CCASE:
PEABODY COAL V. SOL (MSHA)
DDATE:
19930827
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

PEABODY COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. KENT 91-1370-R
	:	Citation No. 3417022; 8/27/91
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 91-1371-R
ADMINISTRATION (MSHA),	:	Citation No. 3551055; 8/13/91
Respondent	:	
	:	Martwick Underground Mine
	:	Mine I.D. No. 15-14074
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-99
Petitioner	:	A.C. No. 15-14074-03599
v.	:	
	:	Docket No. KENT 92-185
PEABODY COAL COMPANY,	:	A.C. No. 15-14074-03600
Respondent	:	
	:	Martwick Underground Mine

DECISION

Appearances: David R. Joest, Esq., Henderson, Kentucky, for Peabody Coal Company; MaryBeth Bernui, Esq., Office of the Solicitor; U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor.

Before: Judge Melick

These consolidated cases are before me under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," to contest citations issued by th Secretary of Labor to the Peabody Coal Company (Peabody) and for review of civil penalties proposed by the Secretary for violations of mandatory standards alleged therein.

The Secretary moved to vacate Citation No. 3551060 (Docket No. KENT 92-185) on the grounds that there had been insufficient time to effectively negotiate the disputed provisions of the operator's ventilation plan. The undisputed motion was granted at hearing and Citation No. 3551060

was accordingly vacated. In addition, the Secretary moved at hearing for a settlement of Citation Nos. 3417027 and 3417031 (Docket No. KENT 92-185) proposing a reduction in penalties

from $419 to $275. I have considered the representations, documentation, and testimony at hearing in support of the motion and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The order following this decision will incorporate that settlement.

The two citations remaining at issue, Citation No. 3551055 (Docket No. KENT 92-99) and Citation No. 3417022 (Docket Nos. KENT 91-1370-R and KENT 92-185) allege violations of the mandatory safety standard at 30 C.F.R. 75.507 and, more specifically, as modified charge respectively as follows:

Citation No. 3551055

> Power connection points are in return air outby the last open x-cut on the No. 4 unit (ID 004-4), 1st E. Panel off S.W. submains. Return air was being coursed over the non-permissible power connection points of the conveyor belt motor, starting box and the belt power center located outby the 004-0 section at the mouth of the panel. The intake air reading between No. 1 and No. 2 room was 23,560 cfm and the return air reading at the block stopping across from the working section was 14,150 cfm.

Citation No. 3417022

> Power connection points are in return air outby the last pen crosscut on No. 1 unit (ID 001-1) Second East Panel. Return air was being coursed down the belt and track entries over the pump station, belt drive, and other power boxes along the track entry. The intake air between No. 1 and No. 2 room was 20,400 cfm and 13,299 cfm immediate return. Split return 15,162.

The cited standard, 30 C.F.R. 75.507, provides that "[e]xcept where permissible power connection units are used, all power-connection points outby the last open crosscut shall be in intake air."

The issuing inspector for Citation No. 3551055, Cheryl McMackin McGill, a coal mine safety and health specialist for the Mine Safety and Health Administration (MSHA) with 16 years experience in the mining industry, testified that she measured the intake air of the cited section (see Joint Exhibit No. 2) at 23,560 cubic feet per minute (cfm) and the return air at the combined returns at 14,150 cfm leaving a difference of about 10,000 cfm. According to Ms. McGill, this amount of air was accordingly passing through the neutral areas, i.e.,

the belt and track entries, after having ventilated at least one working face. She explained that the violation existed because this air then passed over a non-permissible power connection point. Ms. McGill took bottle samples on the No. 4 unit on the date the citation was issued and upon testing showed .12 percent methane. Methane readings on that date with a hand held detector showed .2 percent methane in the return closer to the section.

According to Ms. McGill the violation was "significant and substantial" and hazardous because of the existence of non-permissible power connectors in what she believed to be return air and the presence of methane from the working face which could result in fire and/or explosions thereby causing burns and fatalities from asphyxiation.

MSHA Inspector Lendell Noffsinger issued Citation No. 3417022 on August 27, 1991. He testified that the difference between the intake and return air in the neutral entries was about 6,000 cfm on that date. He measured the intake air between the No. 1 and No. 2 rooms at 20,400 cfm and on the return at 13,299 cfm (See Joint Exhibit No. 3). As a result he felt that return air was passing over non-permissible power connection points on the belt drives and pumps. He concluded that the violation was "significant and substantial" because he believed return air from a working face, possibly containing explosive levels of methane, was passing over non-permissible power connecting points. He concluded that it was reasonably likely to cause injuries such as burns from an explosion. He also detected .1 percent methane in the return air and noted that the section belt was running at the time the citation was issued.

MSHA Ventilation Specialist Lewis Stanley agreed that ventilating air containing methane gas passing over non-permissible power connection points could be dangerous. Inspector Stanley has been a ventilation specialist for 12 years, has had additional experience as a regular mine inspector, and 14 years experience as a coal miner. In his opinion, the condition could result in explosions resulting from sparks or an arc emanating from the power connection points.

Subsequent to hearings and briefing in these cases, the Commission, in Secretary v. Zeigler Coal Co., 15 FMSHRC 949 (June, 1993), upheld the Secretary's definition of the term "return air" for the purposes of 30 C.F.R. 75.507, as air that has ventilated any working face or place in a coal producing section. Peabody's argument that under that standard air does not become "return air" until it has passed the last working place is accordingly rejected.

Peabody continues to argue, however, that at the time the instant citations were issued mine operators were not provided adequate notice of the requirements of the cited standard to enable them to defend against charges under that standard. In particular, Peabody argues that the cited standard does not give adequate notice of its requirements since the standard does not set forth any definition of intake or return air and the Secretary's Program Policy Manual definition of return air as air which has ventilated any one working face is contrary to what MSHA had previously recognized to be the accepted meaning of the term in the industry. Peabody further argues, but without any supporting evidence, that "a reasonably prudent person familiar with the mining industry and the protective purposes of the standard" would have no way of knowing that "return air" is air that has ventilated any working face or place in a coal producing section.

I note preliminarily that Peabody's claim of inadequate notice appears to have been presented only in the abstract and that Peabody did not raise this claim either in its Answer, in its response to the Prehearing Order, or in opening statement at trial. Indeed, Peabody did not raise the claim that it did not have adequate notice until it filed its Posthearing Brief. Even at hearing Peabody failed to present any testimony that it did not receive adequate notice and produced no affirmative evidence that a "reasonably prudent person familiar with the mining industry and the protective purposes of the standard" would not have recognized the specific requirements of the standard. See Alabama By-Products Corp., 4 FMSHRC 2128 (December 1982); Lanham Coal Co., Inc., 13 FMSHRC 1341 (September, 1991). Under the circumstances, I find that Peabody has waived any claim to inadequate notice.

In any event, as each of the Secretary's expert witnesses did, when considering the purpose of the cited standard, i.e., preventing air contaminated with methane from passing over potential ignition sources from non-permissible power connection points, it is clear that ventilating air that has ventilated any working face or place in a coal producing section may be air contaminated with methane and therefore must be considered "return air" within the meaning of the cited standard. The Secretary's expert witnesses, Inspectors Lewis Stanley, Lendell Noffsinger and Cheryl McMacken McGill may be considered to be "reasonably prudent persons familiar with the mining industry and the protective purposes of the standard." Their recognition of the requirements of the standard within the framework of the mining industry and the protective purposes of the standard confirms the Secretary's interpretation applied herein. See Lanham Coal, Inc., supra; Alabama By-Products, supra. For this additional reason I reject Peabody's contention.

Peabody next argues that the Secretary has failed to prove that return air in fact passed over non-permissible power points as alleged. Peabody maintains that in this case the inspectors simply took intake and return air flow readings and assumed that the difference between the readings represented air which coursed down the neutral entries. Peabody argues that this assumption suffers from two major defects. First, it argues that the intake and exhaust air readings were not taken simultaneously and that no effort was made to verify that no change in air flow occurred in the interim. According to Peabody's argument, Inspector McGill simply assumed that the air flow remained constant based on nothing occurring in her presence to change air flow even though changes to mine ventilation could have effected air flow to the No. 4 Unit. Peabody argues, secondly, that the inspectors assumed that any air from the face areas which entered the neutral entries passed over non-permissible power points, even though the equipment containing such points is located some distance down the neutral entries and even though there are return side regulators and vents (for example, for battery charging stations) through which the "return" air could re-enter the return entries.

While Peabody speculates, in essence, that the Secretary's testing methods utilized in this case may have been less than perfect I find that the tests performed by the Secretary's agents were clearly sufficient to establish facts from which it may reasonably be inferred that return air passed over non-permissible power points and that the violations therefore were proven as charged. If indeed Peabody wished to establish affirmative defenses such as it suggests in its argument, it was incumbent upon Peabody to present that evidence at hearing.

I agree, however, with Peabody's argument that the Secretary has failed to prove that the violations were "significant and substantial."

> 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 in 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 Coal Co., 13 FMSHRC 912, 916-917 (1991).

As Peabody notes in its Posthearing Brief the Secretary's witnesses testified that they believed the violations at issue were "significant and substantial" because of the danger of a methane ignition caused by methane in the "return air" coming into contact with non-permissible power points. However, no methane readings were taken in the vicinity of the power points and the levels of methane actually monitored were indeed low -- ranging from .03 percent to .2 percent. There is no evidence that methane levels in the return entries have ever been anywhere near explosive levels and no evidence of any prior ignitions. Testimony that there was a mere "possibility of explosion" is not sufficient. Without essential evidence as to the likelihood of an ignition the third element of the Mathies test is not proven. See U.S. Steel Mining, 6 FMSHRC at 1834 (August, 1984) and Secretary v. Zeigler Coal Co., supra at page 953.

In determining an appropriate civil penalty for the instant citations I find, in the absence of evidence, that Peabody is chargeable with but little negligence. Moreover, the violation was not proven to be of high gravity. Considering the available evidence under the criteria in Section 110(i) of the Act I find a civil penalty of $150 for each violation to be appropriate.

ORDER

Citation No. 3551060 is hereby VACATED and Contest Docket No. KENT 92-30-R is DISMISSED. Citation Nos. 3417027, 3417031 are AFFIRMED as modified to delete the "significant and substantial" designations and Peabody Coal Company is hereby directed to pay a civil penalty of $275 for both violations therein within 30 days of the date of this decision. Citation Nos. 3417022 and 3551055 are AFFIRMED, as modified to delete the "significant and substantial" designations and Peabody Coal Company is hereby directed to pay civil penalties of $150 each for the violations therein within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

David R. Joest, Esq., Peabody Coal Company, 1951 Barrett Court, P.O. Box 1990, Henderson, KY 41420-1990 (Certified Mail)

MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

/lh