

CCASE:
SOL (MSHA) V. ENERGY WEST MINING
DDATE:
19931123
TTEXT:

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

November 23, 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 91-251
Petitioner : A.C. No. 42-01944-03586
 :
v. : Cottonwood Mine
 :
ENERGY WEST MINING COMPANY, :
Respondent :

DECISION ON REMAND

Before: Judge Lasher

The Federal Mine Safety and Health Review Commission, in its Decision of September 27, 1993, rejected the "substantial possibility" formulation as the equivalent of "reasonable likelihood" in the third element of its "Significant and Substantial" (S&S) formula set forth in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). In so doing, (1) the conclusion reached in my decision in this matter that the violation committed by Respondent Energy West as charged in Citation 3413898 was S&S was vacated, (2) the Commission requested application of its traditional Mathies formula for determination of the issue, and (3) clarification of my finding that the mine was "gassy" and findings regarding past ignitable methane levels were requested.

After reviewing the record in this matter, I conclude that the evidence that the mine is gassy is too general (II-T. 133, 139-140) and is not sufficiently supported. Likewise, the evidence of past high levels of methane in the mine was sufficiently general and contradictory between Inspectors (see fn. 6 of Remand) to lack the persuasiveness necessary for such finding.

Accordingly:

1. The finding that the mine is gassy is VACATED and, as the Commission specifically requested in its Remand, it is here determined that there is not sufficient evidence on this record to determine whether the mine is or is not, or has been, subject to section 103(i) spot inspections.

~2398

2. The testimony of Inspector Donald Gibson at II-T. 139-140 is rejected as too general and my finding that there had existed prior ignitable levels of methane at the mine is VACATED. (See fn. 6 of Remand).

3. a. Applying the Mathies test, and determining whether there existed a reasonable likelihood that the hazard contributed would result in an injury, it is determined that there is no such likelihood since the mine was not determined to be gassy and since there was no evidence of record that the mine had ever had ignitable levels of methane.

- b. Citation No. 3413898 is MODIFIED to delete the "Significant and Substantial" designation thereon.(Footnote 1)

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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)

Thomas C. Means, Esq., CROWELL & MORING, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004 (Certified Mail)

ek

1 It is understood that the Commission has, in its remand order, reserved to itself responsibility for recalculation of penalty for this Citation, as modified.

Thomas C Means Esq
CROWELL & MORING
1001 Pennsylvania Ave NW
Washington DC 20004
Robert J Murphy Esq
Office of the Solicitor
U S Department of Labor
1585 Federal Office Building
1961 Stout Street
Denver, CO 80294