pg. 4 in Energy West motion).

The plan does not in any manner qualify the requirement of 30,000 CFM. The word "shall" is not ambiguous as explained below.

As previously noted, while the Secretary agrees that at the time the Citation was issued, coal was not being produced since the MMU was being repaired, the Secretary contends that the air quantity must be maintained at 30,000 CFM regardless of whether or not coal is actually being mined at any given moment. Such contention is based on the regulations:

> 30 C.F.R. 75.301 states in pertinent part that: ... the minimum quantity of air reaching the intake end of a pillar line shall be 9000 cubic feet a minute ... . The authorized representative of the Secretary may require in any coal mine a greater quantity and velocity of air when he finds it necessary to protect the health or safety of miners. [Emphasis added].
>
> 30 C.F.R. 75.301-3(c) states that "When longwall mining is practiced the volume of air shall be measured in the intake entry or entries at the intake end of the longwall face and the longwall shall be constructed as a pillar line."

Thus, the C.F.M. that is required by the District Manager and specified in the approved ventilation plan is to be maintained at the intake end of the pillar line. The word "shall" means at all times, since there is no qualifying language restricting the requirement to when coal is being mined.

30 C.F.R. 75.301-3(c) requires that longwall faces are to be: "Constructed as a pillar line" for determining air quantity locations. This means that the intake end of the pillar line applies to longwall faces. Since the air quantity must be maintained at all times at the intake end of the pillar line, the 30,000 CFM, in Deer Creek's case, must be maintained at all times. I find no ambiguity in theses requirements.

Also, as stated in the Affidavit of MSHA Supervisory Mining Engineer, William Reitze, the reasons for requiring this air quantity at this location at all times is to ensure that during idle face periods not only is there sufficient air to maintain the face clear of methane and other harmful or noxious gases but that there is an adequate volume of air to ensure that the bleeder system is being provided with sufficient air to control methane and other harmful or noxious gases. He indicates therein that it has always been understood by operators and enforced by MSHA that the quantity of air at the last open crosscut and at the intake end of the pillar line must remain constant at or above the approved ventilation plan quantity, regardless of whether coal is being produced or the MMV is idle. This ration-

ale satisfactorily rebuts any contention that the Secretary's interpretation would result in an absurdity.

In Energy Fuels Coal, Inc., 12 FMSHRC 698 (April 1990) it was held:

> It is a cardinal principle of statutory and regulatory interpretation that words that are technical in nature "are to be given their usual, natural, plain, ordinary, and commonly understood meaning." Old Colony R. Co. v. Commissioner of Internal Revenue, 284 U.S. 552, 560 (1932), When the meaning of the language of a statute or regulation must be interpreted according to its terms the ordinary meaning of its words prevails, and it cannot be expanded beyond its plain meaning. Old Colony R. Co. v. Commissioner of Internal Revenue, supra; see Emery Mining Corp. v. Secretary of Labor, 783 F.2d 155, 159 (10th Cir. 1986).

The issue presented in this matter, i.e., whether the plan requirements of 30,000 CFM apply only when coal is actually being produced and not during idle periods, has been addressed and decided by the Commission.

In Mid-Continent Coal and Coke, 3 FMSHRC 2502, 2504 (Nov. 1981), the Federal Mine Safety and Health Review Commission held:

> The parties do not dispute that the requirements of a duly adopted ventilation plan are generally enforceable under the Act. Zeigler Coal Company, 4 IBMA 30, aff'd 536 F.2d 398, 409 (D.C. Cir.) (April 22, 1976). Here, the area cited was a working face, the continuous miner had just backed away form the face to allow the crosscut to be cleaned up and ventilation reestablished for further cutting in the production of coal. A temporary halt in cutting, mining, or loading to permit other mining activities in preparation for further mining and production does not interrupt the ventilation requirements of 30 C.F.R. 75.316. To hold otherwise would allow unsafe conditions, as in this instance, to escape sanction unless the operator were caught in the act of cutting, mining, or loading. The Judge's finding of violation is affirmed. [Emphasis supplied].

Commission Judges have uniformly adopted the reasoning of Mid-Continent Coal and Coke, supra.

In Consolidation Coal Company, 3 FMSHRC 2207 (September 1981), Judge Gary Melick affirmed a violation of Section 75.316 for the failure by the operator to ventilate an entry with a line curtain. Although the evidence established that the certain had been in place 2.5 hours prior to the issuance of the Citation, but had been taken down for some unexplained reason, the Judge

found that the absence of the curtain at the time the Citation was issued was still a violation.

In Windsor Power House Coal Company, 2 FMSHRC 671 (March 1980) (Commission review denied April 21, 1980), Judge Melick affirmed a violation of Section 75.316 because of the operator's failure to maintain adequate ventilation oat a working face as required by its ventilation plan. Even though the evidence showed that mining was temporarily halted in the cited area because of a mechanical breakdown, it was held that the absence of the required ventilation constituted a violation.

In Co-op Mining Company, 5 FMSHRC 2004 (November 1983), Judge Virgil Vail affirmed a violation of Section 75.316, because of an operator's failure to install a line curtain as required by its ventilation plan. Although Judge Vail considered the fact that the curtain may have been down for only a short time due to possible rib sloughage, he found that such an unusual occurrence was no defense. Citing Zeigler Coal Co., 4 IBMA 30 (1975), aff'd, 536 F.2d 398 (D.C. Cir. 1976), and Consolidation Coal Co., supra, the Judge found that when an operator departs from his ventilation plan, a violation of Section 75.316 is established.

In Consolidation Coal Co.m, 8 FMSHRC 612 (April 1986), Judge John J. Morris affirmed a violation of Section 75.316, because of the operator's failure to maintain the proper air velocity at a face, as required by its ventilation plan, even though the air reaching the face may have been interrupted for no more than 30 seconds because of a ventilation curtain being pushed against a rib by a shuttle car trailing cable.

In Western States Coal Corp., in a decision that preceded the Commission's Mid-Continent Coal and Coke holding, Judge George Koutras found:

> Failure by an operator to comply with any provision of its ventilation plan constitutes a violation of the provisions of 30 C.F. R. 75.316. Peabody Coal Company, 8 IBMA 121 (1977); Valley Camp Coal Company, 3 IBMA 176 (1974); Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976). The fact that coal was not being cut or loaded at the precise moment that the Inspector arrived on the scene and observed that the line curtain had not been advanced as required is immaterial, and respondent's proposed interpretation of the standard cited is rejected.

Western States Coal Corp. 1 FMSHRC 2059, 2061 - 1st unnumbered FMSHRC Bluebook at page 24 (March 1979).

Since the minimum quantity of air reaching the intake end of the longwall face was less than 30,000 CRFM as required by the Approved Ventilation Plan, the contest lacks merit and the subject citation is AFFIRMED.

ORDER

1. Docket No. WEST 92-216-R is DISMISSED.

2. In related Penalty Docket No. WEST 92-421 the penalty of $20 stipulated to by the parties in the premises is here ASSESSED for Citation No. 3583185 and Respondent SHALL PAY the same TO THE SECRETARY OF LABOR within 30 days from the date of issue of this decision.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Thomas C. Means, Esq., J. Michael Klise, Esq., CROWELL & MORING, 1001 Pennsylvania Avenue, NW, Washington, DC 20004-2505 (Certified Mail)

Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

ek

Margaret Terry, Esq.
Thomas C Means Esq
J Michael Klise Esq
CROWELL & MORING
1001 Pennsylvania Avenue NW
Washington, DC 20004-2505
Robert J Murphy Esq
Office of the Solicitor
U S Department of Labor
1585 Federal Office Building
1961 Stout Street
Denver CO 80294