

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 16, 2014

AMERICAN COAL COMPANY,
Contestant,

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION, (MSHA),
Respondent,

CONTEST PROCEEDING

Docket No. LAKE 2010-408-R
Order No. 8418503; 1/19/2010

New Era Mine
Mine ID 11-02752

DECISION ON REMAND

Appearances: Robert H. Beatty, Jr., Dinsmore & Shohl, LLP, Morgantown, WV 26501, for the Contestant;
Barbara M. Villalobos, Office of the Solicitor, U.S. Department of Labor, Chicago, IL 60604, for the Respondent.

Before: Judge Miller

This matter is before me on a remand from the Commission, in a case originally decided by Judge Avram Weisberger, *American Coal Co.*, 35 FMSHRC 380 (Feb. 2013). The case involves a Notice of Contest filed by American Coal Company challenging the issuance of a Section 103(k) Order by the Secretary of Labor, Mine Safety and Health Administration (“MSHA”) at American Coal’s New Era Mine. The order was issued after an inspector observed smoke, ash and heat on a coal stockpile. The mine filed a notice of contest to the 103(k) order and the case was assigned to ALJ Weisberger.

As a result of the contest and at the request of the mine operator, Judge Weisberger held an expedited hearing on July 22, 2010 in St. Louis, Missouri. At the conclusion of the hearing the parties presented oral arguments and Judge Weisberger issued a bench decision in favor of American Coal, which was later reduced to writing and issued on September 28, 2010. Subsequently, the Secretary of Labor, appealed the matter to the Commission. On February 28, 2013 the Commission issued its decision vacating Judge Weisberger’s order and remanding the case for further proceedings. Judge Weisberger has retired and as a result, the case, along with two related cases, Docket Nos. LAKE 2010-409-R and LAKE 2010-759, have been assigned to me. The two related dockets are a contest and a subsequent penalty case involving a citation that was issued for failure to report the accident that is the subject of the order on appeal. Consequently, the dockets should move forward from this point together.

On January 19, 2010, MSHA issued a section 103(k) order at the New Future stockpile alleging that an accident, in the form of a mine fire, had occurred. The same day MSHA issued a second, similar order at the New Millennium Stockpile. The order issued at the New Millennium Stockpile was not contested by the operator because, in that instance, the parties observed flame in several areas. In this case, the inspectors did not observe a flame on the New Future Stockpile, but did observe smoke, smoldering material, and white ash in several areas. American Coal contested the 103(k) order issued at the New Future Stockpile arguing that smoke alone, in the absence of a flame, is not enough to establish that there is a mine fire and, accordingly, the 103(k) order was improperly issued. While Judge Weisberger agreed with American Coal and vacated the order, the Commission vacated the judge's decision, remanded the case, and directed the judge to "apply the Secretary's reasonable interpretation of the term 'mine fire' . . . to the facts of the case." 35 FMSHRC at 387.

On remand, this case again hinges on whether the conditions at the mine constituted a "mine fire." If I find that there was a fire, the parties agree that the order was validly issued. Conversely, the parties have stipulated that if I find there was not a fire and, hence, no accident, the 103(k) order will be dismissed. (Tr. 11-12). For the reasons discussed below, I find that a "mine fire" existed and that the 103(k) order was properly issued.

I. STATEMENT OF FACTS

American Coal operates the New Era Mine, an underground coal mine which is part of American Coal's Galatia Complex. The mine is located in Galatia, Illinois. Coal is mined underground, brought to the surface by a series of conveyors, and dumped on the New Future Stockpile. Once at the stockpile, the coal is moved by a dozer and eventually fed across a beltline to a preparation plant. The Galatia Complex also has a separate stockpile, known as the New Millennium Stockpile.

Michael Rennie, a MSHA supervisor and mine inspector for nearly twenty years, traveled to the New Future Stockpile on January 19, 2010. He, along MSHA inspector Wendell Ray Crick and Michael Smith, a safety representative for the mine, arrived at the stockpile between 8:00 a.m. and 8:30 a.m. Rennie observed and took pictures of smoking and smoldering areas in the lower portion of the stockpile as shown in Sec'y Exs. 2, 3, 4 and 5.

Wendell Ray Crick has been MSHA inspector for three years and has twenty-two years of prior mining experience, including work overseeing the safe operation of a coal stockpile. In addition, prior to his time with MSHA, he owned a mine safety company and conducted mine safety refresher trainings and taught coal mine safety classes on various topics, including stockpile safety. Further, he has eight years of experience as a firefighter and was called to respond to a fire just four weeks prior to the hearing in this case.

Crick described the New Future Stockpile as approximately 1000 feet wide, slightly more than 300 feet long, and 50 to 70 feet high. As Crick arrived at the stockpile, he picked up a sulfur-like odor which he described as a burning coal smell. He indicated that, at approximately

five different locations, he observed smoking and smoldering material. Crick was able to approach within about five feet of some of the burning areas. According to Crick, the sulfur odor got stronger as he got closer to the smoking areas. The smoke was about three to five feet in diameter and rose to roughly eight to ten feet high. He described the smoke as “whitish, brownish” and described heat waves coming off the coal and a whitish coat of ash around the areas where the smoke was rising. (Tr. 54). The extent of the ash was from three to five feet in diameter depending on the area. According to Crick, at the time of the inspection, there was a slight wind blowing in the area of the stockpile. As a result of his observations, Crick issued the subject 103(k) order.

Crick opined that a hazard existed because at any time the conditions that he observed could burst into flame due to oxygen or wind hitting the smoldering coal. Further, there was a dozer operating at the stockpile at the time of the inspection, and Crick indicated that the smoldering coal can create a void area in the stockpile which would present a hazard for the dozer operator if he drove over the area.

Crick could not get close enough to the fire to take a carbon monoxide reading, nor did he have a heat gun to measure the heat generated by the smoldering coals. He did not see any flames at the smoking areas that he observed. However, it was his opinion that, based on his experience, if there is smoke, there is fire. He explained that a fire continues to burn if there is smoke present and that “as a firefighter . . . we don’t walk off and leave things smoking because of fire.” (Tr. 70).

Michael Smith, the mine’s safety representative and a member of the mine fire brigade, testified on behalf of the company. He indicated that he traveled with the inspectors, observed the five cited areas, but did not see any flames. He travelled to within 60 or 70 feet of the smoking and smoldering areas and did not see any white ash as described by Crick. Based upon his observation that there was no flame, he indicated that there was no fire.

II. CONCLUSIONS OF LAW

On January 19, 2010 MSHA inspector Crick issued Order No. 8418503 pursuant to section 103(k) of the Act. The order alleges, in pertinent part, that “[u]pon inspection of the New Future raw coal stockpile located at the New Future portal, the stockpile is observed with 5 separate locations smoking with white colored ash surrounding these areas.” The parties have stipulated that the singular issue in this matter is whether a mine fire, as contemplated by the Act, existed on the New Future Stockpile. For the reasons that follow, I find that a mine fire did exist, that an accident occurred, and, accordingly, that the 103(k) order was validly issued.

Section 103(k) of the Act provides, in pertinent part, that “[i]n 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[.]” 30 U.S.C. § 813(k). The Act defines the word “accident” as “include[ing] a mine

explosion mine ignition, *mine fire*, or mine inundation, or injury to, or death of, any person.” 30 U.S.C. § 3(k) (emphasis added).

The Commission, in vacating the Judge’s original decision, conducted a Chevron two step analysis of the statutory language and found that the Mine Act is silent or ambiguous as to whether a “mine fire” requires the presence of a flame, and that the Secretary’s interpretation of the term was reasonable and controlling. *American Coal Co.*, 35 FMSHRC 380, 382-384 (Feb. 2013); *Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

The Secretary interprets the term “mine fire” to “include ‘both events marked by flaming combustion and events marked by smoldering combustion that reasonably has the potential to burst into flames.’” *Id.* at 384. In its decision, the Commission stated that the Secretary’s interpretation was “consistent with the statute’s language, purpose, and legislative history concerning fires in mines.” *Id.* at 385. Given the testimony of the inspector, it is clear that the smoldering, smoking area had the potential to burst into flames and therefore constitutes a mine fire.

In applying the Secretary’s interpretation, I find that the area observed and subsequently cited, constitutes a “mine fire” based upon the observation of the smoke and ash. Both Crick and Rennie testified that they observed smoking and smoldering areas on the stockpile. Additionally, Crick testified that he observed “heat waves” and white ash in the smoking and smoldering areas. Further, he explained that if oxygen or air hit those areas, they “could burst into flame at any time.” (Tr. 59) Smith, the mine’s sole witness, did not testify as to the existence or non-existence of smoke or smoldering material, and instead offered that he did not see flames, “hot coals,” or white ash. While Smith testified that he was only able to get within 60 to 70 feet of the smoldering areas, Crick indicated that he was able to travel within five feet of at least one of the areas. Given the testimony as a whole, I find that smoke, ash, and smoldering areas existed on the New Future Stockpile and those areas had the potential to burst into flame at any time, and therefore there was a fire on the stockpile, which in turn is an accident as described by the statute.

In its decision, the Commission noted the following: “Time is of the essence when dealing with a fire, and requiring an inspector who observes smoldering coal to wait to observe a flame before evacuating an area may cause a delay that is the difference between life and death. Furthermore, a flameless smoldering mine fire is dangerous in and of itself.” Smoldering fires clearly present a safety hazard to miners, and therefore must fall within the parameters of a “mine fire.” 35 FMSHRC at 385. Given Congress’ and the Commission’s acknowledgement of the particular dangers of smoldering flameless fires, as was the case here, along with the Rennie and Crick’s testimony, I find that the areas of the stockpile named in the order presented conditions that amounted to a “mine fire” and, in turn, an “accident” as contemplated by the Act. Accordingly, I **AFFIRM** the section 103(k) order.

III. ORDER

Consistent with the Commission's decision and direction on remand, and based upon the record evidence, I find that the Secretary has established that Order No. 8418503 was validly issued. Order No. 8418503 is hereby **AFFIRMED** and this contest proceeding is **DISMISSED**.

Margaret A Miller
Administrative Law Judge

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