

CCASE:
OLD BEN COAL V. MSHA
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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OLD BEN COAL COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. LAKE 94-615-R
: Citation No. 4050921; 7/29/94
:
SECRETARY OF LABOR, : Spartan Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Mine ID 11-00612
Respondent :

DECISION

Appearances: Timothy M. Biddle, Esq., Crowell & Moring,
Washington, D. C., and Thomas L. Clarke, Esq., Old
Ben Coal Co., Fairview Heights, Illinois, for
Contestant;
Miguel J. Carmona, Esq., Office of the Solicitor,
U. S. Department of Labor, Chicago, Illinois, for
Respondent.

Before: Judge Amchan

Procedural Background

This case arises out of Old Ben Coal Company's contest of citation No. 4050921, which was issued on July 29, 1994, alleging that Old Ben was operating without an approved ventilation plan. Section 75.370(a)(1) of volume 30 of the Code of Federal Regulations requires a mine operator to develop and follow a ventilation plan designed to control methane and respirable dust. That plan must be suitable to the conditions and mining system at the mine and must be approved by MSHA.

Ventilation plans must be reviewed by MSHA every 6 months to assure that they are suitable to the current conditions at the mine, 30 C.F.R. 75.370(f). In the spring of 1994, during such a review of Old Ben's ventilation plan for its Spartan mine in Randolph County, Illinois, MSHA concluded that the then approved ventilation plan was deficient. On March 22, 1994, MSHA wrote Contestant advising them of these perceived deficiencies and requesting their correction (Exh. R-3, pp. 21-22).

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All of the alleged deficiencies were changed to MSHA's satisfaction save one (Exh. R-3, pp. 7-8). After a meeting on June 7, 1994, Contestant requested that MSHA issue a citation so that the dispute could be resolved before the Commission (Tr. 147). The approval for the ventilation plan expired on June 30, 1994 (Exh. R-2). The instant citation was issued shortly thereafter (Tr. 13-14).

To abate the citation Old Ben submitted a revised plan which was approved by MSHA on August 1, 1994 (Exh. C-6). On August 2, 1994, Old Ben filed a notice of contest to citation No. 4050921, claiming that the changes that were forced upon it by MSHA were not warranted by the conditions at the Spartan mine.

The Disputed Plan Provision

The unresolved issue in Contestant's disapproved plan concerned the typical sequence of extended face cuts. More specifically, MSHA was concerned with the ventilation of the straight (or straight portion of an entry) when a crosscut was made to the right, (Exh. C-2, p. 18, top sketch).

The same procedure was employed by Old Ben with all three of the continuing miner units at the Spartan mine. As depicted on the right side of exhibit C-4, notch 9 (in purple) and in exhibit C-5, the continuous miner would advance over 100 feet inby the last open crosscut and then would back up over 76 feet to cut a notch to start a crosscut to the right of the entry. When the mining machine cut this notch, the line curtain, which had extended to within 38 feet of the working face on the right side of the entry, was removed in the area in which the notch was cut (Tr. 23, 126).

The line curtain in this area was not generally replaced until this notch was bolted. This could occur within a few minutes or as much as an hour and a half after the notch was cut (Tr. 131-32). The continuous miner would back out of the entry after cutting the right notch and then return at a later time to cut the crosscut all the way through to the adjacent entry to the right. The line curtain would also have to be taken down or curved to the right, to allow completion of the crosscut (Exh. C-2, p. 18).

During its review of Contestant's ventilation plan in the spring of 1994, MSHA concluded that Old Ben's mining procedure did not provide adequate ventilation to the straight, the area inby the notch (Tr. 33, area C of exhibit C-5). The agency concluded that, due to this condition, methane which was liberated from the coal seam would not dilute or dissipate and could explode (Tr. 35-36, 39, 43).

Under the ventilation plan approved by MSHA in August 1994, the continuous miner advances only 20 feet beyond the inby rib of the crosscut which it will start to the right (Exh. C-7, C-8), as opposed to 76 feet under the disapproved plan (Tr. 154-56, Exh. C-5). The post-August 1994 procedure requires Contestant to move its equipment more frequently, which results in a decrease in coal production of 800 - 1,000 tons per mining cycle (Tr. 166-67).

Contestant also alleges that the new procedure is more hazardous than the old. It submits that the increased number of equipment moves is likely to result in an increased number of back injuries (Tr. 158, 180-81). (Footnote 1) Further, Contestant believes the new procedure increases the chances of a miner being crushed by its machinery (Tr. 193-94), and increases the exposure of its miners to coal dust (Tr. 203, 210).

Most importantly, Contestant claims that the changes imposed upon it by MSHA's disapproval of its prior ventilation plan are unnecessary in protecting the health and safety of its miners (Tr. 165-67). Thus, it concludes that its old plan was suitable to the conditions at the Spartan mine and that the MSHA-imposed plan is unsuitable in that it increases hazards and reduces the profitability of the mine without legitimate reasons.

The Spartan mine is not a high methane liberation mine (Tr. 46). In approximately 38,000 examinations made at the working faces of the Spartan mine between December 1992 and August 1994, no concentrations of methane were found above four-tenths of one percent (Tr. 186, Exh. C-9) (Footnote 2). Four-tenths was detected on two occasions, three-tenths on another two occasions. Two-tenths of one percent or less was detected on all other occasions (Tr. 186-87).

There is no indication that there has ever been a methane explosion at the Spartan mine, or a citation issued for excessive methane. Similarly, there is no indication that a continuous miner has ever been de-energized at the Spartan mine due to methane concentrations over one percent (Tr. 132-33, 189-90). However, in 1986, 7% methane was detected for a split second when a roof bolting machine drilled into it (Tr. 197-98).

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Transcript page 158, line 5 erroneously attributes to the undersigned statements made by Contestant's witness, William Patterson, regarding these hazards.

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The Spartan mine experienced a strike between May 10, 1993 and December 16, 1993 (Tr. 186).

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Old Ben also contends, and I find, that methane releases at the Spartan mine are and will be very rare and will occur in relatively small pockets (Tr. 227). It is unlikely that methane liberation will increase at the Spartan mine in the foreseeable future (Tr. 235-36).

Ninety-five percent of the methane in the Spartan mine is likely to be released during the cutting of coal (Tr. 229-30). Very little of the methane at this mine is residual gas which will be released after cutting is finished (Tr. 232-34).

There are no ignition sources in the straight after the continuous mining machine backs up until the roof bolting machine enters the area (Tr. 236). The roof bolting machine operator must check for methane before entering this area and every twenty minutes thereafter (Tr. 191-92, 243-44).

Disposition of the Citation

In cases arising out of a dispute over the disapproval of a ventilation plan, the Secretary of Labor has the burden of proving that the rejected plan was no longer suitable and that the new plan is suitable, Peabody Coal Company, 15 FMSHRC 628 (April 1993); 15 FMSHRC 381 (March 1993). In the instant case, the Secretary has not met either burden.

The Secretary has not established that the disapproved plan created hazards to Contestant's miners that made it unsuitable. Similarly, in view of his failure to show the unsuitability of the old plan, he has failed to establish the suitability of the new plan, given the significant increased costs of production, which the new plan imposes upon the operator.

Much of MSHA's theory that the old plan is dangerous depends on conclusions drawn from smoke tests made at the Martwick mine in Western Kentucky and other mines (Tr. 36, 82-83). From those tests MSHA concludes that there is no air movement in the straight under the conditions existing under the disapproved plan at Contestant's mine. However, Contestant's expert, Donald Mitchell, whose opinion I credit, concluded that there is sufficient air flow into the straight at the Spartan mine under the old plan to render whatever methane is released harmless (Tr. 237-38).

Following the hearing in this matter I requested that the parties file briefs to address the applicability, if any, of MSHA's regulations at 30 C.F.R. 75.330 and 75.333(g) to this

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case. The parties agree that section 75.333(g) does not have any relevance to this case (Secretary's brief at page 10). (Footnote 3)

Section 75.330 requires that ventilation control devices be installed at a distance no greater than 10 feet from the area of deepest penetration to which any portion of the face has been advanced unless an alternative distance is specified and approved in the ventilation plan. Section 75.330(b)(1)(ii) requires that ventilation control devices be used to ventilate "any other working places as required by the approved ventilation plan."

I am persuaded by Contestant's brief at pages 3-5 that section 75.330(b)(1)(i) and 75.330(b)(2) are not applicable to this case. When the continuous mining machine backs up in the straight, the area of deepest penetration ceases to be a "working face." (Footnote 4) Thus, I conclude that there is no general rule indicating that it is necessary to maintain ventilation control devices at any particular distance from the area of deepest penetration when the mining machine is cutting a notch or crosscut 76 feet outby that location.

The requirements of section 75.330(b)(1)(ii) are somewhat circular as applied to this case. If Contestant had submitted a plan requiring that ventilation controls be maintained within a certain distance of a "working place," that requirement would be binding on Old Ben. However, if such a requirement were forced upon Contestant through the mechanism of the plan approval process, the Secretary would have to demonstrate its suitability.

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Section 75.333(g) provides:

Before mining is discontinued in an entry or room that is advanced more than 20 feet from the inby rib, a crosscut shall be made or line brattice shall be installed and maintained to provide adequate ventilation...

The parties appear to agree that the word "discontinued" means permanent cessation of mining in an area, not the movement of a mining machine out of an area temporarily to extract coal at another location to continue the mining cycle (Contestant's brief at 10-12, Secretary's brief at 10).

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"Working face" is defined in MSHA's regulations as any place in a coal mine in which the work of extracting coal from its natural deposit in the earth is performed in the mining cycle. "Working place" is defined as the area of a coal mine inby the last open crosscut, 30 C.F.R. 75.2.

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If the Secretary desires to prohibit the mining practice represented by Exhibit C-4, he would have to do so through notice and comment rulemaking. There is nothing about the conditions at the Spartan mine, or about a number of mines that are similarly situated, that would warrant a prohibition of this practice at the Spartan mine while allowing it at many or all other mines. Peabody Coal Company, 15 FMSHRC 381, 386 (March 1993).

CONCLUSION AND ORDER

For the reasons stated herein I vacate citation No. 4050921.

Arthur J. Amchan
Administrative Law Judge
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